Date: 20010104
Docket: CAC 152193

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Tran, 2001 NSCA 2]

Freeman, Bateman and Oland, JJ.A.

BETWEEN:

QUOC DUNG TRAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Kevin G. Coady for the appellant Dana W. Giovannetti, Q.C. for the respondent
Appeal Heard:	November 15, 2000
Judgment Delivered:	January 4, 2001
THE COURT:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Freeman and Oland, JJ.A. concurring.

BATEMAN, J.A.:

[1] The appellant, Quoc Dung Tran, appeals his conviction on a charge of second-degree murder of Ali Sharifrazi for which offence he was sentenced to life imprisonment with no eligibility for parole for a period of ten (10) years.

BACKGROUND:

[2] Mr. Tran was tried in the Supreme Court of Nova Scotia before the Honourable Justice William B. Kelly presiding with a jury. The trial commenced on October 1, 1998, and continued to November 4, 1998.

[3] According to the evidence at trial, on December 8, 1996 Van Khoe Nguyen, who was a taxi driver, Mr. Tran and others were eating at the apartment of Mr. Nguyen at 2360 Hunter Street in Halifax. They were all members of Halifax's Vietnamese community. Mr. Nguyen was intoxicated when he left the residence at around 6:30 p.m. driving his taxi and accompanied by Mr. Tran.

[4] Shortly thereafter, Mr. Nguyen's car struck a parked car on Charles Street. He did not remain at the scene but continued on, eventually stopping at the intersection of Robie and Charles streets where he was confronted by the

owner of the parked car, who had followed him. Mr. Nguyen's son, Dat Nguyen, arrived and dealt with the operator of the second vehicle. Both Mr. Tran and Mr. Nguyen left the site on foot. There was no clear evidence as to whether they left the car together, separately, or in which direction they proceeded.

[5] The victim, Ali Sharifrazi, was working as a clerk at Friends Convenience Store on Agricola Street in Halifax. He was involved in a romantic relationship with Nga Ngo, the former spouse of Van Khoe Nguyen. Mr. Nguyen was hostile to Mr. Sharifrazi over this relationship.

[6] Alireza Roshanimeydan (known as Ali Roshani) was, at the time, a Halifax realtor who also drove taxi. At trial he was the Crown's only eyewitness to the murder. He testified that on December 8, 1996, at about 6:45 p.m., he entered Friends Convenience store to talk business with Mr. Sharifrazi. The two were alone. Mr. Roshani said that while they talked, Mr. Nguyen entered the store intoxicated and agitated. Mr. Nguyen beckoned for Mr. Sharifrazi to come out from behind the counter. Mr. Roshani stepped off to the side. Mr. Nguyen and Mr. Sharifrazi met in front of the counter and a struggle ensued. Mr. Nguyen pulled a large knife from behind his back and stabbed Mr. Sharifrazi in the neck and upper shoulder. The struggle ended

up on the floor with Mr. Nguyen on top of Mr. Sharifrazi continuing to assault him.

[7] Mr. Roshani testified that during the assault Mr. Tran entered the store. He appeared not to notice Mr. Roshani. He went to the struggling pair and held down Mr. Sharifrazi, thereby allowing Mr. Nguyen to continue the attack. Mr. Roshani attempted to initiate a call for help on a portable telephone at which point Mr. Tran noticed him. He left the struggling pair, and approached Mr. Roshani, took the telephone and stared at him menacingly. Mr. Tran then returned to the struggle, and again restrained Mr. Sharifrazi, allowing Mr. Nguyen to continue the attack. Mr. Roshani fled the store and called the police.

[8] The police arrived shortly to find Mr. Sharifrazi dead in a large pool of blood. There was blood throughout the store. No one was present when the police arrived. Mr. Tran was arrested walking on a nearby street. He had no blood on his person or clothing notwithstanding his arrest minutes after the homicide. Mr. Nguyen was found blood-covered at a drug store at Quinpool Centre in Halifax.

[9] Mr. Tran and Mr. Nguyen were charged with the murder of Mr. Sharifrazi. Van Khoe Nguyen subsequently entered a guilty plea to second-degree

murder. He was sentenced to life imprisonment without eligibility for parole for a period of ten (10) years. His conviction is not under appeal.

[10] It was the Crown's theory that Messrs. Tran and Nguyen killed the victim over Nga Ngo, the divorced spouse of Mr. Nguyen, fiancée of the deceased, and the object of Mr. Tran's desires. The Crown put forth Mr. Ali Roshani as the only eyewitness to the crime. Additionally, the Crown proffered evidence of a plot between Mr. Tran and Mr. Nguyen to murder Mr. Roshani before trial.

[11] Mr. Tran testified that he was not with Mr. Nguyen in the store and, specifically, that he was not involved in Mr. Sharifrazi's death. It was his position that Mr. Roshani was either mistaken or untruthful. Additionally, it was his evidence that he was not in on any plan to kill Mr. Roshani.

[12] Mr. Tran was prosecuted as a party to the offence committed by Mr. Nguyen pursuant to s. 21(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

[13] Mr. Tran has since been convicted of conspiring to murder Mr. Roshani and sentenced to a term of 71/2 years concurrent to the life sentence then being served. His appeal from that conviction and sentence was dismissed by this Court by decision dated November 10, 2000 (reported as **R. v. Tran**, [2000] N.S.J. No. 355)

GROUNDS OF APPEAL:

[14] The appellant identifies the following issues on this appeal:

1. That the Learned Trial Judge erred in law in not holding a voir dire and admitting evidence of post-offence conduct, and as such committed an irreversible error.

2. That the Learned Trial Judge erred in law in his instructions to the jury respecting identification of the Appellant as a party to the death of Ali Sharifrazi.

