

Citation: *R. v. Vaneltsi*, 2021 YKTC 55

Date: 20211207
Docket: 19-00065
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

WILLIAM DEAN RYAN VANELTSI

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Lauren Whyte
Gregory Johannson

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] Mr. William Vaneltsi is charged with four *Criminal Code* offences, namely, breaking and entering a dwelling house and committing an indictable offence, sexual assault, common assault, and forcible entry.

[2] It is common ground that the complainant was attacked, therefore, the Crown and defence agree that the triable issue in this matter is the identification of the individual who attacked the complainant.

[3] The Crown led evidence from two civilian witnesses and three police officers. The defence did not call any evidence.

[4] Counsel submitted an Agreed Statement of Facts regarding a photograph pack procedure that the police completed with the complainant. The photographs used by the police and a videotape of the entire photograph pack procedure also became part of the evidence at trial. There was also an admission that the RCMP released a description of the attacker on social media on December 31, 2018. Additionally, various photos were tendered in evidence, including photos of Mr. Vaneltsi in 2018.

Summary of the Relevant Evidence

A.M.

[5] *A.M.* is a resident of Whitehorse, and testified that on December 31, 2018 she was living on Centennial Street in the Porter Creek neighbourhood. She was in her second floor apartment with her 12-year-old twins. At around 8:20 a.m., her buzzer rang, signifying that someone was attempting to contact her from the lobby area. When she responded by picking up the phone, there was silence on the other end. Approximately five minutes later, her buzzer rang again. The caller asked her if she had a black Nissan vehicle, and when she responded in the affirmative, the caller stated that she should come to check on it, because the caller believed he had struck it. *A.M.* did not recognize the voice, but testified that it was a male's voice.

[6] *A.M.* called her boyfriend, who suggested that she take her smart phone with her to take photos of the damage. When she arrived outside, she did not observe anything

unusual. After checking her vehicle for damage, she noted a male standing near the apartment building entrance. She approached him and asked him if he had buzzed her apartment. He denied having done so. When she explained to him what had occurred, he mentioned that the same thing had happened to his sister. A.M. commented that these calls were perhaps pranks.

[7] A.M. and the male both entered the apartment building. He was behind her, and stated “good night”, which she found odd since it was the morning. She walked up the stairs and opened her apartment door while in the process of phoning her boyfriend again. She testified that she then saw a flash of the assailant’s red and black plaid jacket, as he threw her into her apartment. She landed on her back and started to scream. He sat on her chest with his legs straddling her body and kept moving his hand over her mouth. She described his face being inches from hers. She attempted to push him off her with her legs. After they struggled on the floor, A.M. was suddenly on her feet, and being dragged down the hallway by her thumb. The assailant unsuccessfully tried to remove her phone from her hands, as she tried to call 911. At some point, the male ran out of her apartment. She testified that he had been on top of her for a few minutes. At the same time, she agreed that it happened very quickly and that it was a very traumatic event.

[8] A.M. suffered injuries to her facial area consisting of a cut lip and scratches to her cheek. She also had a bruised thumb, and bruising on her side where the assailant’s legs had been.

[9] Immediately following this attack, A.M. phoned her boyfriend and then the police. In A.M.'s initial interaction with police, on the day of the incident, she described the assailant as a First Nation male, heavy build, between 5'8" and 5'10" in height. She thought that he was in his 40s, maybe 46. She could not recall whether the assailant had any facial hair or other particulars about the male. In a second statement to police five days later, she estimated his weight to be around 180 pounds. She stated that she did not "notice the hair, or hat or anything". She stated that the attacker looked rough looking.

[10] Later on the day of the attack, A.M. observed a man wearing a red and black plaid jacket in a local grocery store. She took a photo of the individual and forwarded it to the police. She told police that she believed that the individual was the same size, and wearing the same type of clothing, as the assailant. She later told Cpl. Manweiller that she believed that this man could have been the assailant. A.M. testified that after the attack she came to realize that the type of plaid jacket worn by the attacker is a fairly common form of clothing in Whitehorse.

[11] In February 2019, she contacted police to advise that she had seen a First Nation's man in her apartment building who she was worried could be her attacker. She thought that he could be the same size as her assailant.

