IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

GATES WESLEY ROBERT JEN

REASONS FOR RULING

of the

HONOURABLE JUDGE CHRISTINE GAGNON

Heard at: Yellowknife, Northwest Territories

Date of Decision: July 25, 2014

Counsel for the Crown: Jennifer Bond

Counsel for the Accused: Caroline Wawzonek

[Sections 5(1) and 5(2) of the *Controlled Drugs and Substances Act*]

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INTRODUCTION

[1] This decision is about how the exclusion of evidence pertaining to the name of the accused affects the Crown's ability to prove his identity.

CONTEXT

[2] The evidence in this case was heard in the context of a voir-dire because the Defense applied for the exclusion of evidence on the basis that it had been obtained in violation of the accused's Charter-protected rights.

[3] In a separate ruling, this court declared that evidence of the name of the accused should be excluded as a result of having been obtained in breach of his fundamental right not to incriminate himself. The rest of the evidence heard during the voir-dire, insofar as it does not relate to the name

of the accused, and provided that it is not otherwise inadmissible, has been applied to the trial proper, which includes the exhibits. The decision includes a determination that the police had reasonable grounds to intercept the taxicab and to arrest the accused for possession of drugs for the purpose of trafficking.

[4] In their final submissions, counsel focused their arguments on the issue of identity, but I will nonetheless review the evidence and make the necessary findings, as I still need to satisfy myself that the Crown has proved all the elements of the offences beyond a reasonable doubt. I also find that the issue of identity must be determined on the totality of the evidence.

[5] Counsel made no specific comment with regard to the credibility of the witnesses who, except for the taxi driver Khokon Nasir-Uddin, were police officers. Their evidence was largely consistent and non-contentious. Some inconsistencies were dealt with during the voir-dire and do not impact the evidence on the trial proper.

[6] I will however make a general comment about the testimonies of Constables Kowalchuk and Newberry. I find that these witnesses were evasive on certain issues which resulted in contradictions with the testimonies of Constables White and Mounsey. I find that Constable White and Constable Mounsey testified in a straightforward and sometimes candid manner and I find that they were credible and reliable. Whenever there was a contradiction between their testimony and that of other witnesses on a certain issue, I preferred their testimonies.

PROOF OF THE OFFENCES

[7] On April 5, 2012, Constable Keith Kowalchuk of the Royal Canadian Mounted Police, Federal Investigations Unit, "G" division in Yellowknife, received a detailed tip from a confidential source about a person running a "dial-a-dope" operation, through a cellular telephone number, 445-0088.

[8] "Dial-a-dope" refers to an operation whereupon potential clients contact a certain telephone number usually using cellular telephones, and through a common coded language, arrange for the purchase and delivery of drugs.

[9] On April 12, 2012, Cst Kowalchuk consulted Constable Paul Mounsey (a member of the Royal Canadian Mounted Police, working in the Drugs Section) about this tip, and they decided to follow that lead upon making summary verifications.

[10] They put together a surveillance team and agreed that one of them would pose as a potential buyer. Constables Kowalchuk and White were tasked with making the contact with the target. Cst Jonathan White contacted 445-0088 and sent a text message saying "Hey bro cn u hook up with 4?" which, he explained, meant that he was seeking to buy 4 grams of cocaine[1].

[11] He received a response one minute later. After some back and forth, Cst White and the target agreed on a transaction of 4 grams of cocaine for 320$. At 6:55 pm, they agreed to meet in "Bowling Alley", which is an alley situated in an area delineated by 50th and 51st Streets and 51st and 52nd Avenues in Yellowknife's downtown core.

[12] Constables Kowalchuk and White parked their unmarked police vehicle in "Bowling Alley", while Constable Newberry took a position on a nearby cross street. Constable Mounsey set up on the roof of a high-rise building and used binoculars to observe Bowling Alley and its surroundings.

[13] All officers were in contact with one another through radio transmitters and they kept each other informed of any development as it occurred. Cst White shared the messages he was receiving from the target

[1] Exhibit 5

and Cst Mounsey was calling in whatever he was observing on the streets and in Bowling Alley.

[14] At 7:08 the target texted that he was in front of Bowling Alley. Cst White texted: « U there ». He received no response. He texted again : «U in cab», as he had just seen a cab drive by. The target texted back: "No im walking wait in front not the alley".

[15] As Cst White relayed this exchange on the air, Cst Mounsey said he didn't see anything in the alley. Between 7:13 and 7:23, Cst White and the target texted back and forth trying to get each other to say where they were. At 7:24, the target texted "U ain't in the Fuckin alley".