3. That the Learned Trial Judge erred in law in his instructions to the jury respecting the evidence of "unsavoury" Crown witnesses Roshani and Liebhardt.

4. That the Appellant's conviction should be set aside as unreasonable and not supported by the evidence, and therefore there was a miscarriage of justice.

ANALYSIS:

1. That the Learned Trial Judge erred in law in not holding a voir dire and admitting evidence of post-offence conduct, and as such committed an irreversible error.

[15] The evidence of post-offence conduct to which the appellant objects consisted of the testimony of Frank Liebhardt and that of Constable Barry Mombourquette about the conspiracy to kill Mr. Roshani. Mr. Liebhardt, who has a lengthy criminal record, was an inmate at the Halifax County Correctional Center serving 15 days for a parole violation

during the time that Mr. Tran and Mr. Nguyen were on remand pending trial. They lived in the same cell block. According to Mr. Liebhardt's evidence they asked him to review the Crown disclosure in their case and tell them whether they could beat the charge. The three concluded that the only way out was to get rid of Mr. Roshani, the eyewitness. Mr. Liebhardt agreed to put them in touch with someone to do the job. He then decided that he did not want to participate in this plan and reported it to the police. The police arranged for Constable Mombourquette to pose as the hit man. Mr. Liebhardt was paid $5000 for assisting the police.

[16] It was Constable Mombourquette's evidence that he met with Messrs. Tran and Nguyen at the Correctional Center, introduced by Mr. Liebhardt. After the introductions he asked Mr. Liebhardt to leave. Both Mr. Tran and Mr. Nguyen participated in the discussion with Constable Momberquette about the plan to kill Mr. Roshani. Mr. Tran provided the information that Mr. Roshani worked as a real estate agent for Remax at the Halifax Shopping Centre and suggested that Constable Mombourquette might contact him by feigning interest in purchasing a house. Mr. Nguyen added that Mr. Roshani was also a taxi driver and provided the roof light number for his cab. Mr. Nguyen was to arrange payment of the $20,000 fee for the hit through his son, Dat Nguyen. Constable Mombourquette wanted $10,000 up front and the balance when the job was done. Mr. Nguyen wanted to pay when he was set free. Mr. Tran told Constable Mombourquette that Mr. Nguyen would get him the rest of his money when [Mr. Roshani] "is dead and doesn't come to court as a witness." At trial, Mr. Tran admitted being in the room during the meeting with Constable Mombourquette but maintained that that was the first he had

heard of the plot to kill Mr. Roshani. He denied being part of the plan and testified that he was only in the room to assist with the communication between Constable Mombourquette and Mr. Nguyen due to language difficulties.

[17] This evidence was put before the jury without a *voir dire* on the agreement of counsel. The appellant says that notwithstanding that agreement the judge should have held a *voir dire* on his own motion. It is his submission that the prejudicial effect of the evidence substantially outweighed its probative value. Had the judge fully considered the nature of the evidence, through the *voir dire* process, says the appellant, he would not have permitted it to be heard by the jury.

[18] The Crown had summarized the intended evidence of the plot to kill Mr. Roshani during his opening statement. The judge had been alerted prior to trial that the defence was opposing its admission. In discussions with counsel after the opening statement, the judge noted his surprise that the defence had abandoned its opposition to the admission of the evidence. He suggested that he might conduct a *voir dire* in any event. Both counsel opposed the holding of the *voir dire*. In a joint letter to the judge dated October 14, 1998, counsel said, in relevant part:

> It is respectfully submitted that counsel for Crown and Defence have thoroughly canvassed the relevant caselaw pertaining to the issue of whether or not the alleged post-offence conduct in the present case should be left to the jury and thus have concluded that it should be left to the jury, with proper instruction to ensure that the evidence is not misused. The content of such an instruction is addressed in the **White** decision. **[R. v. White** (1998), 125 C.C.C. (3d) 385 (S.C.C.)]

[19] The judge determined, in the face of that submission, that the evidence would go to the jury on counsels' agreement. Mr. Tran has new counsel on this appeal. It is appropriate to note here that there is no suggestion by the appellant of ineffective assistance of defence counsel on this issue. In particular, the appellant does not say, directly, that defence counsel erred in agreeing that a *voir dire* was not required. The appellant says, however, that it is the judge's obligation to ensure that only properly admissible evidence comes before the jury. This evidence was not admissible, its prejudicial effect outweighing its probative value, thus, says the appellant, the judge erred at law in permitting it to go to the jury.

[20] It is the Crown's submission that the fact that the appellant agreed to the admission of the evidence of post offence conduct without a *voir dire* is a complete answer to this ground of appeal. The waiver of the *voir dire* was a proper acknowledgment by the defence that the evidence was admissible. The Crown cites **R. v. Hodgson** (1998), 127 C.C.C. (3d) 449 (S.C.C.) and **R. v. Park** (1981), 59 C.C.C. (2d) 385 (S.C.C.) in support of its submission that the judge was entitled to rely upon the waiver.

[21] Notwithstanding the foregoing, the Crown has urged us to consider this issue on its merits, without taking into account the waiver of the *voir dire*. Defence counsel said in her oral submissions to Justice Kelly on the question of the *voir dire*:

> And my reading of [**R. v. White**] was such that if there was some probative value to the proposed evidence, the Jury must hear it and weigh it. If there is no probative value, essentially there is no relevance.
>
> (Emphasis added)

[22] Although evidence may have "some probative value", before admitting the evidence the judge must consider whether that value is outweighed by its prejudicial effect. It is therefore incorrect to say, as did defence counsel, that if the evidence has some probative value it "must" go to the jury.

