CITATION: R. v. 2013 ONSC 2349 COURT FILE NO.: 12-40000535-0000

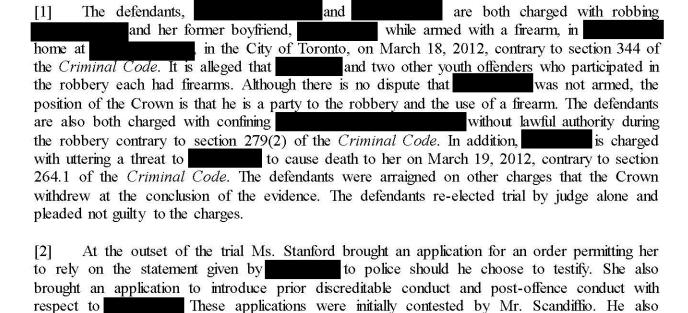
**DATE: 20130423** 

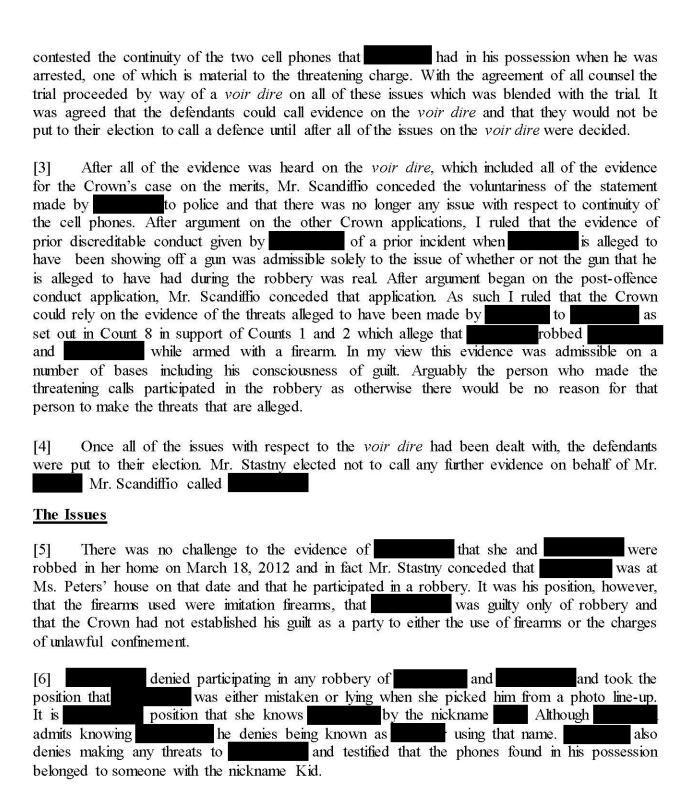
### **ONTARIO**

SUPERIOR COURT OF JUSTICE	
BETWEEN:	)
HER MAJESTY THE QUEEN	) Anna Stanford, for the Crown
– and –	
and	) Andrew Stastny, for the Defendant,
Defendants	) John Scandiffio and Marsha Kideckel, for the Defendant, )  HEARD:  Tebruary 19-22, 25-28, and March 1, 2013