[16] Cst White called on the radio that a taxi was passing in the alley and Cst Mounsey confirmed this by calling back "Cab 20". This was a white vehicle belonging to the City Cab taxi company.

[17] Meanwhile, in a white taxi of the City Cab company, driven by Khokon Nasir-Uddin, was sitting a young man. Mr. Nasir-Uddin said that he picked up this client "somewhere along Finlayson near the Shell Station".

[18] The client had called him to pick him up and to take him downtown. The passenger then told him to "drive around". He drove his taxi on 54th Avenue, then to Matonabe Apartments, then through "Bowling Alley". He drove twice through "Bowling Alley", at his passenger's request. At no time did he stop; and at no time did the passenger get off.

[19] Constable Mounsey observed that the white cab circled the streets around "Bowling Alley" a couple of times, and that it did not stop to pick up or drop off any client. He saw no other vehicle circulating in "Bowling Alley" during that period.

[20] After one further attempt by Cst White to get the target to say whether or not he was in the passing cab, the target texted at 7:29: "Im walking bak home ur stupid". Cst White called out that there was nobody on the road, while Cst Mounsey called out that the cab was leaving the area, as he saw it moving on 52nd Avenue away from the downtown core.

[21] Concurrently, Khokon Nasir-Uddin was driving his City Cab taxi in a circling pattern in Yellowknife's downtown core. His passenger told him to drive towards Matonabe apartments and he drove by 56th Street, which is away from the downtown core.

[22] The police decided to intercept the cab. Cst Mounsey described to the other officers the route that the taxi was following.

[23] Constables Kowalchuk and White closed in on the taxi and intercepted it a few blocks away, by Sunridge Apartments on 51A Avenue, just past 56th Street. The chase lasted less than three minutes.

[24] Khokon Nasir-Uddin said that he heard sirens and that he (meaning his cab) was pulled over by the police past the Sunridge Apartments.

[25] Constables Kowalchuk and White rushed out of their vehicle and ran towards the cab. It was a white taxi from the company City Cab, with the number 23 painted on the side. Although Cst Mounsey erroneously described the taxi as being "car number 20", I am satisfied that he observed only one taxi in the area between 7:08 and 7:29 pm, and that this was the cab which Mr. Nasir-Uddin drove.

[26] Cst White opened the back door and saw a young man, whom he said was Asian or aboriginal, sitting on the back seat, and whom he had never seen before. He placed him under arrest for a drug-trafficking offence.

[27] Constable Mounsey arrived last at the scene. He asked Cst Kowalchuk if he had dialed "the" phone number. Cst Kowalchuk dialed 445-0088 and a ringtone sounded from inside the cab.

[28] Cst White searched the young man and found one cell phone, one Ipod, nine twenty-dollar bills, and a key. He found no drugs.

[29] Cst Mounsey saw a half-empty water bottle in the back of the cab. Based on his experience, he concluded that the young man may have swallowed the drugs, which would explain why they did not find any on his person.

[30] He decided to explain to the young man the risk of overdosing as a result of swallowing drugs. He asked him if he wished to go to the hospital. The young man declined this offer.

[31] Constable Mounsey then ordered that the young man be transported to the RCMP detachment and that he be placed in a dry cell.

[32] Constable Mounsey gave instruction to the matron to notify him if the prisoner had a bowel movement or if he said that he wanted to go to the hospital.

[33] At about 8:35 pm, the young man asked to be taken to the hospital. He was brought to the Stanton Territorial hospital at about 9:00 pm, and police officers including Constables White, Newberry and Kowalchuk, took turns in guarding his room.

[34] The agreed statement of fact filed as Exhibit 1 states that "the accused admitted to Dr. Farrell that he had ingested several small baggies of cocaine."

[35] At 1:10 in the afternoon of April 13, 2012, the young man had a bowel movement. Constables Newberry and Williams were present. Cst

Newberry seized the feces and searched them. He found and extracted pieces of white matter wrapped in plastic, he cleaned them and placed them in small jars, which he then packed in sealed exhibit bags. Pictures of the samples were tendered collectively and on consent as Exhibit 6. These samples, labelled H2295672 and H2295671 by Cst White, were sent to the Health Canada Drug Analysis Service Laboratory in Winnipeg.

[36] The Crown tendered on consent the corresponding Certificates of Analysis as Exhibits 7 and 8. They reveal that the white substance contained cocaine, procaine and benzocaine.

[37] Corporal Eric Irani was called as expert witness. His *curriculum vitae* was tendered on consent as Exhibit 10 and the Defense acknowledged his qualifications. Corporal Irani was declared to be an expert on "practices, habits of drug users, and drug trafficking" and was permitted to give opinion evidence. His Expert Report and related Notice of Intent were tendered on consent as Exhibits 11 and 12.