[23] Defence counsel may have recognized that admission of the evidence was inevitable even should a *voir dire* be held. On the other hand, she may have been motivated to waive the *voir dire* on a misunderstanding of the relevant law. It is in that latter unlikely event, that the Crown urges this Court to consider the substantive issue of admissibility of the evidence without giving effect to the waiver of the *voir dire*.

[24] Two of the leading cases in this area are **R. v. White**, **supra** and **R. v. Arcangioli** (1994), 87 C.C.C. (3d) 289 (S.C.C.). In **Arcangioli**, the accused admitted committing a common assault but denied committing aggravated assault by the stabbing of the victim, who had been attacked by several men. Evidence of the accused's flight from the scene was admitted at trial to suggest consciousness of guilt. The Supreme Court of Canada held that the flight from the scene was equally consistent with consciousness of guilt in relation to a common assault or an aggravated assault, and that the judge erred in not instructing the jury to that effect. Major J., for the Court, said:

> [43] The test articulated in *Myers* provides helpful guidance on the inferences that may be drawn from evidence of an accused's flight (or other possible *indicia* of consciousness of guilt, such as lying). Such evidence can serve the function of indicating consciousness of guilt only if it relates to a particular offence. Consequently, where an accused's conduct may be equally explained by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge

should instruct a jury that such evidence has no probative value with respect to any particular offence.

[25] In **R. v. White** the accused were charged with a murder in Ottawa. Shortly after the killing they left Ottawa and committed two bank robberies in Mississauga. After returning to Ottawa they fled when confronted by the police. At trial for the murder the Crown introduced, *inter alia*, the evidence of flight from the police as demonstrative of consciousness of guilt. The trial judge allowed the evidence to go to the jury but instructed the jury that innocent people sometimes flee from the scene of the crime and that flight was evidence that should be weighed with all other. The appeal to the Ontario Court of Appeal was dismissed. The further appeal to the Supreme Court of Canada was dismissed. That Court held that the jury instruction was adequate. In the course of its decision the Court encouraged substitution of the neutral term "post-offence conduct" for "consciousness of guilt". Major, J., for the Court, said:

> [19] Under certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the accused's culpability for that crime. . . . As Weiler J.A. noted in *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 (Ont. C.A.), at p. 238:
>
> > Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.
>
> . . .
>
> [21] Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly

incriminating, while in others it might play only a minor corroborative role. Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.

[22] It has been recognized, however, that when evidence of post-offence conduct is introduced to support an inference of consciousness of guilt it is highly ambiguous and susceptible to jury error. As this Court observed in *Arcangioli*, the danger exists that a jury may fail to take account of alternative explanations for the accused's behaviour, and may mistakenly leap from such evidence to a conclusion of guilt. In particular, a jury might impute a guilty conscience to an accused who has fled or lied for an entirely innocent reason, such as panic, embarrassment or fear of false accusation. Alternatively, the jury might determine that the conduct of the accused arose from a feeling of guilt, but might fail to consider whether that guilt relates specifically to the crime at issue, rather than to some other culpable act.

[23] Two legal doctrines have arisen in response to these concerns. As a preliminary matter, this Court held in *Arcangioli* that a jury should not be permitted to consider evidence of post-offence conduct when the accused has admitted culpability for another offence and the evidence cannot logically support an inference of guilt with respect to one crime rather than the other. That rule is essentially a matter of relevance and will usually apply in narrow circumstances. More generally, this Court has also held that when evidence of post-offence conduct is put to the jury, the jury should be "properly instructed" to ensure that the evidence is not misused: *Arcangioli*, at p. 143; *Gudmondson v. The King* (1933), 60 C.C.C. 332 (S.C.C.), at pp. 332-33. The content of such an instruction, particularly the appropriate standard of proof, has been the subject of ongoing controversy in the Courts of Appeal and is addressed below.

. . .

[26] *Arcangioli* stands for the proposition that a piece of evidence should not be put to the jury unless it is relevant to the determination of a live issue in the case. . . . Whether a jury should be permitted to consider evidence of post-offence conduct will depend on the facts of each case. The question that should be asked at the outset is: What does the Crown seek to prove by means of the evidence? An admission by the accused may have the effect of narrowing the issue in dispute considerably, as was the case in *Arcangioli*. If, as a result of such an

> admission, the accused's conduct can no longer be attributed to the offence being tried rather than some other offence, then the jury should be so instructed. The evidence of post-offence conduct may still be used by the jury for other purposes where appropriate, for example to connect the accused to the scene of the crime or to a piece of physical evidence, or to undermine the credibility of the accused generally.
>
> (Emphasis added)

[26] The appellant's assertion that the failure to hold a *voir dire* constitutes reversible error is premised on the assumption that the evidence of post-offence conduct would not have been admitted had a *voir dire* been held. The appellant acknowledges that the evidence of the plot to kill Mr. Roshani is circumstantial evidence tending to prove identity. The appellant says, however, that the judge should have exercised his discretion to exclude this evidence because its prejudicial effect outweighed its probative value. A judge has a residual discretion to exclude relevant and admissible evidence where its admission would render the trial unfair. See **R. v. Harrer** (1995), 101 C.C.C. (3d) 193 (S.C.C.) per LaForest, J.:

> [41] The second premise of the argument, that judges have the power to exclude evidence where its admission would render the trial unfair, while less obvious, is readily resolved. At common law, a trial judge has a discretion to exclude evidence "if the strict rules of admissibility would operate unfairly against the accused.": *Kuruma v. The Queen*, [1955] A.C. 197 (P.C.) at p. 204, *per* Lord Goddard. Similarly, in Canada, the discretion allows exclusion of evidence that "would undermine the right to a fair trial": *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 at p. 400, *per* Dickson C.J.C., Beetz and Lamer JJ. concurring; at pp. 433-4, *per* La Forest J. (dissenting), [1988] 1 S.C.R. 670, 64 C.R. (3d) 1, considering s. 12 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10. <u>This principle permits the exclusion of evidence the probative value of which is outweighed by its prejudicial effect</u>: *Seaboyer*, *supra*, at pp. 389-91 C.C.C., pp. 261-3 D.L.R.; *R. v. Potvin* (1989), 47 C.C.C. (3d) 289 at p. 314, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193. J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (Markham, Ont: Butterworths, 1992), at p. 401, conclude that "[i]t seems