### SPIES J.

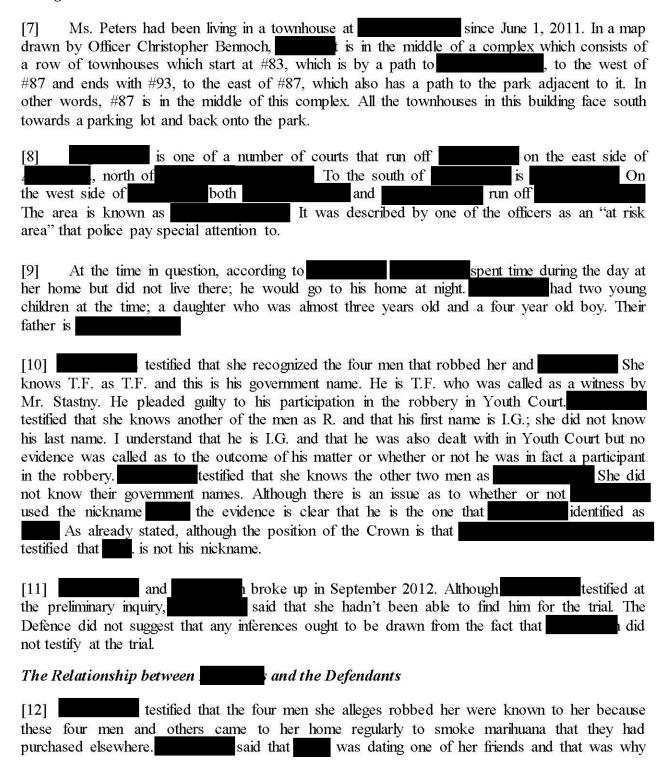
### **Overview**

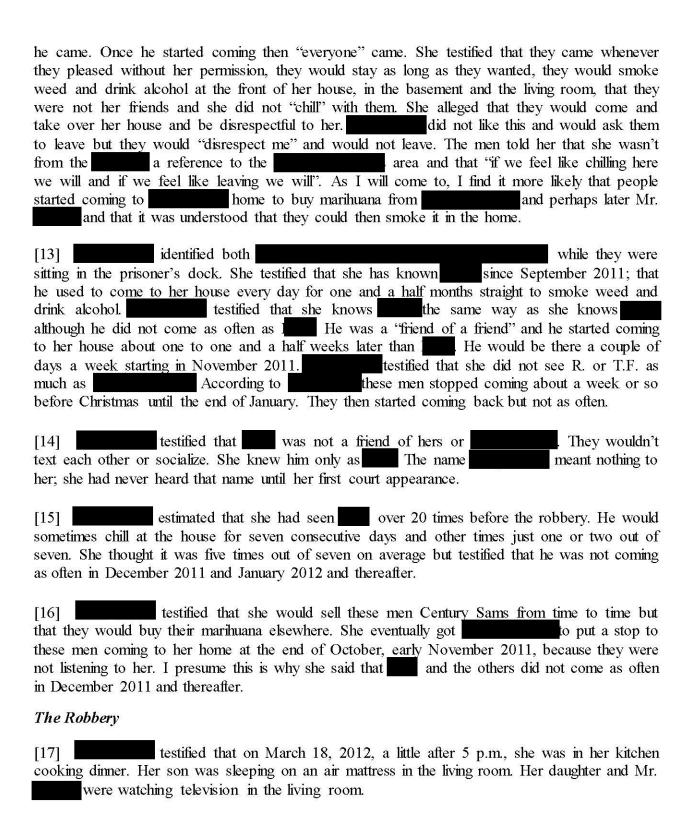


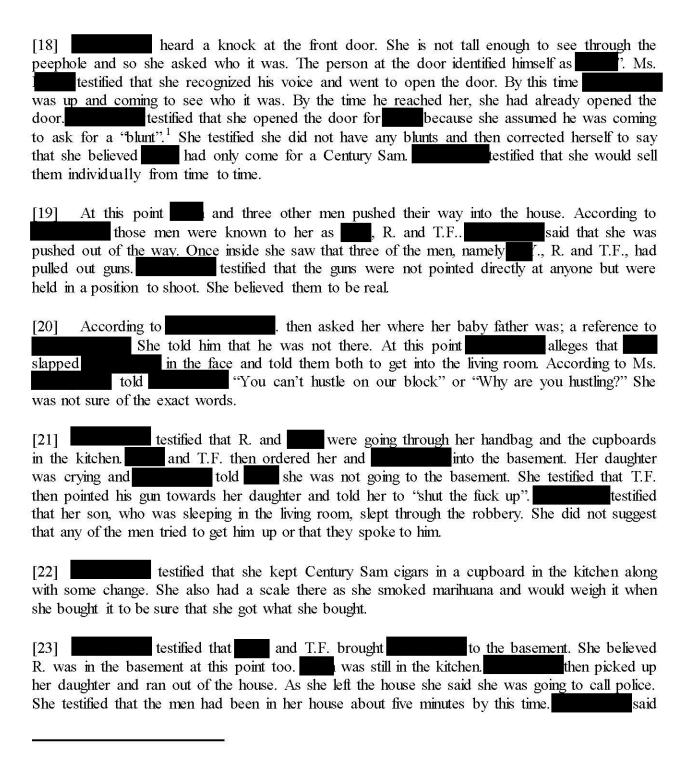


### The Undisputed Evidence and Preliminary Findings of Fact

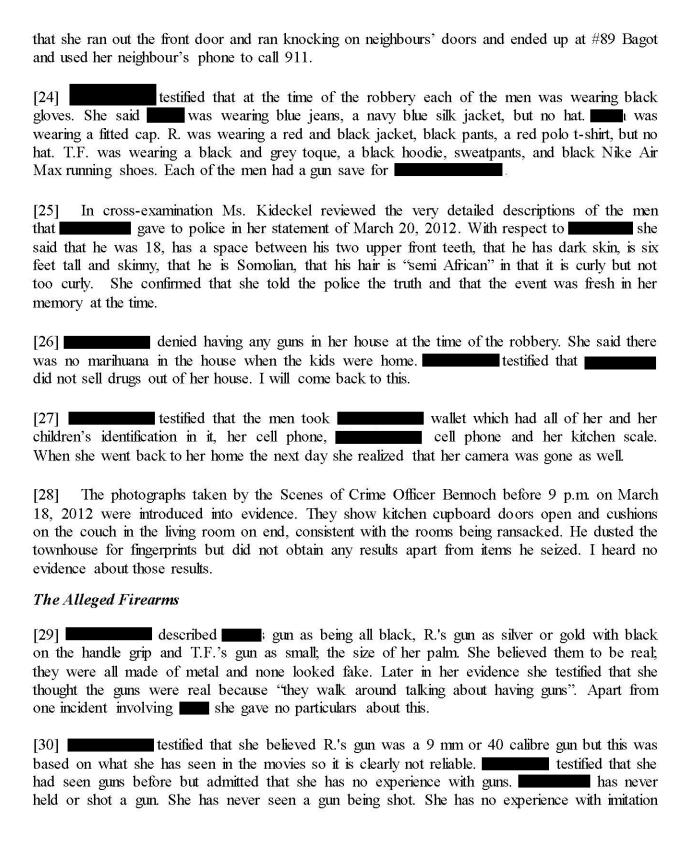
### Background



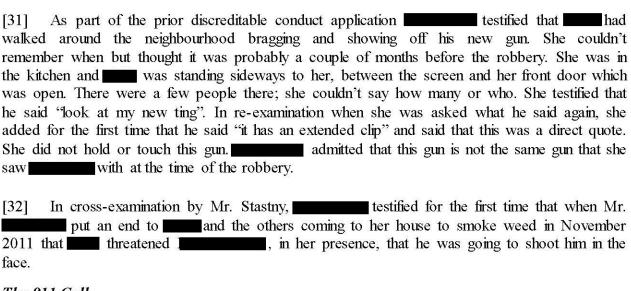




<sup>&</sup>lt;sup>1</sup> On the evidence a "blunt" is a cigarette made from using the wrapper from a cheap cigar, in this case Century Sams, and adding marihuana.



guns although she said she had seen a fake BB gun before. She did not explain how she knew it was fake.



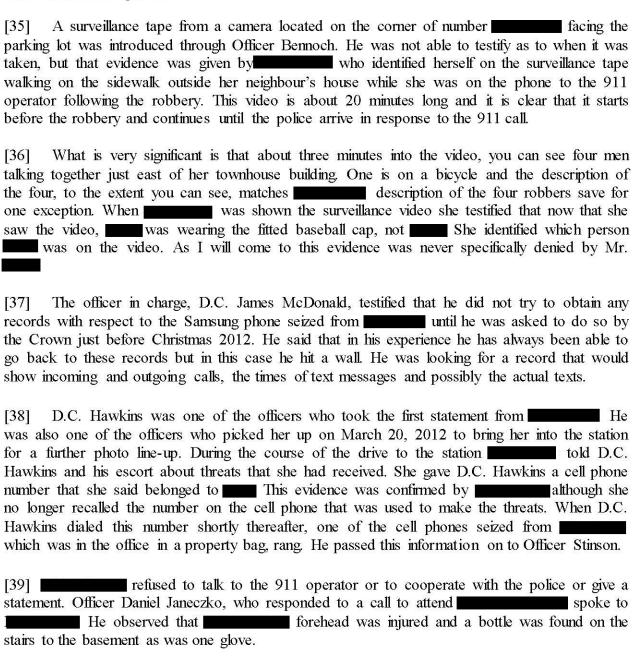
### The 911 Call

The 911 call made by was introduced into evidence. Sounded very hysterical on that call and could barely speak. She told the 911 operator that she knew the four guys and knew their names and that they were between 15 and 18 years old. She named first, then and then changed topics and started screaming, presumably because she saw the men now outside the townhouse. She can be heard velling at them that they should bring her phone and that she had called the police on them. The 911 operator told her to stay back. She told the operator that they had her phone and that her mother had no way to get in contact with her. She then told the operator that the men were T.F., I.G. and that they were wearing all black and that they had come to the house to rob her boyfriend. She was hysterical and crying throughout the call while the operator kept her on the line. It was difficult to tell what she was saying for parts of the call. She told the operator that they had put a gun to her three year old's head, that they had gloves on, that she didn't know their last names and that although some did not live in the neighbourhood they would come to the neighbourhood, that she had seen them in the neighbourhood before, that she had just moved there and that she would say 'hi' to them and had seen them walk past her house. also told the 911 operator that she had never chilled with them. When asked about this statement in cross-examination said that she meant she did not hang out with them and said that she told the 911 operator that she knew "through" the neighbourhood not that he lived in the neighbourhood.

[34] testified at trial that she did not see the men leave her house but she saw them at the end of \_\_\_\_\_\_ When she saw them after they left her home, they were running towards \_\_\_\_\_ Three were on foot and one was on a bike. (I note that \_\_\_\_\_ testified that he has a cousin who lives in \_\_\_\_\_ ) \_\_\_\_ then came out of the house with her son. She explained that she was concerned about her phone because her mother had just had a

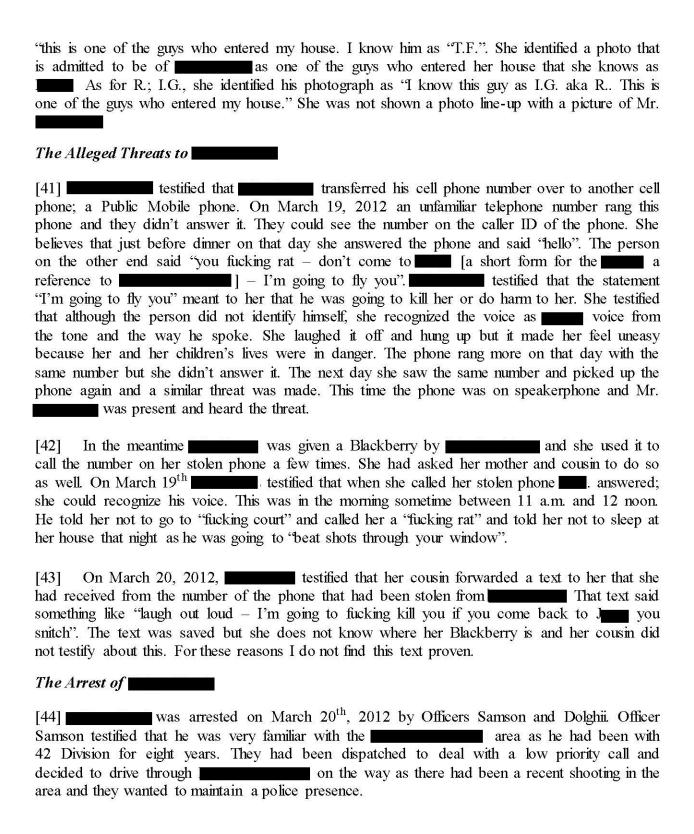
stroke and her phone was the only way her mother could call her. That is why she kept yelling at the men about the fact that they had taken her phone.