[38] He gave the opinion that the facts of the case are consistent with possession for the purpose of trafficking rather than with simple possession. In his opinion, the young man in whose possession the drugs were found was not a user, but a trafficker, based on:

- the mode of packaging of the drugs (the packages were described as "spit balls" of .7 to 1.0 gram and were packaged for street resale),
- the mode of communication by text messages through a cell phone,
- the possession of money in 20-dollar bills,
- the mode of transportation (by cab, to avoid detection),
- the possession of a water bottle (to be able to swallow the drugs by fear of detection), and
- the lack of user paraphernalia in the immediate possession of the suspect.

PROOF OF IDENTIFICATION

[39] Keith Kowalchuk was asked what the young man sitting in the back of the taxi looked like. He said: "He's sitting in the courtroom", and he pointed him out at counsel table. He offered the following description: "18-20 years old, taller, slim, appears to be aboriginal or Asian."

[40] The Crown further asked if he noted any change. His answer: "No, he looks the same." Cst Kowalchuk observed him during the arrest process, and also when he was guarding him at the hospital.

[41] The taxi driver, Khokon Nasir-Uddin, said that he picked up a customer on April 12, 2012 and that he knew him, although at that time, he did not know his name. He described his passenger as taller than him, 20-something , between 20-25, with black hair. He then said: "I can recognize him" and he pointed to the person sitting next to Defense counsel with his chin.

[42] Jonathan White described the young man sitting at the back of the taxi as: "young aboriginal or Asian male, whom I had never seen before." He then pointed to the accused in the courtroom. He had had the opportunity to observe him during his encounter by the taxi, while he was talking to him, and when he placed him under arrest; he observed him further at the detachment and while he was driving him to the hospital.

[43] Scott Newberry observed the young man while driving him to the police detachment. He served him with a Promise to Appear at the hospital at 4:01 pm on April 13, 2012, just before the young man was discharged. He testified to that during the trial, and the Crown lead further evidence on that point by tendering an agreed statement of facts[2] in which it is stated that:

[2] (Exhibit 15)

> "4. The individual that Cst Newberry served with the Promise to Appear is the same individual that has been present in court during the trial proceedings on this matter, seated next to defence counsel at counsel table."

POSITIONS OF THE PARTIES

[44] Counsel for the Defense says that the name of an accused is an essential element of the offence and that the Crown must prove it beyond a reasonable doubt. The Defense adds that there is a gap in the Crown's case as a result of this court's ruling and that this gap cannot be filled.

[45] The Defense, relying on the authority of *R. v. Levene*[3] and *R. v. Ali*,[4] says that the Court should not consider its own proceedings as containing an acknowledgement of identity on the part of the Accused, specifically because of the context of a breach of the accused's right to be protected against self-incrimination.

[46] The Defense says that the name appearing on the Information does not prove identity and she adds that the fact that the accused is present in court to obey the Promise to Appear is not an admission that his name is Gates Jen. She adds that there is no independent evidence of the name of the accused and that the Crown may have proved that the police believed the young man to be Gates Jen, but has failed to prove beyond a reasonable doubt that he was Gates Jen.

[47] Counsel for the Crown says that they only need to establish that the person before the court is the person whom the police arrested and from whom they seized illegal drugs.

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[3] [2007]O.J. No 103.
[4] [2011] O.J. No. 5950

[48] The Crown relies on *R. v. Nicholson*[5] and says that the accused is the person the Informant had in mind when he swore the information. The Crown says that the court may infer that the accused present in court is Gates Wesley Robert Jen from the combination of Exhibit 15, which proves that Cst Newberry served on the person sitting at counsel table a Promise to Appear in the name of Gates Wesley Robert Jen, eyewitness identification, in-dock identification, and the circumstances of the dial-a-dope investigation leading to the interception of the cab in which the suspect travelled.

[49] The Crown says that they proved all the elements of the offence and that they have created a circle of identification from which results a real identification of the person present in court during the trial. She says that what matters is that they proved that the person present in court is the perpetrator of the offences, whatever his name is, and regardless of whether his name was proved or not. The Crown says that the court may draw an inference from the proven facts that the accused is Gates Wesley Robert Jen.

ANALYSIS

a. <u>The proven facts</u>

[50] I find that the following facts have been established beyond a reasonable doubt:

1. The police arranged on April 12, 2012, at 6:55 pm, to buy 4 grams of cocaine with a person whom they contacted at 445-0088, a cellular telephone number. At all material times, the events occurred in Yellowknife, in the Northwest Territories.