> uncontroversial that if the admission of certain evidence would adversely affect the fairness of an accused's trial, the evidence ought to be excluded".
> (Emphasis added)

[27] Post-offence evidence of interference with a witness is generally held to have probative value. Specifically, post-offence evidence of plots to kill key witnesses has been admitted by courts as important evidence of "consciousness of guilt". (see for example, **R. v. Lawrence** (1989), 52 C.C.C. (3d) 452 (Ont.C.A.); **R. v. Millette** (1987), 33 C.C.C. (3d) 551 (Que.C.A.); **R. v. Panzevecchia** (1997), 115 C.C.C. (3d) 476 (Ont.C.A.); **R. v. McCullough** (2000), 142 C.C.C. (3d) 149 (Ont.C.A.))

[28] The "prejudicial effect" to be weighed against the probative value is the risk that the admission of the evidence would render the trial unfair or be in some way misused by the trier of fact. Contrary to the submission of the appellant here, the judge does not have the discretion to withhold otherwise relevant and admissible evidence simply because it tends to prove the guilt of the accused. The appellant equates "prejudice" with the tendency of the evidence to lead to the inference that Mr. Tran was guilty of the offence.

[29] I am satisfied that had the judge conducted a *voir dire* he would have permitted the evidence of post-offence conduct to go to the jury. In so concluding, I am not suggesting that he was obliged to hold a *voir dire* in these circumstances.

[30] In the alternative, the appellant submits that the judge's error in permitting the evidence to go to the jury might have been corrected had the judge included a "no probative value" instruction in the charge, in relation to the evidence of post-offence conduct. In failing to so instruct, the appellant says that the judge erred.

[31] As I am of the view that had the judge held a *voir dire* he would have found the evidence of post-offence conduct to be admissible, it would be unusual for him to have then given the jury a "no probative value" instruction. If the evidence had no probative value, the judge, in these circumstances, would not have admitted it.

[32] In **R. v. White** Justice Major said of the "no probative value" instruction:

> [27] As a general rule, it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act. It is also within the province of the jury to consider how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role. Consequently, a "no probative value" instruction like the one required in *Arcangioli* will be called for only in limited circumstances.
>
> [28] Such an instruction is most likely to be warranted where, as in *Arcangioli* itself, the accused has admitted to committing the *actus reus* of a criminal act but has denied a specific level of culpability for that act, or has denied committing some related offence arising from the same operative set of facts. In such cases, the participation of the accused in the culpable event is not at issue; the question to be decided is merely the extent or legal significance of that participation. . . .
>
> [29] By contrast, a "no probative value" instruction is not required where the accused has denied any involvement in the facts underlying the charge at issue, and has sought to explain his or her actions by reference to some unrelated culpable act. In such cases it is the identity of the accused as the perpetrator, rather than the extent of his or her culpability, that is in issue, and it will almost invariably fall to the jury to decide whether the evidence of post-offence conduct can be attributed to one culpable act rather than another.
>
> (Emphasis added)

[33] Here Mr. Tran had not acknowledged commission of a lesser offence which might lead to the conclusion that the plot to kill Mr. Roshani was equally consistent with that offence rather than the murder of Ali Sharifrazi. Nor did Mr. Tran offer some other explanation

for the plan to kill Mr. Roshani which might lead to the inference that the plot was not probative of his involvement in the Sharifrazi murder. Mr. Tran simply denied involvement in the plan to kill Mr. Roshani. There was nothing in the evidence which would have followed the holding of the *voir dire* on the post-offence conduct, which would have affected the probative value of the evidence. It is impossible, then, to conceive of a basis here for a "no probative value" instruction.

[34] As is clear from the comments of the Court in **R. v. White**, **supra**, reproduced above, such an instruction is rarely appropriate. Generally, it is for the jury to decide whether the post-offence conduct is related to the crime, and, if so, the weight to assign to it. Only in rare circumstances should the judge usurp that role through the "no probative value" instruction. The judge gave a clear, appropriate and cautious instruction on the use to which the jury might put this evidence. The instruction was adequate for the circumstances. He did not err by failing to hold a *voir dire* nor in the manner in which he instructed the jury.

2. That the Learned Trial Judge erred in law in his instructions to the jury respecting identification of the Appellant as a party to the death of Ali Sharifrazi.

[35] It was only the evidence of Mr. Roshani, the eyewitness, that directly implicated Mr. Tran in the murder. The appellant correctly points out that there was no physical evidence such as blood, fingerprints or footprints which would otherwise place Mr. Tran at the scene. When arrested by the police shortly after the murder, Mr. Tran had no blood

on his person or clothing. It was the defence theory that the eyewitness was either lying or mistaken as to Mr. Tran's presence at the scene.

[36] Mr. Roshani testified that, although he did not know Mr. Tran by name, he had seen him on a couple of previous occasions. He had driven him in his cab at least once from the Sheraton Casino to Gerrish Street. Mr. Roshani acknowledged on cross-examination that shortly after the murder he told the police that although he recognized the accomplice as Vietnamese, he did not know his name. He admitted, as well, that he may have said all Vietnamese look alike. He did, however, identify Mr. Tran as the accomplice in a ride-along with the police immediately after the murder. Mr. Tran was found walking in the vicinity.