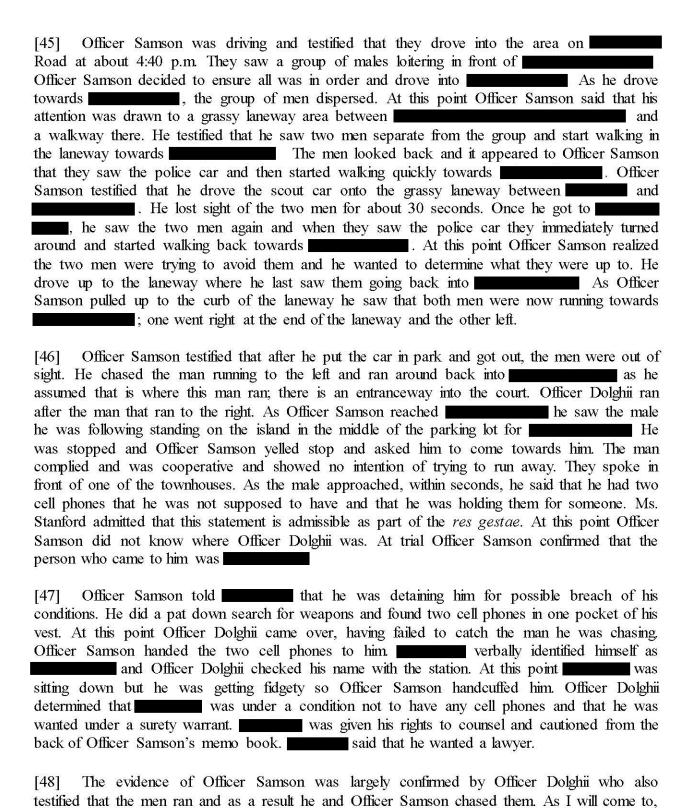
### The Police Investigation

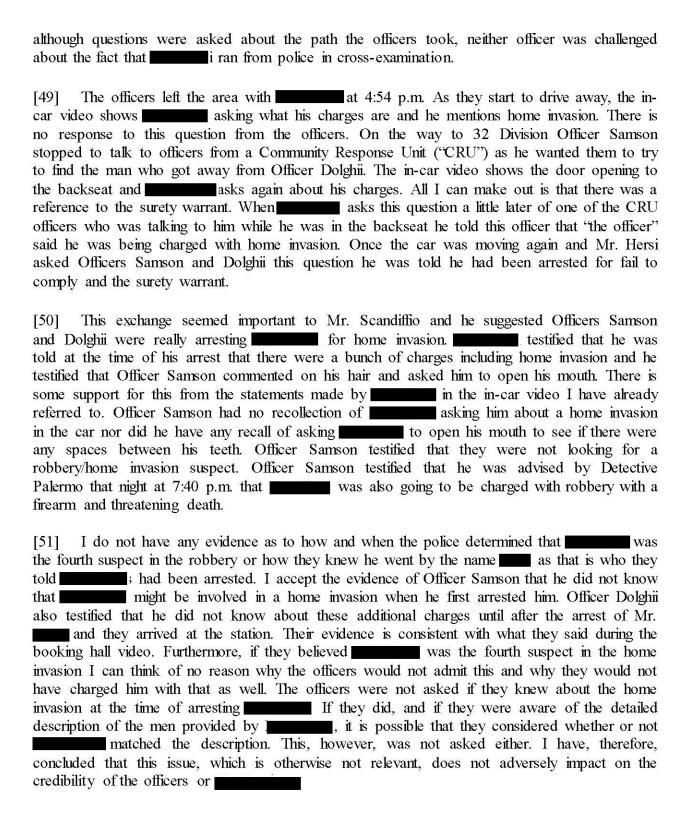


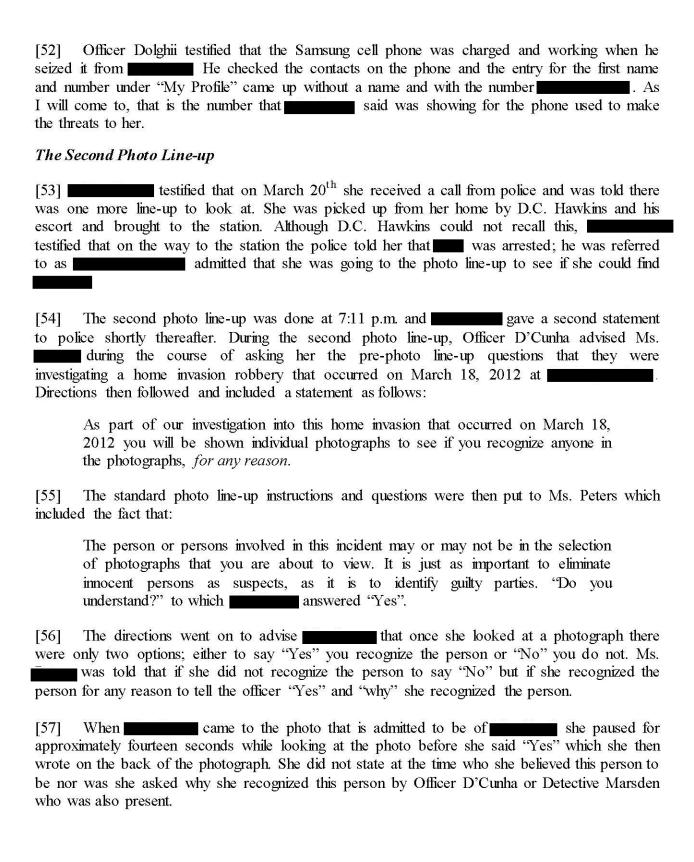
### The First Photo Line-up

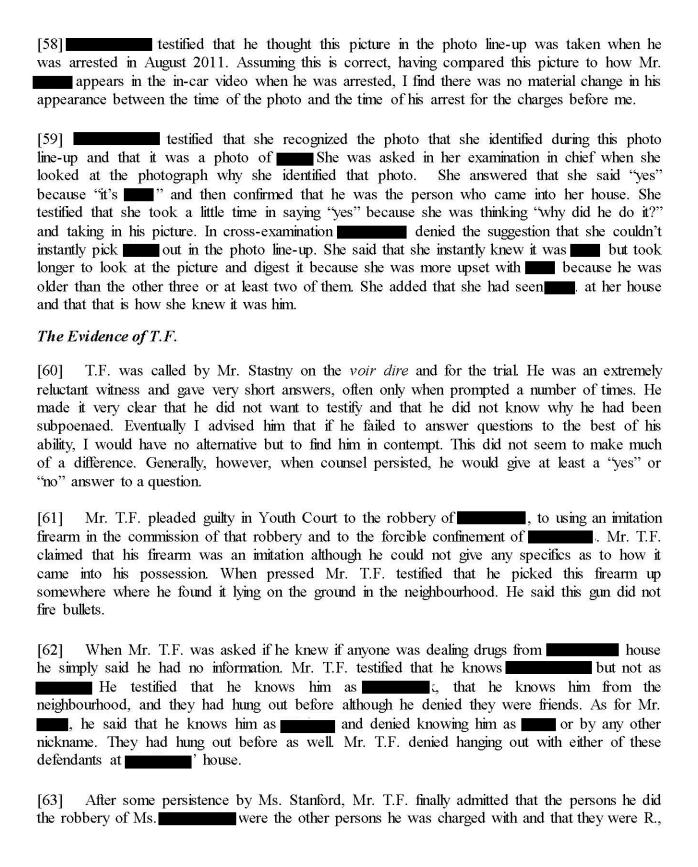
[40] There was no issue raised with respect to the first set of three photo line-ups conducted with by Detective Palermo on March 18, 2012 at about 9 p.m. She identified T.F. as