2. The police were in contact by text messages with the person responding at this number and concurrently observed a white

[5] 1984 CarswellAlta 43, 12 C.C.C. (3d) 228

taxi from the company City Cab in the area where the meeting was to take place.

3. The police intercepted the white taxi within minutes of the last communication with 445-0088.

4. The passenger in this taxi was in possession of a cellular telephone, which rang when the police dialed 445-0088.

5. The passenger was picked up by a white taxi cab from the City Cab company near Finlayson Drive and the Shell station, and he remained in the cab until it was intercepted by the police on 51A Street, shortly after 7:29 pm.

6. The passenger was under constant and direct police surveillance from the time of his interception until his release from the Stanton Territorial Hospital on a Promise to Appear.

7. While the young man was detained, the police seized pieces of cocaine wrapped in plastic from his excreted feces.

8. The young man admitted to a physician that he had swallowed drugs.

9. In addition to the drugs and the cellular telephone, the police seized a half-empty water bottle found in the back of the taxi and nine twenty-dollar bills found on the passenger's person. They also failed to find user-paraphernalia.

b. <u>The factual inferences drawn from the proven facts</u>

1. The passenger in the cab was texting the police from the cab as they were driving toward the meeting point in "Bowling Alley".

2. The passenger was the only person exchanging with Constable White through 445-0088 between 6:55 and 7:29 pm on April 12, 2012.

3. The passenger of the cab was transporting and was in possession of at least four small packages of cocaine wrapped in plastic while he was being driven in and around "Bowling Alley".

4. He was prepared to sell these packages to "April".

5. As he failed to see April in the alley, he disengaged from the transaction.

6. He swallowed the individual plastic bags containing the cocaine and he drank water from the water bottle to facilitate the process, shortly before the cab was intercepted by the police.

7. He swallowed the drugs to avoid detection.

c. <u>The legal conclusions drawn from the proven facts</u>

1. The passenger of the taxi was in possession of a substance included at Schedule I of the *Controlled Drugs and Substances Act*.

2. Based on the quantity of drugs, their packaging, the fact that they had been ordered through text messages on an unregistered cell phone, the lack of user paraphernalia on the young man's person, the young man was in possession of a substance included in Schedule I of the CDSA for the purpose of trafficking.

3. The passenger was transporting the substance included in Scheduled I of the CDSA, therefore he was trafficking.

[51] The only element missing in order to secure a conviction is the identity of the passenger. It is a well-established rule that in a criminal case, the Crown must prove "not only that an offence has been committed but that the accused was the one who committed it"[6]

[52] Identity may be proven "by either direct or circumstantial evidence or a combination thereof."[7]

[53] In the matter of *R. v. Nicholson*[8], the Alberta Court of Appeal discussed the related but different concepts of identification:

> One can speak of identification in several contexts. One question, for example (…) is which member of the human race is charged with the offence? Another is in terms of a judge being satisfied that the accused is actually before the court for the purposes of a trial. Yet another arises when the Crown or defence seeks to introduce certain documents which purport to relate to the accused. And, lastly, the Crown must (…) prove beyond a reasonable doubt that it was the accused, and no other, who committed the crime charged.

[54] Counsel for the Defense says that in order to prove the accused's identity, the Crown must prove the accused's name. Clearly, in order to swear an Information, an informant must have grounds to believe that a person has committed an offence and must enter the name or "a sufficient description" of the accused.[9]

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[6] (see The Honourable Mr. Justice S. Casey Hill, David M. Tanovich & Louis P. Strezos, eds., McWilliams' Canadian Criminal Evidence, 4th ed., looseleaf (Aurora: Thomson Reuters Canada Limited, 2010) vol. 2 at para. 29:10).
[7] R. v. O'Kane, [2012] M.J. No. 307. See also s. 6.1, Canada Evidence Act
[8] 1984, 12 C.C.C. (3d) 228, Alberta Court of Appeal; leave to appeal to the Supreme Court denied, without reasons: [1984] S.C.C.A. No. 176
[9] R. v. Paradis and Paquet (1922), 37 C.C.C. 318 at 321 (Que.K.B.). That this has been the law for some time is apparent from Hale's Pleas of the Crown (1778), Vol. I, pp. 575-581 and appears to be the law in other jurisdictions; see Renton and Brown, Criminal Procedure According to the Law of Scotland (4th ed.) (1922), pp. 26 and 27; Corpus Juris Secundum, Vol. 22, Criminal Law ss. 311, 324". (Her Majesty the Queen on the information of

[55] In the matter of *R. v. Unnamed Person*[10], the Ontario Court of Appeal was of the view that an Information cannot be laid against an unknown person and must be sworn against a named person or against a person who can be sufficiently described so as to be identifiable.