[37] The appellant acknowledges that the trial judge did generally instruct on the frailties of eyewitness identification but submits that the charge was not adequate on the dangers in these particular circumstances. The appellant says in this regard:

> It is the Appellant's respectful submission that the Learned Trial Judge failed to stress the absence of factors that usually shore up identification evidence. There was no evidence as to light conditions or eyesight abilities. There was no evidence as to the clothing of the second assailant save the 3/4-length coat which was at best confusing. There was no evidence of the presence or absence of distinctive features, height, weight and the like.

[38] The judge gave a lengthy charge covering all of the relevant issues:

> Now I want to comment to you on the frailty of eyewitness evidence. You all know that every once in a while in our courts a person is convicted of an offence even though they're innocent. More often than not, when that happens, it's because of a mistake made by one or more eyewitnesses. It's easy to see how this can happen. An eyewitness can be very convincing when that witness honestly

believes that the accused person is the one that he or she saw committing some offence.

Now in this case, your decision may depend largely on whether you find that the eyewitness, Mr. Ali Roshani, correctly identified Mr. Tran as the person he saw at the friend's convenience store on the night of December the 8th, 1996. And more specifically is the person who allegedly aided and abetted Mr. Nguyen.

So you must, therefore, understand that observation and memory are often unreliable when it comes to identification of people. In other words, it's an area where people often make honest mistakes.

When you consider the evidence of Mr. Roshani, you should use the following guidelines. Pay particular attention to his opportunity to observe the person that he says is Mr. Tran. Let me list a number of those guidelines.

Number one, how long was Mr. Roshani looking at the person he saw and in what circumstances. Number two, how far away was the eyewitness. Was there anything which might have obstructed his view of the eyewitness at particular times. Was there anything else happening at the same time that might have distracted him. Do we have any evidence relating to the lighting conditions at the time that you might look to. Did the eyewitness appear to have good eyesight. Was it questioned in any way.

Did the eyewitness, Mr. Roshani, appear to have good memory. Compare it to his recollection of other matters. You ask yourselves how long it was between the time when the eyewitness saw the event and the time when he identified Mr. Tran. If I recall the evidence, it's a matter of only several minutes.

Consider whether the eyewitness was able to give a good description of the person he saw. Has Mr. Roshani made any significant changes in that description over time. Did Mr. Roshani adequately explain how he was able to identify Mr. Tran as the person he saw. Did he mention any specific features which helped him make that identification. And was there other evidence that appeared to support the identification of the eyewitness. Finally, was Mr. Tran someone who was known to Mr. Roshani before all of this took place. If he knew Mr. Tran before, you will probably attach more weight to the identification, depending upon the nature of that previous acquaintanceship.

Please bear in mind, however, that we sometimes make mistakes when we try to recognize people even though we know them quite well. I suggest that some of you have probably had the experience where someone has come up to you and said, I know you, didn't you used to live near me, or something of that nature. And find out that you'd been mistaken for someone else. Or perhaps you've done that yourself.

Now, I will not be reviewing all of the evidence relating to this question. That's your function. And counsel have already brought to your attention much of the relevant evidence. However, I will discuss some of it, but remind you to consider all of the evidence given by the witnesses when considering this important topic.

First of all, both sides acknowledge that the two people in question, Mr. Tran and Mr. Roshani, had met before. The general evidence relating to identification here is that Mr. Roshani said he knew Mr. Tran prior to the incident in question. He also said he knew Mr. Sharifrazi, the victim, who was also of Iranian descent, for several years. Mr. Roshani also said that he knew Mr. Nguyen for several years, as they both were taxi drivers, as apparently was Mr. Sherifrazi from time to time.

Mr. Roshani's previous contact with Mr. Tran was that he had picked him up as a passenger in his taxi once or twice. He said he had driven him to the Gerrish, Brunswick Street area. And we know that Mr. Tran had a number of addresses, but he certainly on one occasion, he lived on Gerrish Street. That appears to have been the extent of his prior relationship with Mr. Tran.

Mr. Tran acknowledged that he knew who Mr. Roshani was and where he worked. He mentioned the Mic Mac Mall. And we've had other evidence that Mr. Roshani had a booth there, a real estate booth there. Mr. Tran said, however, that he was not a close friend.

I repeat that Mr. Roshani said that he saw Mr. Tran up close, and then subsequently, as you know, identified him when he was located on Sarah Street.

You will also recall the exchange between Mr. Roshani and Ms. Hutt when she asked him if in his statement to the police he said he did not know Mr. Tran's name. Mr. Roshani acknowledged that that was correct, that he had learned the

name from press reports. He also said that it was possible that when the police asked him if he had ever seen Mr. Nguyen's partner before, that he had replied to the police, "I might have, I don't know."

Mr. Roshani acknowledged that he had asked the police during that statement to help him by giving him a chance to look at Mr. Tran again when he was in police custody. On the other hand, when Ms. Hutt asked if he remembered telling the police his statement that all Vietnamese look alike, he said he didn't remember that, or words to that effect.

My recollection of the evidence is that he initially replied, "Yeah," and then subsequently said he didn't remember, I believe, when I asked the question. Thus, it didn't become evidence as he didn't confirm it and it wasn't proven that he said it. I'll review that briefly when I get to prior statements as well.

Now in considering identification evidence, I repeat that you must consider all of the relevant evidence and testimony when reviewing this topic, this important topic of identification.

. . .

In this trial counsel submitted that the testimony of some of the witnesses was inconsistent with their previous out-of-court statement. Now this happened on a number of occasions with reference to a number of witnesses. But I'm only going to give you a few examples just so that you will understand the treatment of such type of evidence.

I refer to you at page 22 of Ms. Hutt's exchange with Mr. Roshani. There she referred to a statement he gave to the police wherein he said to them that he wanted the police to help him by helping him look at them. Again, on the early morning hours of December the 8th, 1996, it's either late evening December 8 or early morning hours of December the 9th.