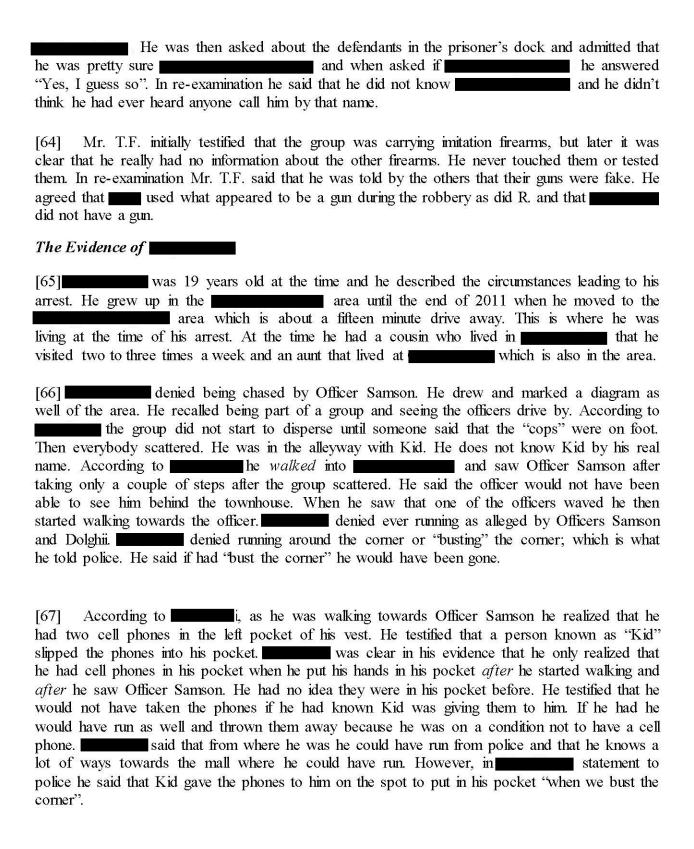


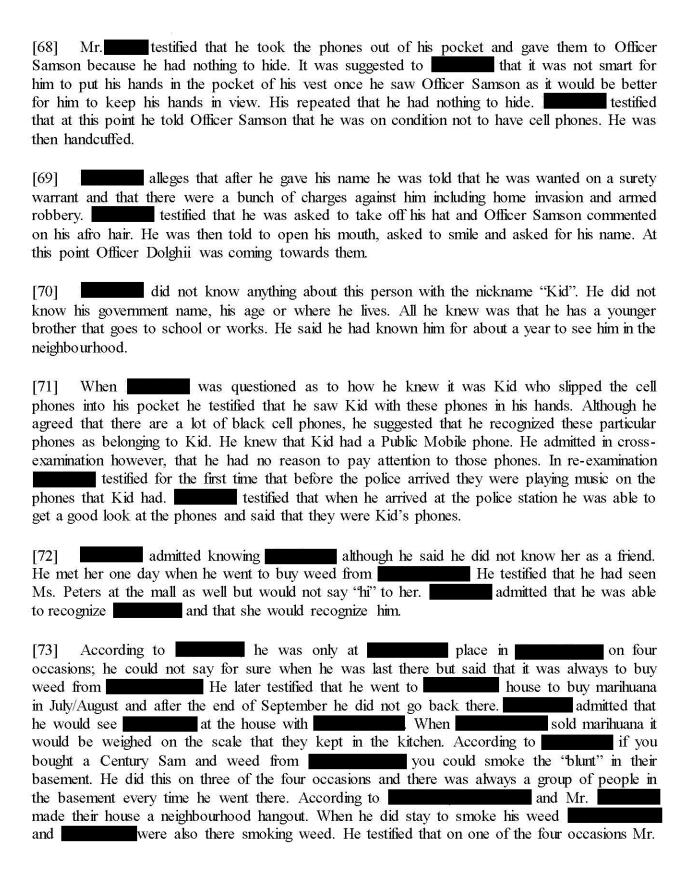


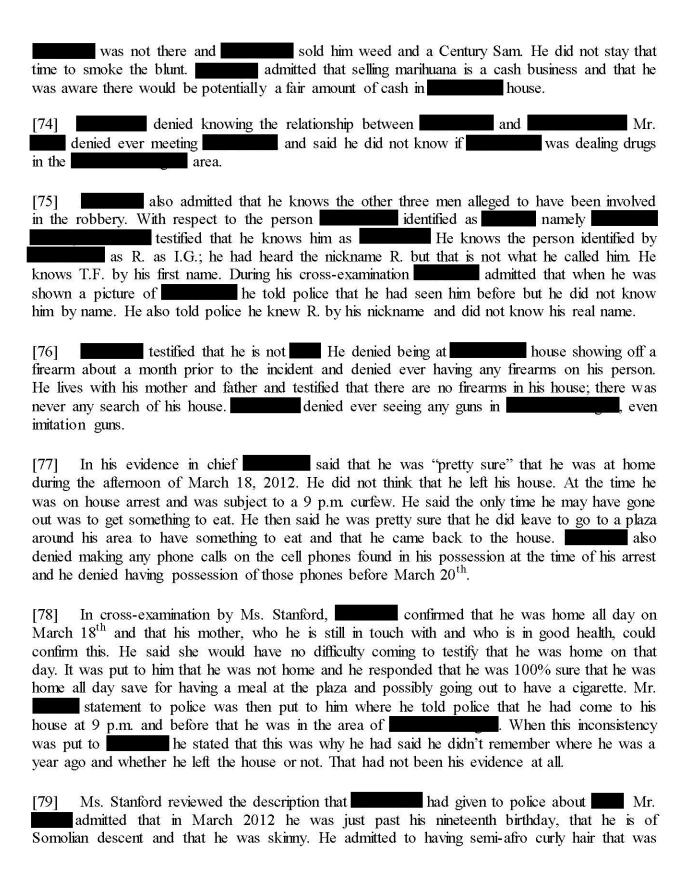


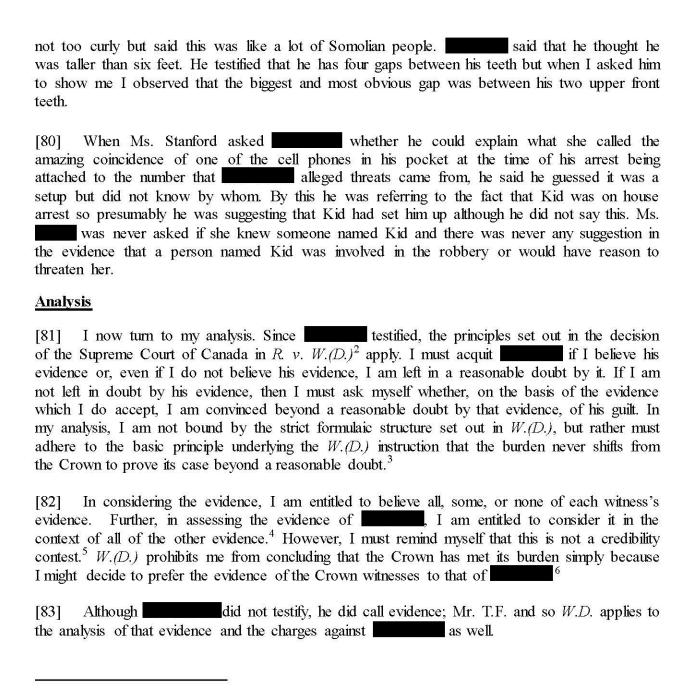












<sup>&</sup>lt;sup>2</sup> [1991] 1 S.C.R. 742.

<sup>&</sup>lt;sup>3</sup> See R. v. C.L.Y., 2008 SCC 2 at paras. 7, 9; R. v. J.H.S., 2008 SCC 30 at para. 13.

<sup>&</sup>lt;sup>4</sup> See R. v. C.L.Y., ibid. at para. 6; R. v. Mends, 2007 ONCA 669 at para. 18. R. v. Carriere (2001), 159 C.C.C. (3d) 51 at para. 48 (Ont. C.A.).

<sup>&</sup>lt;sup>5</sup> R. v. J.H.S., supra at para. 9.

<sup>&</sup>lt;sup>6</sup> R. v. Hull, [2006] O.J. No. 3177 at para. 5. See also R. v. Van, 2009 SCC 22 at para. 23.