[12] On March 5, 2019, the police prepared and showed A.M. a photograph pack. She picked Mr. Vaneltsi's photograph, indicating that he was the assailant. She told the officer conducting the photograph pack viewing that she chose Mr. Vaneltsi's photo because she recognized the face. She also advised the officer that the guy that did it

was rough looking, and that his mouth was a bit open with larger lips. When asked if there was anything else, she stated to the officer that there was nothing else that she could describe. At trial, she testified that his lower lip was uneven.

[13] A.M. testified that she believed that the individual who spoke to her via intercom was the same individual she spoke with outside the main door, and who subsequently attacked her.

Cst. C. Thur

[14] Cst. Thur testified that he was one of two RCMP General Investigation section officers who assumed conduct of this investigation on the day of the incident. Even though the police had no suspect in the days and weeks after the incident, Cst. Thur felt there was influence by A.M.'s fiancé on her to identify a suspect. The police were unable to identify a suspect until they received a tip in February 2019. Based on the tip, the police ended up putting together a photograph pack for A.M. to view.

[15] Early in the investigation, Cst. Thur had concerns that a photograph pack would be "fraught with potential unreliability". He was of this view due to photos A.M. had viewed on social media after the incident; the individual that she had seen at the grocery store who police later ruled out as a suspect; and the pressure that he believed her boyfriend was putting on her to identify a suspect. The officer also pointed out in his testimony that it would have been improper to conduct a photo lineup until there was a viable suspect.

[16] Cst. Thur's investigation of the individual who A.M. had photographed at the grocery store on the day of the incident satisfied him that this possible suspect was very unlikely to have been the assailant. The police's investigation into the second possible suspect, identified by A.M. in February, led them to the conclusion that this was not the assailant. He was of a different height and build.

Cst. D. LaVallee

[17] Cst. LaVallee is a police officer with the RCMP's General Investigation Section in Whitehorse. He testified to being involved in this investigation from the outset. On March 19, 2019, he executed a search warrant at a residence in Fort MacPherson, Northwest Territories, where he learned the accused had been living. He seized items including two red and black plaid jackets. Cst. LaVallee ultimately arrested Mr. Vaneltsi on April 18, 2019, in the Stewart Crossing area of Yukon.

Cpl. K. Manweiller

[18] Cpl. Manweiller is a watch commander with the RCMP in Whitehorse. She took a statement from A.M. on January 5, 2019, five days after the attack. She testified that she interviewed A.M. for approximately an hour, and asked her a number of times during the interview for a description of the assailant. A.M. described the individual as 5'8" and 180 to 200 pounds. He had short black hair, black eye brows and dark brown eyes. He was big. She indicated that he was wearing a red plaid jacket and black pants. When requested to describe the assailant's face, she said that it was a bigger face. When asked if he had facial hair, A.M. initially indicated that he did not have a beard, and then stated that if he had facial hair, it would not have been very much.

April Neyando

[19] April Neyando is a Whitehorse resident and a cousin of Mr. Vaneltsi. They both grew up in Fort MacPherson and saw each other often when they were younger. In December 2018, Ms. Neyando and her family spent time in Fort MacPherson. She testified that after returning to Whitehorse in late December, she saw the accused on Lewes Boulevard, in the Riverdale subdivision, on New Year's Eve between 5 p.m. and 10 p.m. She was in her car when she saw him walking up the street with another individual. She noted that he was wearing black sweatpants, a red plaid jacket and a black ball cap. She had observed him wearing similar clothing during the summer of 2018 when he stayed with her family on and off.

[20] On January 1, 2019, Ms. Neyando received a visit from Mr. Vaneltsi sometime between 7:30 a.m. and 10:00 a.m. She found it unusual for him to visit her at that time of the day. He was wearing black pants, a black jacket and a ball cap. He seemed to be worried about something, although she did not know why. Before his arrival, Ms. Neyando had received information on Facebook about a recent assault on a woman on Centennial Street, involving a person wearing a red plaid jacket. When she read the description of the assailant, she thought about Mr. Vaneltsi. She thought it strange that he was now wearing a black jacket.