Mr. Roshani confirmed that that was correct. So by his confirmation, this then becomes evidence in the trial for you to consider. As well, he confirmed that at the time he stated to the police that all Vietnamese looked the same. But when I repeated the question, he replied, "I don't remember that." So his replies are

inconsistent. You'll recall that when I referred to it earlier, I just said that he'd confirmed it. But, in fact, my recollection is that he had inconsistent answers there, once to Ms. Hutt and once to myself.

So you, as the triers of fact, then, must determine, of course, first of all, whether he confirmed or denied the information. And then you must make an assessment of how to use that information in your assessment of his credibility.

If you conclude that it was a denial, then you can't use it as evidence. But you of course might use it to assess credibility. If you conclude, as triers of the fact, that he confirmed it, then you can use it as evidence. But that's a decision you must make.

. . .

The evidence of the eyewitness placing Mr. Tran at the scene of the murder, assisting Mr. Nguyen by holding the arms and hands of Mr. Sharifrazi while Mr. Nguyen continued to hit him, and to taking the cordless phone, according to the defence, is unreliable and inconsistent with the facts. Inconsistent particularly with the facts that there was so much blood at the scene, and there was no blood on Mr. Tran.

Either the eyewitness is mistaken as to the identity of the party who assisted Mr. Nguyen, or there never was a second party, according to the defence.

[39] After a brief recess during the charge and discussion with counsel Justice Kelly made two corrections to his charge:

It appears I was in error when I said that Mr. Tran knew that Mr. Roshani worked at Mic Mac Mall. What Mr. Tran had apparently said was that he had waved at him at the casino, to indicate that he had some acquaintanceship with him. So I ask you to accept that correction.

Now I would also refer you briefly to page 22 of the evidence where I had said at the bottom of that page that Mr. Roshani acknowledged that he had asked the police during that statement to help him by giving him a chance to look at Mr.

Tran again, when it appears that what he said was to look at them again, apparently referring to both Mr. Nguyen and Mr. Tran. I make those corrections before I continue.

[40] I am satisfied that in his charge to the jury the judge fully, fairly and appropriately canvassed the evidence of Mr. Roshani and pointed out to the jury the dangers of eyewitness identification. This was not a fleeting glimpse of an alleged perpetrator by the eyewitness. Mr. Roshani testified that he was face to face with Mr. Tran, a person whom he recognized from previous contact. This ground of appeal is without merit.

3. That the Learned Trial Judge erred in law in his instructions to the jury respecting the evidence of "unsavoury" Crown witnesses Roshani and Liebhardt.

[41] The appellant says that both Mr. Roshani and Mr. Liebhardt were unsavoury Crown witnesses and that the charge to the jury was inadequate in this regard. Specifically, the appellant says that the judge should have given the *Vetrovec* caution (see **Vetrovec v. The Queen** (1982), 67 C.C.C. (2d) 1 (S.C.C.)), particularly in relation to Mr. Liebhardt.

[42] There were two facets to Mr. Liebhardt's evidence. He testified that it was on Messrs. Tran and Nguyen's instructions that he introduced the "hit man". In addition he testified as follows:

Q. And what did Mr. Tran tell you about his involvement in this matter?

A. He was out following his buddy, following his friend Khoe, and that when he seen what was going on in the store, he just went into the store and took cellular phone from Ali... that's Ali Roshani."

[43] Failure to give a *Vetrovec* warning when required is an error of law. In **R.** v. **Brooks**, [2000] 1 S.C.R. 237 Major J., who dissented in the result, described the *Vetrovec* caution at § 94:

> What then is a clear, sharp warning? It is obvious there is no particular language or formula. At a minimum, a proper *Vetrovec* warning must focus the jury's attention specifically on the inherently unreliable evidence. It should refer to the characteristics of the witness that bring the credibility of his or her evidence into serious question. It should plainly emphasize the dangers inherent in convicting an accused on the basis of such evidence unless confirmed by independent evidence.

[44] In **Brooks** a 19-month-old child was found murdered in her crib. Only the accused and the child's mother had access to her on the night of the murder. The child had blood and vomit on her face, a swollen left eye, bruises on her head, and bruising and redness on her genital area. The cause of death was acute brain injury. Trace amounts of semen were found on vaginal and anal swabs but DNA testing of sperm proved inconclusive. The Crown's expert could neither include nor exclude the accused as the possible source of the sperm. The Crown led evidence from two jailhouse informants who testified that the accused, while incarcerated, had admitted that he had killed the child to stop her crying. Their testimony did not include a suggestion that the killing was committed during the commission of a sexual assault. Both informants had lengthy criminal records of dishonesty. One unsuccessfully sought a lighter sentence in return for his testimony and had testified as an informant in a prior trial. The other had a history of substance abuse and a psychiatric history highlighted by suicide attempts, paranoia, deep depression and a belief in clairvoyant ability. Both had histories of offering to testify in criminal trials.

[45] The Court divided on whether a *Vetrovec* warning was required in that case. Three judges (Gonthier, McLachlin, and Bastarache, JJ.) thought not and three (Iacobucci, Major and Binnie, JJ.) held that the caution should have been given. Justice Binnie was satisfied that the failure to give the *Vetrovec* caution in that case could be cured under s. 686(1)(b)(iii) (see **R. v. Bevan** (1993), 82 C.C.C. (3d) 310 (S.C.C.)). The Court was unanimous, however, in agreeing that the decision on whether to give the warning was a matter for the discretion of the trial judge. There was agreement, as well, that in making that decision the judge should take into account (i) factors affecting the credibility of the witness; and (ii) the importance of the unsavoury witness' evidence to the Crown's case.