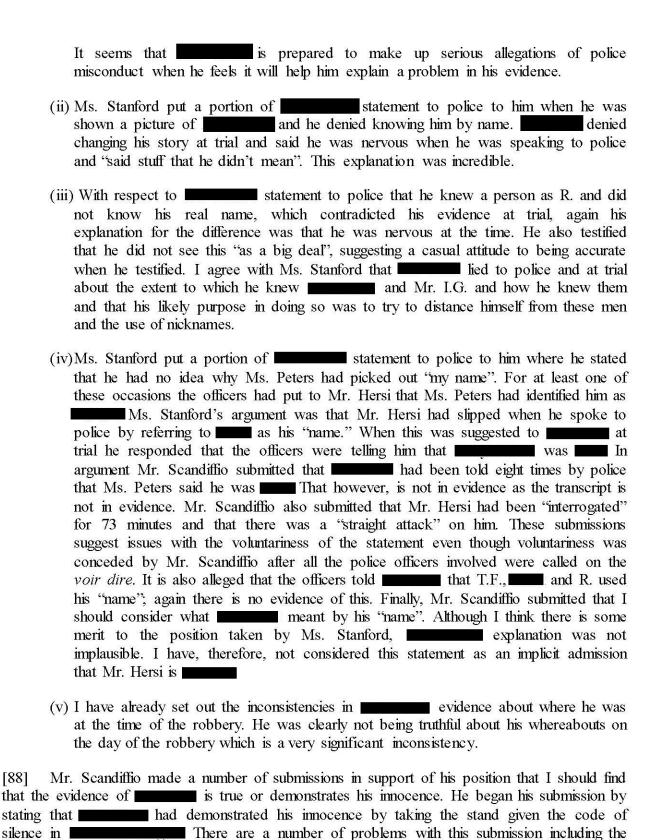
### Credibility Assessments

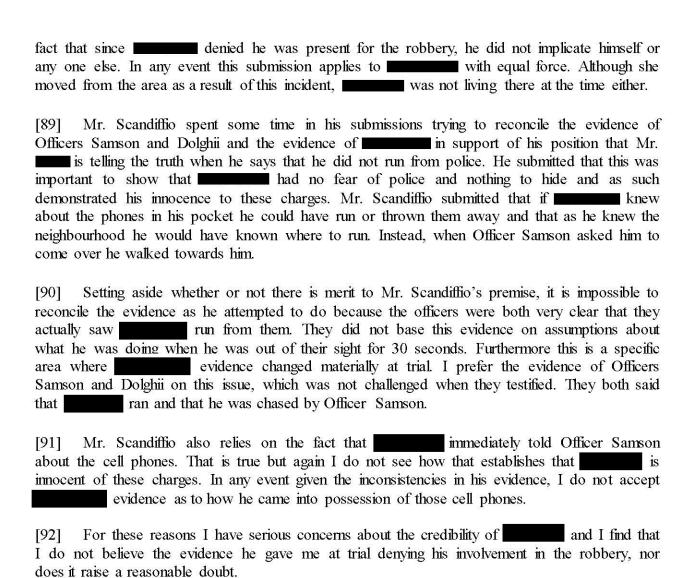


[84] There was nothing about Mr. Hersi's demeanour that assists in determining his credibility. However, as I will come to, his evidence changed materially when he was challenged and I have concluded that I cannot believe much of his evidence and that some of it was simply incredible.

### [85] has a criminal record as follows:

- August 13, 2011 was found guilty of breaching his recognizance and sentenced to seven days and five days pre-trial custody;
- December 1, 2011 pleaded guilty to breach of recognizance and received six days pre-trial custody and nine months probation;
- August 30, 2012 pleaded guilty to possession of cocaine for the purpose of trafficking. He testified that at the time he had nowhere to live and so had gone to live with a friend. He claimed not to have known that there was cocaine in the apartment but then when he was asked if he knew that people in the apartment were involved in cocaine he said "yes". denied that the drugs found in the house were his but said that he pleaded guilty because the police said the cocaine came out of his pocket. He figured with his word against the officers, the officers would be believed.
- [86] I have doubts about evidence as to why he pleaded guilty to the cocaine charge but that conviction is not relevant to his credibility *per se*. The other convictions suggest disrespect for court orders but I find they are not of much assistance in determining the credibility of
- [87] What I found most significant in assessing credibility are the serious inconsistencies between Mr. Hersi's evidence at trial and his statement to police as follows:
  - (i) Ms. Stanford impeached on his statement to police as to how he got the cell phones which, as I have reviewed, was materially different than his evidence at trial. Also in his statement to police he said that Kid gave the phones to him "when we bust the corner" which with the word "bust" suggests that they were both running. When these differences were put to at trial he agreed that there was a difference in his evidence but said he wasn't given any choice because the two officers who took the statement had beat and kicked him multiple times before he gave the statement. He also alleged that they put words in his mouth and told him that if he said something they would beat him up even more. This explanation was in my view totally fabricated. There had never been any hint of such an issue during the voir dire.





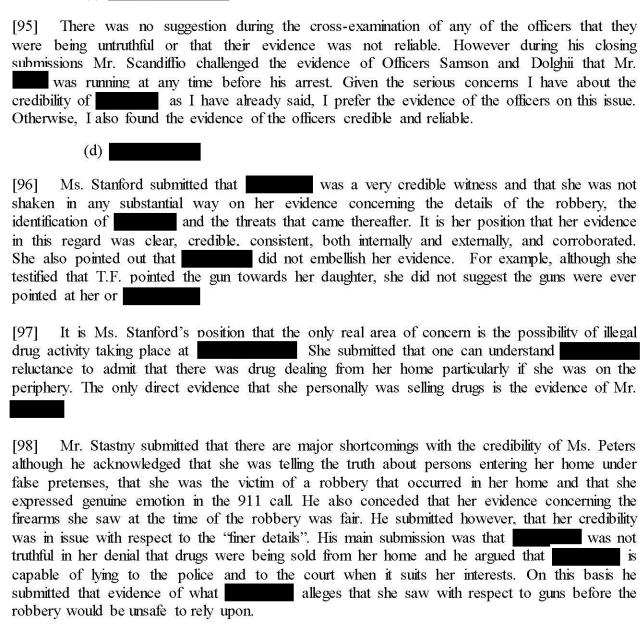
(b) <u>T.F.</u>

[93] Ms. Stanford submitted that for the most part Mr. T.F.'s evidence was at best evasive and at worst an outright lie. It is her position that he was doing his best to help and protect his friends and that since this was his intent, I should only accept his evidence when his evidence contradicted the interests of his friends.

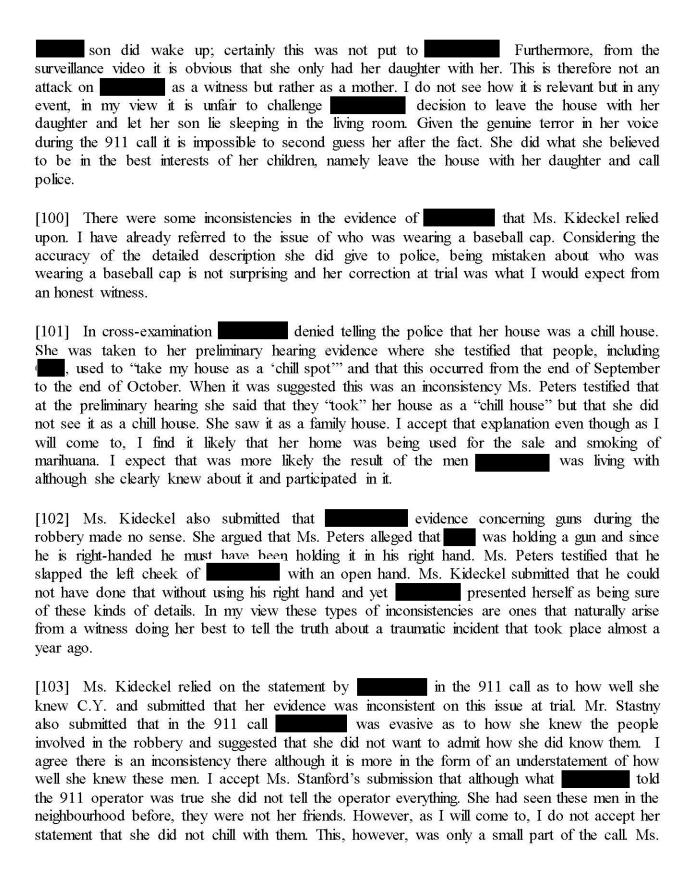
[94] To the extent that Mr. T.F. gave exculpatory evidence supporting the defence of either defendant, it need only raise a reasonable doubt. To the extent his evidence was incriminating of either defendant, I have considered it with caution. I have already commented on Mr. T.F.'s extreme reluctance to testify. I agree with Ms. Stanford that he did not want to give any evidence that would hurt his friends and in particular, the defendants. I therefore agree with Ms. Stanford that the evidence that he gave that is adverse to their position, which came only very reluctantly,