[21] Ms. Neyando showed the accused the Facebook post. After reading it, he finally said "it wasn't me". She testified that he seemed scared because he said that he wanted to return to Fort MacPherson which was unlike him. Ms. Neyando agreed in cross-examination that although Mr. Vaneltsi had been sober in the summer of 2018, he

had relapsed over the holidays and that he was going through a rough patch. She also agreed that she saw him in Fort MacPherson in January 2019 and that he told her that his life was messed up. She also testified that soon after she spoke to police in February 2019, Mr. Vaneltsi returned to Whitehorse.

[22] Ms. Neyando testified that in the summer of 2018, Mr. Vaneltsi told her that he visited with friends at the Centennial Street apartments.

[23] Ms. Neyando testified that she is 34 years of age, and that Mr. Vaneltsi is younger than her. She described him as being close to six feet tall, and weighing between 200 and 230 pounds in 2018.

Analysis

[24] It is trite law that a court must carefully scrutinize identification evidence due to its inherent frailties. Many courts have commented on the potential difficulties with eyewitness identification.

[25] The Supreme Court of Canada in *R. v. Hibbert*, 2002 SCC 39, stated at para. 51: “The danger of wrongful conviction arising from faulty but apparently persuasive eyewitness identification has been well documented. ...”

[26] In *R. v. Reitsma*, [1998] 1 S.C.R. 769, rev'g (1997), 97 B.C.A.C. 303, the Supreme Court of Canada adopted the reasons of Rowles J.A., dissenting, that the trial judge had overlooked deficiencies in the pre-trial identification procedure. She stated at para. 58 of her dissent:

The frailties of eye-witness identification may be most pronounced in cases where the accused was not known to the complainant before the offence and where the complainant's opportunity to observe the perpetrator was limited to a brief, stressful encounter...

[27] In **R. v. Atfield**, 1983 ABCA 44, the Court of Appeal commented at para. 3:

The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases, where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. ...

[28] In **R. v. Hanemaayer**, 2008 ONCA 580, at para. 21, the Ontario Court of Appeal offered the following instructive comments on the honest but mistaken witness:

I wish to make a few comments about the identification evidence in this case. We now know that the homeowner was mistaken. No fault can be attributed to her. She honestly believed that she had identified the right person. What happened in this case is consistent with much of what is known about mistaken identification evidence and, in particular, that honest but mistaken witnesses make convincing witnesses. Even the appellant, who knew he was innocent, was convinced that the trier of fact would believe her. The research shows, however, that there is a very weak relationship between the witness' confidence level and the accuracy of identification. The confidence level of the witness can have a "powerful effect on jurors": see Manitoba, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) at 28...

[29] Madam Justice Charron, as she then was, stated in **R. v. Miaponoose**, 110 C.C.C. (3d) 445 (Ont. C.A.), para. 11:

Eyewitness testimony is in effect opinion evidence, the basis of which is very difficult to assess. The witness's opinion when she says "that is the man" is partly based on a host of psychological and physiological factors, many of which are not well understood by jurists. One example is pointed out by the Commission (at p. 10):

Simply by way of illustration, psychologists have shown that much of what one thinks one saw is really perpetual filling-in. Contrary to the belief of most laymen, and indeed some judges, the signals received by the sense organs and transmitted to the brain do not constitute photographic representations of reality. The work of psychologists has shown that the process whereby sensory stimuli are converted into conscious experience is prone to error, because it is impossible for the brain to receive a total picture of any event. Since perception and memory are selective processes, viewers are inclined to fill in perceived events with other details, a process which enables them to create a logical sequence. The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus the final recreation of the event in the observer's mind may be quite different from reality.

Witnesses are often completely unaware of the interpretive process whereby they fill in the necessary but missing data. They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes. Thus, although most eyewitnesses are not dishonest, they may nevertheless be grossly mistaken in their identification.

While the circumstances surrounding the witness's identification can be subject to scrutiny in cross-examination, many of the more subjective processes that have led to it are impossible to expose in this fashion.