[46] In writing for the three who found no error in the charge, Justice Bastarache said at §14:

> . . . The evidence of King and Balogh [the jailhouse informants] may have been important but it was not determinative, and, where the evidence of a witness merely provides further support for a jury's finding, appellate courts should more likely find that the decision to give a "clear and sharp" *Vetrovec* warning is within the trial judge's discretion.
>
> Failure to Request a Warning
>
> [15] A further problem with making the "clear and sharp" *Vetrovec* warning mandatory is that it may have the unintended effect of causing greater prejudice to the accused either by calling attention to the impugned evidence or to evidence corroborating the impugned evidence.
>
> [16] While this Court has established in *Bevan* that the trial judge need not necessarily point to corroborating evidence each time a *Vetrovec* warning is given, it is usually a corollary of the *Vetrovec* warning that the trial judge refer to evidence supporting the impugned evidence of the "unsavory" witness. Therefore, if the trial judge had given a "clear and sharp" *Vetrovec* warning in this case, it would have been open to him to highlight for the jury the

ample evidence which confirmed the evidence of King and Balogh. In requesting a *Vetrovec* warning, defence counsel therefore risks bolstering the credibility of the "unsavoury" witness by highlighting the inculpatory evidence against the accused. In this regard, *Vetrovec* warnings may, in certain circumstances, be counter-productive by actually strengthening the case against the accused.

[17] Defence counsel in this case neither requested a *Vetrovec* warning nor objected when one was not provided. This may well have been the result of a tactical decision on the part of defence counsel to avoid the risk of causing greater prejudice to the accused. Defence counsel chose to concentrate on attacking the Crown's circumstantial and physical evidence in this case rather than to draw attention to the evidence of King and Balogh. Indeed, defence counsel, in his address at trial, referred to the evidence of King as "comic relief", stating that King and Balogh had concocted stories that "didn't make sense" and that nothing further needed to be said about them. It is at least implicit from the defence's references to the evidence of King and Balogh that the defence felt that there was no striking need for a "clear and sharp" *Vetrovec* caution, that the evidence of King and Balogh was insignificant, and that the jury was fully capable of assessing the credibility of these witnesses on its own. Had defence counsel requested a *Vetrovec* warning, however, the evidence of King and Balogh would have been singled out for the jury's attention and possibly emphasized by the trial judge.

[47] Justice Major, writing for himself and Justice Arbour said:

. . . I agree with the view expressed in "Developments in the Law of Evidence: The 1992-93 Term" (1994), 5 S.C.L.R. (2d) 421. The author, M. Rosenberg (now Rosenberg J.A.), concluded that *Vetrovec* and *Bevan* require the trial judge to focus on two different elements of the case in determining whether or not a warning is necessary. At p. 463 he stated:

> The judge should first in an objective way determine whether there is a reason to suspect the credibility of the witness according to the traditional means by which such determinations are made. This would include a review of the evidence to determine whether there are factors which have properly led the courts to be wary of accepting a witness's evidence. Factors might include involvement of criminal activities, a motive to lie by reason of connection to the crime or to the authorities, unexplained delay in coming forward with the story, providing different accounts on other occasions, lies told under oath, and similar considerations. It is not then whether

> the trial judge personally finds the witness trustworthy but whether there are factors which experience teaches that the witness's story be approached with caution. Second, the trial judge must assess the importance of the witness to the Crown's case. If the witness plays a relatively minor role in the proof of guilt it is probably unnecessary to burden the jury with a special caution and then review the confirmatory evidence. However, the more important the witness the greater the duty on the judge to give the caution. At some point, as where the witness plays a central role in the proof of guilt, the warning is mandatory. This, in my view, flows from the duty imposed on the trial judge in criminal cases to review the evidence and relate the evidence to the issues.
>
> [80] In summary, two main factors are relevant when deciding whether a *Vetrovec* warning is necessary: the witness's credibility, and the importance of the witness's testimony to the Crown's case. No specific threshold need be met on either factor before a warning becomes necessary. Instead, where the witness is absolutely essential to the Crown's case, more moderate credibility problems will warrant a warning. Where the witness has overwhelming credibility problems, a warning may be necessary even if the Crown's case is a strong one without the witness's evidence. In short, the factors should not be looked to independently of one another but in combination.
>
> (Emphasis added)

[48] Justice Major agreed that defence counsel may refrain from requesting a *Vetrovec* warning for tactical reasons. In his view, the absence of a specific request from defence counsel while not determinative of the issue, was a factor to be considered in evaluating the prejudice that has been occasioned by the failure to warn.

[49] There were many factors negatively affecting the general credibility of Mr. Liebhardt. However, Constable Mombourquette substantially corroborated Mr. Liebhardt's evidence as to the joint role of Mr. Tran and Mr. Nguyen in the plot to kill Mr. Roshani. Accordingly, although his general credibility would call for scrutiny, in these circumstances there was little reason to doubt the reliability of his evidence on the issue of the plot to kill Mr. Roshani. Supporting this view is the fact that the defence counsel

did not request the warning nor complain that it had not been given. When assessing the importance of the impugned evidence to the matter in issue, which was the murder of Ali Sharifrazi, the judge could rightly have concluded that Mr. Liebhardt's evidence was of little import. In view of Constable Mombourquette's evidence of Mr. Tran's role in the plot to kill the only eyewitness, and Mr. Roshani's eyewitness identification, nothing turned upon Mr. Liebhardt's evidence.