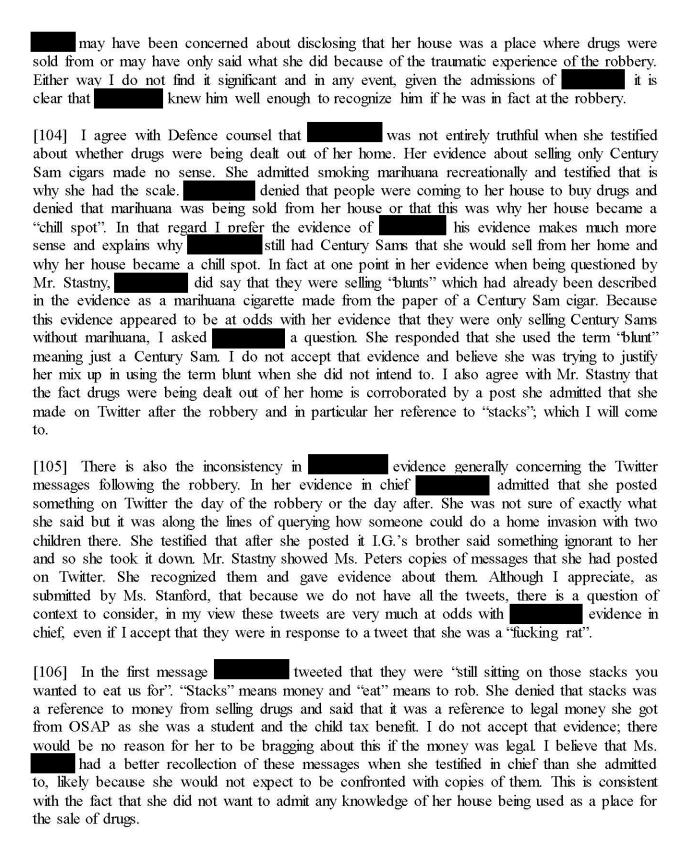
is likely true. However, I could not consider Mr. T.F. a reliable witness and so I must consider his evidence very carefully. I have decided not to place much weight on it.

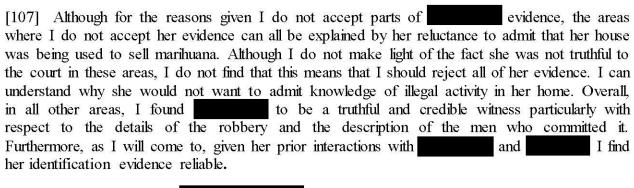
### (c) The Police Officers



[99] Ms. Kideckel adopted the submissions of Mr. Stastny. She also submitted that the evidence of should cause the court much concern and that it was exaggerated and full of contradiction, implausible and incredible. Ms. Kideckel submitted it is difficult to believe that son would not wake up and that she would leave the home without him. I do not accept this submission. First of all there was never any suggestion in the evidence that Ms.

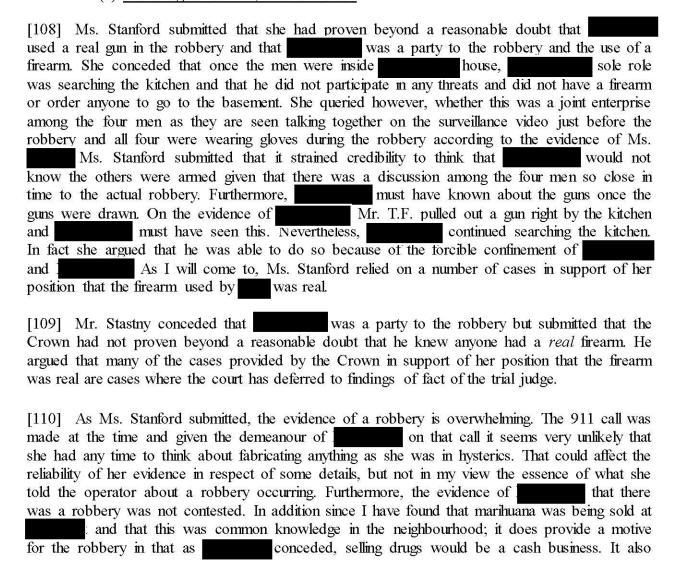


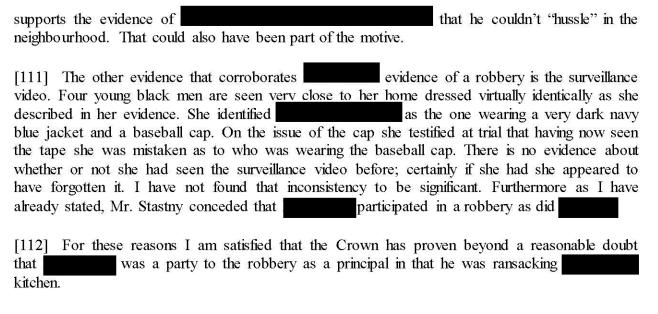




# Findings With Respect to

### (a) The Alleged Robbery with a Firearm





- [113] The cases relied upon by the Crown in support of her position that a real firearm was used are as follows:
  - (i) R. v. Richards, [2001] O.J. No. 2286 (Ont. C.A.). At paragraph 4 the court noted that having regard to the description of the gun given by the witnesses, the fact that the witnesses were ordered to get down on the floor, had a gun pressed to their head, were threatened, and the *modus operandi* indicating that the accused had ready access to guns called up from different locations prior to the subsequent robbery, left it was open to the trial judge to come to the conclusion that the gun used by the appellant was a firearm.
  - (ii) R. v. Mills, [2001] O.J. No. 3675 (S.C.J.). In this case the complainant described what appeared to her to be a sawed-off shotgun. She did not know anything about guns, she only had general familiarity with firearms that a person in Canada might pick up in ordinary society, there was no evidence to suggest that what she saw was not a firearm and the accused was using it to intimidate suggesting he was using it as a firearm. At para. 19 Justice Eberhard stated that "where all the circumstances lead to an inference that the item looking like a firearm is a firearm, it is open to the trier of fact to draw such an inference." (Emphasis added) She noted that in the case before her the operability of the shotgun was never really made an issue and she drew the inference that the item being brandished, causing alarm and fear, was a firearm.
  - (iii) R. v. Carlson, [2002] O.J. No. 1884 (Ont. C.A.). The court found that taken cumulatively the following items of evidence could reasonably support a finding that the handgun in issue was a firearm: the evidence included the fact that during the course of the robbery the appellant brandished the gun, waved it around and eventually pointed it at the back of an employee's head all the while screaming

that this was a "hold up" and demanding money, that various witnesses described the gun as "small" and "black" with a 6-8 inch muzzle and the fact that the appellant had access to guns according to the combined testimony of his accomplice and his common law spouse. With respect to this case Ms. Stanford pointed out that testified that Mr. T.F. pointed his gun at her daughter and told her to shut up. She also relies on the prior incident when he was bragging about a different gun, which she argues means that had access to guns.

(iv) R. v. Charbonneau, [2004] O.J. No. 1503 (Ont. C.A.). The court noted that the trial judge had the evidence of the complainant's clear belief that the gun was real although she could not tell for certain, her description of the object, the appellant's conduct in relation to it and his use of it together with the appellant's threat to shoot while holding it. Furthermore there was a complete absence of evidence to the contrary. The Court of Appeal concluded that this was a sufficient foundation to support the trial judge's finding that it was a handgun.