[30] I am also cognizant of case law that enumerates factors that may be considered when evaluating eye witness identification (*R. v. G. (D.)*, 2008 YKYC 7, at para. 56; *R. v. Powell* (2007), 215 C.C.C. (3d) (Ont. Sup. Ct.) at para. 15). The Crown acknowledges that I must be cautious with the in-dock identification of Mr. Vaneltsi, but argues that once I consider the relevant factors in relation to A.M.'s photograph pack

selection of the accused, and other evidence before the Court, I should find that the Crown has met its burden of proof beyond a reasonable doubt.

[31] In the case at bar, there are a number of factors with respect to identification that stand out. First, the assailant in this matter was a stranger to A.M. As far as she knew, she had never seen him before.

[32] Second, in terms of an opportunity to observe, A.M. initially had a conversation with the assailant outside of the apartment building. She testified in direct examination that she only saw the profile of his face during this conversation. However, in cross-examination, she stated that she saw more of his face as he moved around. She agreed that this brief conversation with him was not a significant event for her.

[33] Although the attack itself took place over the course of minutes, this was a highly stressful situation for A.M. Her attention was partially on her phone as she attempted to call 911 and tried to keep it away from the assailant. She was yelling and struggling to get the attacker off her, and at times, he had his hand over her mouth. Overall, the opportunity for her to identify her assailant was not ideal.

[34] Third, the photograph identification procedure took place more than two months after the incident. This was understandable from an investigative standpoint as the police did not initially have a viable suspect. However, at the same time, it is not an insignificant period of time that elapsed. Also, prior to the photograph pack, A.M. had viewed photos of possible suspects that were forwarded to her by friends. She also identified two other individuals as possible suspects who the police subsequently ruled out. The police believed that she was being pressured to identify a suspect.

[35] In terms of the suspect that she identified on the same day as the attack, A.M.'s evidence at trial appeared somewhat confusing. She initially testified that she had observed the individual in a grocery store from a distance, but that nonetheless she did not believe that he had the same lips as her attacker. When asked about this statement in cross-examination, she testified that she did not recall mentioning that point earlier in her testimony. She reiterated that she had been at a distance from the male in the grocery store. After a playback of that part of her direct examination confirmed that she had earlier testified that the grocery store suspect did not have the same lips as the assailant, she was unwilling to agree that this individual could have been the attacker, only that there were some similarities that she could see viewing him from a few aisles over. However, in her statement to Cpl. Manweiller, A.M. had stated that she thought the man in the grocery store could have been the assailant.

[36] Fourth, A.M. believed that her assailant was in his mid-forties, whereas Ms. Neyando, who was 31 at the time of the alleged offence, stated that the accused is younger than her. Also, A.M. testified that Mr. Vaneltsi appeared to be in his mid-40s in the photograph she chose from the photograph pack. However, based on the evidence of Cst. Thur, that photograph of the accused was six years old (having been taken in 2012), meaning that he was, at most, 24 or 25 at the time of the photo.

[37] Fifth, in terms of A.M.'s description of the assailant, when she spoke to the first officer on scene, she described her assailant as a First Nation's male, heavy build, between 5'8" and 5'10" in height, in his mid-40s. She could not recall whether he had any facial hair, or other particulars about the male. Five days later when A.M. spoke to Cpl. Manweiller, when asked about the presence of facial hair, she stated "no beard, if

he did have some, it wouldn't have been very much". At trial, she testified in direct examination that she believed that the assailant had facial hair, but not a beard or a moustache. She said that he looked rough and was not clean shaven.

[38] Also, in the statement to Cpl. Manweiller, A.M. stated: "When he was right in my face, I didn't get like his full, like it was mostly his eyes that I saw then". In her testimony she agreed that he was very close to her face during the attack, but that she and he were both moving, enabling her to see his whole face. However, A.M. had also told Cpl. Manweiller that since the assailant was so close to her face, she did not notice his hair or whether he was wearing a hat. She mentioned to the corporal that she understood that a witness had stated that he was wearing a hat. This information may have come to her by way of RCMP social media reports made on the day of the attack, which included a description of the attacker. In court, despite having told police that she did not notice his hair, or whether he was wearing a hat, she testified that he did not have long hair, and that if he was wearing a hat, it was dark coloured.

[39] Additionally, when asked by Cpl. Manweiller about his face, A.M. stated that he had a bigger face. When asked at trial, she testified that he had a rounder face.