[50] In his charge to the jury, at the outset of his review of Mr. Liebhardt's evidence, the judge referred to the witness's criminal lifestyle; the fact that he had lived on proceeds of crime; that he has 52 criminal convictions, most relating to dishonesty; and that he had received money from the Crown in relation to his participation in this matter. At the conclusion of his review of Mr. Liebhardt's evidence the judge cautioned that, in assessing Mr. Liebhardt's credibility, the jury should take into account his criminal record and the financial arrangement with the police. It is my view that this instruction by the trial judge was adequate in the circumstances. Mr. Liebhardt's evidence of the plot to kill Mr. Roshani, insofar as it was corroborated by that of Constable Mombourquette, did not necessitate a formal *Vetrovec* warning.

[51] This leaves for consideration Mr. Liebhardt's testimony that Mr. Tran told him that he was in the convenience store and took the telephone from Mr. Roshani. This evidence was uncorroborated save by Mr. Roshani. It was evidence that put Mr. Tran in the store, contrary to his denials. It was also evidence that Mr. Liebhardt could have learned from the disclosure documents made available to him by Mr. Nguyen, rather than necessarily resulting from an admission by Mr. Tran. While the evidence does undermine Mr. Tran's

denial that he was in the store, it does not directly implicate him in the murder of Mr. Sharifrazi. It is equivocal. It could be viewed by the jury as supportive of Mr. Tran's innocence. Should the jury disbelieve Mr. Tran's evidence that he was not in the store, they might nevertheless be left with a reasonable doubt as to his participation in the murder. Importantly, it was not an admission by Mr. Tran to any role in the murder of Mr. Sharifrazi. It was not evidence of a directly incriminating nature and not of the significance of the inculpatory evidence proffered in **R. v. Bevan, supra** and **R. v. Brooks**, **supra**. Taking into account the nature of this evidence, I am satisfied that instruction by the trial judge was sufficient to bring to the jury's attention the characteristics of Mr. Liebhardt which detracted from his credibility. It was not reversible error for the judge to have failed to give a formal *Vetrovec* caution.

[52] As with Mr. Liebhardt's evidence of the plot to kill Mr. Roshani, had defence counsel insisted on the *Vetrovec* caution, she ran the risk of highlighting this evidence with the additional danger that the judge would have reviewed for the jury the evidence supportive of Mr. Liebhardt's credibility. In discussions with counsel during the charge but just prior its completion, the judge told them, inter alia, that he would be referring to Mr. Tran's alleged statement to Mr. Liebhardt and read to them that part of his charge. Defence counsel made no comment. This, in my view, supports the inference that defence counsel (i) did not think this was a sufficiently significant bit of evidence to warrant the *Vetrovec* caution, or, (ii) had made a tactical decision not to request the warning. Her failure to do so in relation to this evidence cannot be considered mere oversight. The defence strategy was to denigrate Mr. Liebhardt as a witness dwelling on

his disreputable past. That strategy would have been weakened had the judge reviewed for the jury the evidence supporting his credibility, which would likely have accompanied the *Vetrovec* caution.

[53] The appellant asserts as well that Mr. Roshani was an unsavoury witness in relation to whose evidence the judge should have given the *Vetrovec* caution. In this regard the appellant notes that prior to the trial, Mr. Roshani had told the police that he would not testify unless he received money for protection from the accused. The police responded that they would not provide funds and would subpoena him if he refused to testify. Mr. Roshani abandoned his demand. When questioned about this at trial, Mr. Roshani testified that he was motivated to ask for the protection money when he learned that Mr. Tran and Nguyen had plotted to kill him.

[54] I find no merit to the suggestion that a *Vetrovec* caution should have been given in relation to Mr. Roshani. He was not an unsavoury witness of the kind that calls for the special warning.

[55] In my view the judge did not err by refraining from giving the *Vetrovec* caution in relation to either witness. Additionally, I am satisfied that even had the warning been given here there is no reasonable possibility that the verdict would have been different. If necessary, I would apply s. 686(1)(b)(iii) of the **Criminal Code** and dismiss this ground of appeal.

4. That the Appellant's conviction should be set aside as unreasonable and not supported by the evidence, and therefore there was a miscarriage of justice.

[56] On a complaint of unreasonable verdict, we are required to review the evidence, re-examining and re-weighing it, but only for the purpose of determining whether the trier of fact could reasonably reach the conclusion it did on the evidence before it. (**R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.)). In applying this test, Arbour J. cautioned in **R. v. Biniaris** (2000), 143 C.C.C. (3d) 1 (S.C.C.):

> [24] Triers of fact, whether juries or judges, have considerable leeway in their appreciation of the evidence and the proper inferences to be drawn therefrom, in their assessment of the credibility of witnesses, and in their ultimate assessment of whether the Crown's case is made out, overall, beyond a reasonable doubt. Any judicial system must tolerate reasonable differences of opinion on factual issues. Consequently, all factual findings are open to the trier of fact, except unreasonable ones embodied in a legally binding conviction...

[57] The significant exculpatory fact relied upon by the defence, in addition to Mr. Tran's denial of involvement, was that there was no physical evidence linking him to the scene, in particular, no blood found on him, despite the bloodiness of the crime scene. The Crown had, however, called Staff Sergeant Vic Gorman, an expert evidence in blood stain pattern analysis. Sergeant Gorman testified in response to a hypothetical question posed by the Crown, that it was possible for Mr. Tran to have assisted in the attack upon Mr. Sharifrazi yet not have blood on him. Simplifying, it was his evidence that the knife wounds which caused the substantial spurting blood flow may have been inflicted upon Mr. Sharifrazi by Mr. Nguyen after Mr. Tran had aided in the attack. He testified that the early knife wounds to Mr. Sharifrazi's back would not necessarily have produced substantial blood flow such that Mr. Tran would inevitably have it on his person, had he assisted in the attack. It was open to the jury to accept that evidence. The factual assumptions underlying the hypothetical have not been attacked by counsel on this

appeal. This jury could reasonably have reached the conclusion it did on the evidence before it.

DISPOSITION:

[58] I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Oland, J.A.