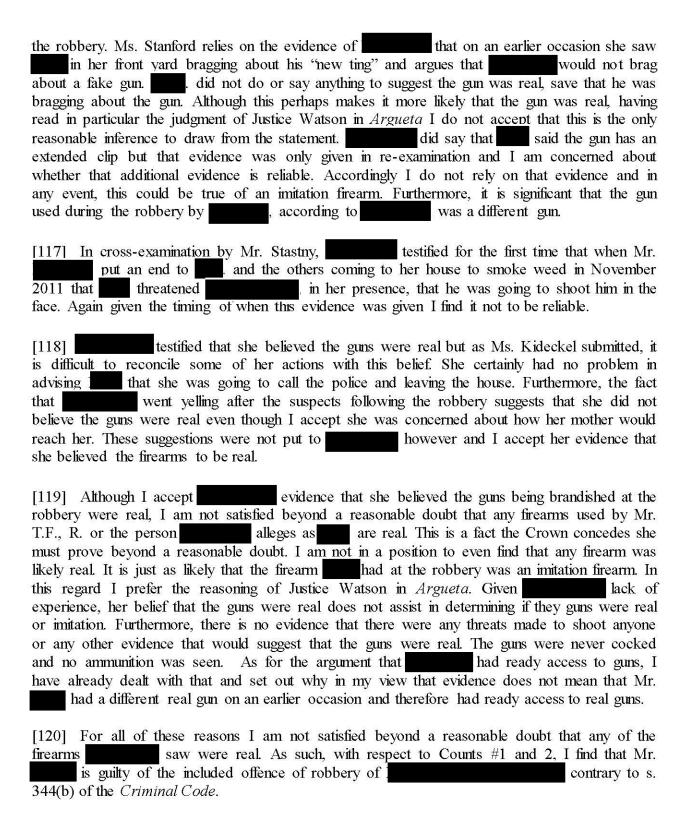
# [114] Mr. Stastny referred to the following cases:

(i) R. v. Argueta, 2011 ONCJ 576. In this case Justice Watson concluded that the Crown had not satisfied its burden of establishing beyond a reasonable doubt that the object was a real firearm. The evidence before the court was considerably stronger than the case at bar save that the court noted that there was no evidence that the defendant had ready access to guns. Justice Watson stated however, at para. 12(6) that:

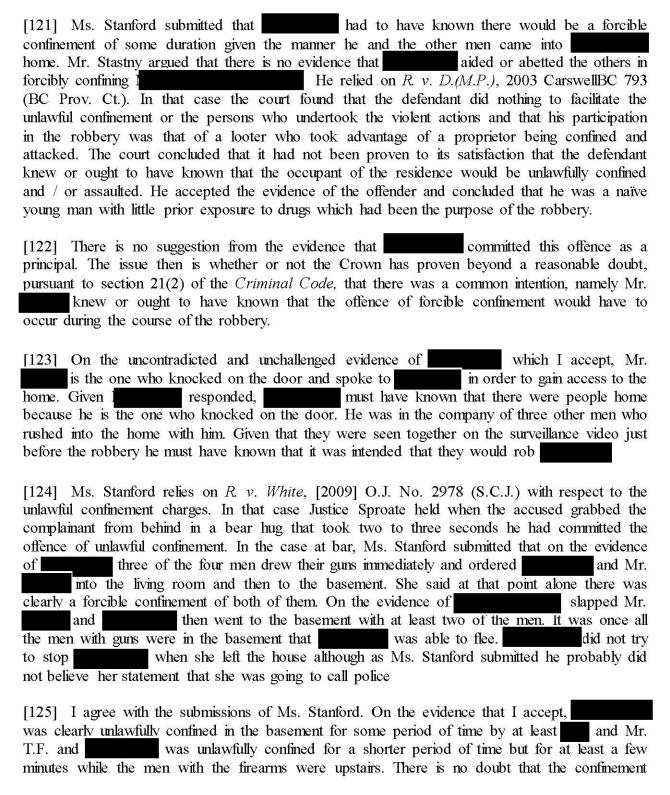
...in my experience in the courts, it is not uncommon to be advised of imitation firearms that appear to be real that have been used in the commission of violent crimes. Although the gun was cocked once and cartridges were seen by at least one victim, and one victim indicated that the defendant attempted to show him where the cartridges were, absent expert evidence, I am unable to draw any definitive conclusions from this evidence as to the nature of the firearm on the totality of the evidence.

[115] No firearms were recovered and so I have only the evidence of Mr. T.F. and on this issue. Mr. T.F. testified that he had been told the guns were fake and that his gun was fake. His evidence about his own gun was dubious as he could not explain how he got his gun. It defies belief that he would not be able to give any details about that. His evidence about the other guns was hearsay and not detailed enough to ascertain reliability. I therefore do not rely on this evidence.

[116] That leaves the evidence of There is no question that is not able to tell the difference between a real gun and an imitation gun, just by looking at them. She has never handled any gun and certainly did not handle any of the guns she alleges were used during



# (b) The Alleged Unlawful Confinement



was unlawful and that it was intentional. I find that this must have been something would know would inevitably happen when they forced their way into the house. He knew Ms. Peters was home and as soon as he entered the house he knew Mr. Osman was as well. Although Mr. Brown remained in the kitchen, given that the main floor of this home is quite small, and given the layout, he must have heard all the conversation and been able to observe what was going on. Although it may be that Ms. Peters was no longer unlawfully confined once she announced her intention to leave and left the home, she clearly was before that. On the unchallenged evidence of Ms. Peters, Mr. Osman was as well.

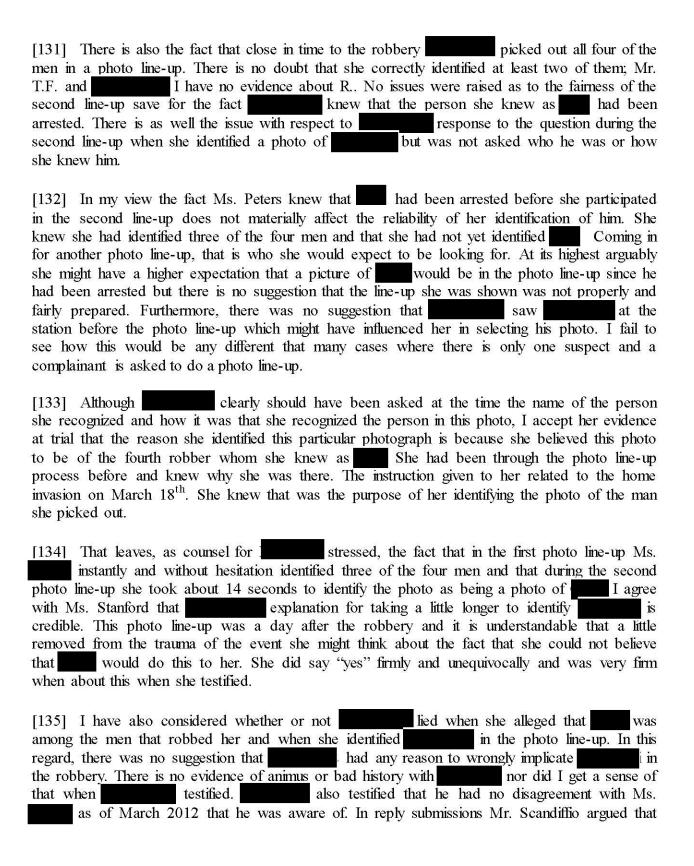
[126] For these reasons I find that Mr. Brown had a joint intention with the other men to unlawfully confine Ms. Peters, and once inside the home, Mr. Osman, as alleged in Counts #3 and 4.

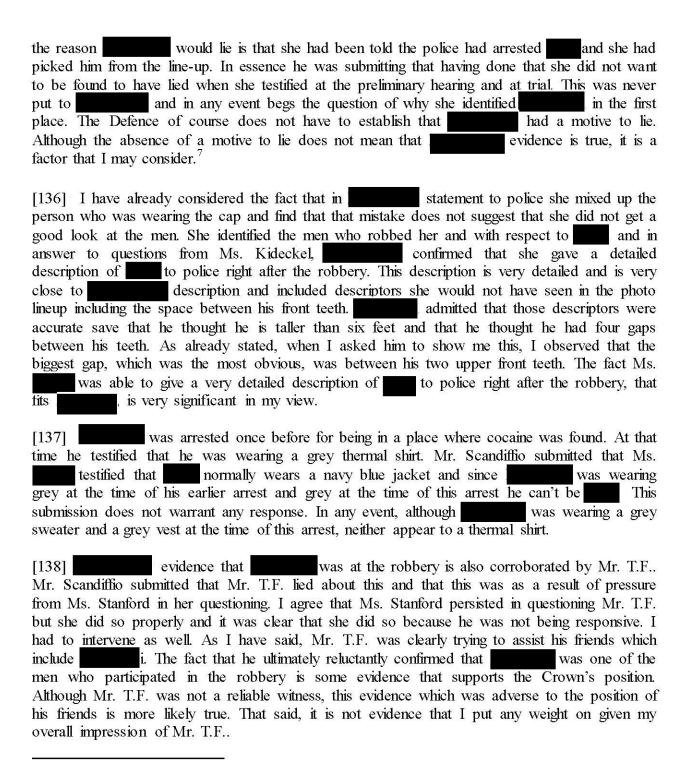
# Findings With Respect to

recognition as well.