[40] On March 5, 2019, when she identified the accused's photo, the police officer conducting the photograph pack procedure asked her why she chose that photo. She replied that "she just recognized his face". She also stated to the officer conducting the photograph pack procedure that the guy who attacked her looked rough looking like the man in the photograph, and "also his mouth was a bit like open, like larger lips...". This was the first time that she mentioned the mouth and lips of the assailant. At trial, she

testified that she specifically remembered his lips. Indeed, for the first time, at trial, she described her assailant's bottom lip, describing it as not only large, but uneven. I understood her to be describing one side of the bottom lip being bigger than the other. As in the decision of *R. v. Harvey* (2001), 57 O.R. (3d) 296 (C.A.), at para. 25, had A.M. referred to her assailant's mouth and lips as distinguishing features prior to the photograph pack viewing, the reliability of her identification would have been significantly enhanced.

[41] Overall, I am mindful of the fact that A.M.'s description became more detailed over time. I am also cognizant of the fact that her confidence in aspects of the description became more certain over time.

[42] Two other issues with respect to the identification evidence were argued. Defence counsel submits that there was evidence that his client has an accent, while A.M. testified that he did not. I do not make much of this submission, since Cst. Thur simply testified that although Mr. Vaneltsi probably had an accent, it was not something that stood out.

[43] Finally, counsel have raised the issue of whether cross-racial identification formed part of this case. Interestingly, A.M. testified that she is of English and Scottish descent, as well as First Nation Mauri from New Zealand. Crown counsel takes the position that in these circumstances, without expert evidence, it would be dangerous to assume that her identification of the accused was cross-racial, whereas counsel for Mr. Vaneltsi submits that Fort MacPherson is a long way from New Zealand, and the fact that A.M. has some Mauri ancestry does not translate into an ability to identify a person

of Gwichin ancestry. With little evidence before me regarding the extent of A.M.'s Mauri heritage, I would be hesitant to conclude this to have been a non-cross-racial identification. At the end of the day, I am of the view that based on all the other evidence regarding this identification, I need not explore this issue further.

[44] I must say that there is no question in my mind that A.M. was a credible witness, however, despite her sincere belief that Mr. Vaneltsi is the individual who attacked her, having considered all of the relevant factors of this identification evidence, I have concerns with respect to its reliability. As a result, a conviction in this matter could not result solely from A.M.'s identification of the accused.

Clothing and Post-offence Conduct

[45] The other evidence potentially linking Mr. Vaneltsi to this crime is his clothing and post-offence conduct. In terms of his clothing, A.M. fairly pointed out that the red and black plaid shirt worn by her assailant is not uncommon clothing in this city. In fact, on the day of the attack, she identified a possible suspect who was wearing the same type of plaid top.

[46] The post-offence conduct is based on Ms. Neyando's sighting of Mr. Vaneltsi wearing similar clothing to that of the attacker 9 to 14 hours after the incident. This is in contrast to him appearing at her residence the next morning wearing a black jacket and appearing "scared". Her reason for believing he was scared stemmed from his stated desire to return to Fort MacPherson. However, Ms. Neyando acknowledged that over the 2018 holiday season, Mr. Vaneltsi had relapsed during his recovery from alcohol

use, and that he told her in January 2019 in Fort MacPherson that he was undergoing a difficult time in his life.

[47] I am unable to find that Mr. Vaneltsi is more likely to have committed the offence because of the clothing that he was wearing many hours after the incident. It would be just as, or even more, likely that if he were the attacker, he would not have been wearing the same clothing a half-day after the attack.

[48] In terms of Ms. Neyando's subsequent interaction with the accused at her apartment, although he was not himself on January 1, 2019, there is another plausible explanation as to why he was acting in the manner she observed, that is, his slip from sobriety and the resulting fallout.

[49] Ms. Neyando also testified that months before this incident, Mr. Vaneltsi told her that he was visiting friends at an apartment on Centennial Street. Based on the timing of this statement, and the lack of detail as to the apartment building he was visiting, I find this evidence to be of little probative value.

[50] In the result, I have a reasonable doubt that Mr. Vaneltsi committed the offences alleged. As such, I find him not guilty of the charges before the Court.

CHISHOLM T.C.J.