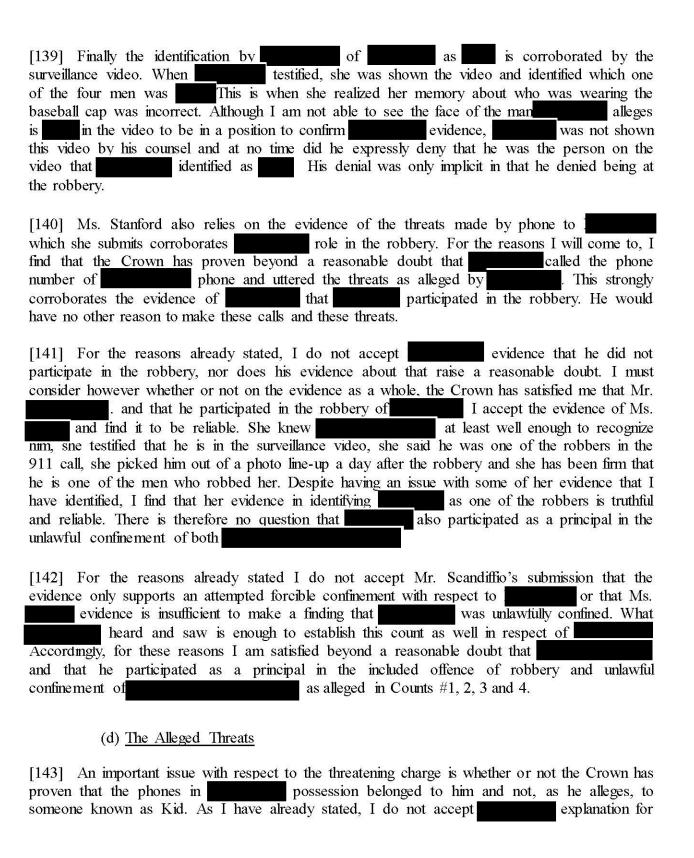
# (c) The Alleged Robbery with a Firearm and Unlawful Confinement

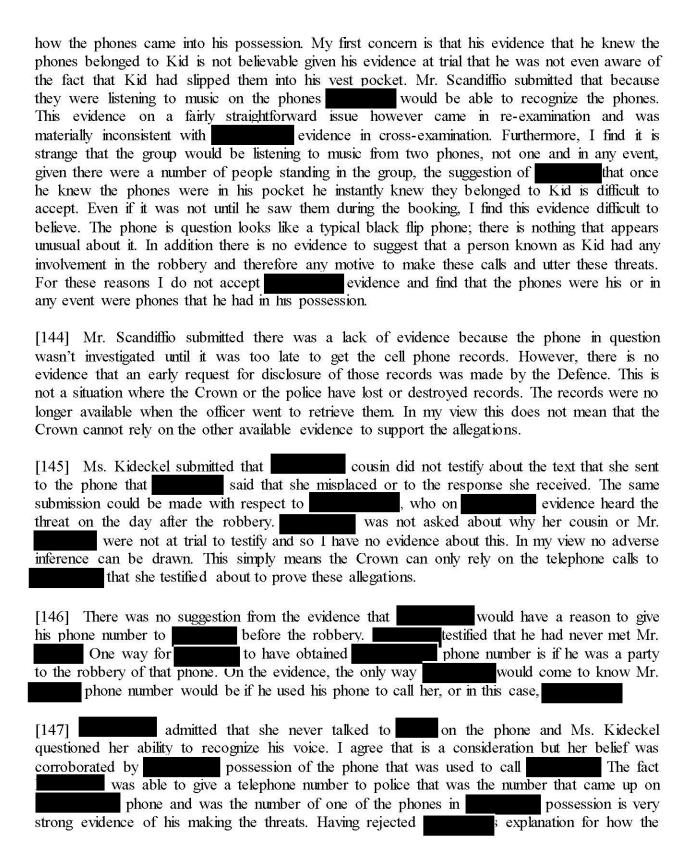
For the reasons already stated, I am satisfied that on the uncontested evidence of Ms. as corroborated by the 911 call and the surveillance video, that she and were robbed and unlawfully confined. Her evidence that one of those persons was someone she knew to be was not challenged. I have also set out my reasons for why I am not satisfied beyond a reasonable doubt that work or for that matter the other men, brandished real firearms as opposed to imitation firearms.
[128] The sole remaining issue then with respect to in connection with these charges is whether or not he is the man whom identified as and who participated in the robbery and unlawful confinement.
[129] The Crown's case rests largely on the evidence of although there is some corroboration of her evidence.
[130] The first consideration is the reliability of evidence and whether or not she could have been mistaken when she identified I agree with Ms. Stanford that in this regard this is not an identification case but rather a recognition case. Although there is a dispute between and and as to how often they saw each other,
admitted that he could recognize and she could recognize him. In fact on his evidence she smoked weed in the house with him which means that he saw for a longer period of time than he initially suggested in his evidence. The unchallenged evidence of is that the four men entered her home without masks or disguises. Although the evidence is not
clear as to exactly how long the robbery took, it took a few minutes, while the men were directing and as to what to do. It was enough time for to see who was involved. On the unchallenged evidence of the man she identified as
addressed her directly telling her to go downstairs. As such had the benefit of voice

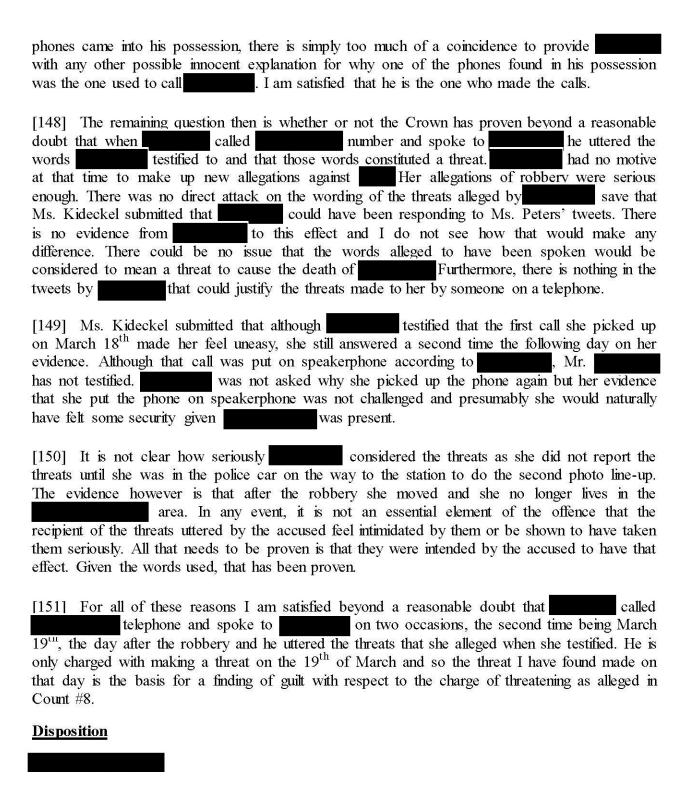




<sup>&</sup>lt;sup>7</sup> The Queen v. K.G.B. (1993), 79 C.C.C. (3d) 257 (S.C.C.) at p. 300.







[152] Would you please stand.

[153] For the reasons I have given I find you guilty of the included offence of robbing Ms. contrary to s. 344(b) of the <i>Criminal Code</i> .
[154] I also find you guilty of unlawfully confining Counts #3 and 4 contrary to section 279(2) of the Criminal Code.
[155] Would you please stand.
[156] For the reasons I have given I find you guilty of the included offence of robbing Ms. contrary to s. 344(b) of the <i>Criminal Code</i> .
[157] I also find you guilty of unlawfully confining, as alleged in Counts #3 and 4, contrary to section 279(2) of the <i>Criminal Code</i> .
[158] Finally, I find you guilty of uttering threats to cause death to contrary to section 264.1 of the <i>Criminal Code</i> .
SPIES J.

Released: April 23, 2013

Edited version released April 25, 2013

CITATION: \_\_\_\_\_\_, 2013 ONSC 2349 COURT FILE NO.: 12-40000535-0000 DATE: 20130423

Additional of the second

# ONTARIO SUPERIOR COURT OF JUSTICE

# BETWEEN: HER MAJESTY THE QUEEN - and and Defendants REASONS FOR JUDGMENT

SPIES J.

Released: April 23, 2013

Edited version released April 25, 2013