[56] The name of an accused is therefore an essential component *of the Information.*

[57] At times, the name of the accused is an element of the offence. For example, when a person is accused of obstructing a peace officer by identifying himself in a false name, the Crown must prove this falsity, which requires proving the real name of the accused, as it was the case in *R. v. Levene*[11].

[58] In *Nicholson*, the Alberta Court of Appeal said that: "The information could, of course, contain any number of facts identifying who the informant had in mind. A name is but one". I conclude that the name of an accused is an essential component of the Information, and that identity is a fact that must always be proved, but that the name of the accused is not always an element of the offence itself.

[59] The Defense insists that because the court excluded evidence of the name of the accused, and because there is no other independent, direct, and admissible evidence of this name, then the Crown cannot prove "who the accused is". They also insist that the Crown must prove that the "named person on the information" committed the offence. They say that because there is no evidence of the name of this person, the circle of identification cannot be completed.

Howard Buchbinder, and An unnamed person that can be pointed out [1985] O.J. No. 161 and also R. v. AFC Soccer [2004] M.J. No 194.

[10] [1985]20 C.C.C. (3d) 481

[11] [2007] O.J. no 103 (first instance) and [2008] O.J. No 5964 (summary convictions appeal)

[60] There are only a few cases dealing with a situation similar to the one in this case.

[61] In *R. v. Lewis*[12], the accused was charged with breaching a condition of a recognizance. The trial judge excluded the evidence of the name of the accused as a remedy to a violation of the accused's right to be protected against self-incrimination. The Crown argued that the accused could still be convicted on the basis of the in-dock identification.

[62] The court ultimately decided that "but for that initial encounter, there would have been no basis to bring Mr. Lewis before the court. From a causal perspective, I have concluded that this prosecution should not have commenced".[13]

[63] The trial court arrived at this conclusion because of the fact that until the police were informed of the name of the accused, they had no idea that he was committing the offence of breach of recognizance. Knowing the name of the accused had allowed the police to verify their database and to find out about the existence of the recognizance and of the conditions contained therein.

[64] The situation is different in our case because I found that the police had reason to believe that the person in the City Cab taxi was in possession of drugs for the purpose of trafficking, therefore that he was committing a criminal offence, before they asked him for his name.[14] Consequently, I find that the result achieved in *R. v. Lewis* cannot be applied in our case.

[65] In the matter of *R. v. Langthorne*[15] the trial court excluded evidence of self-identification because it derived from an unlawful arrest. Upon receiving the ruling, the Crown declared that they were not calling further

[12] [2011] O.J. No. 981
[13] R. v. Lewis, at par. 174
[14] [2014] NWTTC 06 at par. 39
[15] [2012] B.C.J. No. 2845

evidence, which resulted in the acquittal of the accused. This is different from our case and again, I find that this case is not helpful.

[66] In the matter of *R. v. Goudreault*[16], the Ontario Court of Appeal was asked to review the conviction of the accused. The trial judge had excluded evidence as to the identification of the accused, however he still convicted the accused on the basis of the in-dock identification evidence (…) and "other circumstantial evidence of guilt."

[67] The Court of Appeal noted that the trial judge referred to ample circumstantial evidence which "reduces the risk that the wrong person was identified in the stand". In that matter, the accused faced charges of impaired operation and driving with a blood-alcohol concentration in excess of the legal limit.

[68] The police had arrested the accused at the scene of an accident and he was the only person present who was showing signs of intoxication by alcohol. The Court of Appeal maintained the conviction. In obiter, they added, at paragraph 17 of the decision:

> It must be kept in mind that without the appellant's utterance at the scene, Constable Rhéaume would have spoken to any witness at the scene who may have seen the driver. He would also undoubtedly have run the licence plate of the vehicle and would have searched.

[69] This observation was not part of the circumstances which the trial judge considered[17] and I find that the appellate court speculates on this issue. Counsel for the defense had raised the issue of identification, but no issue seems to have been taken to the absence of evidence pertaining to the name of the defendant.

[70] The trial judge decided that the appropriate test was "whether the identification evidence of the witness is sufficiently credible and reliable as

[16] [2004] O.J. No. 4307
[17] R. v. Goudreault [2003] O.J. No. 5989

to leave no room for a reasonable doubt."[18], and he declared himself satisfied that the defendant was the driver of the impugned vehicle, implicitly adopting the wording of *R. v. Nicholson.*

[71] When the Defense suggests that the Crown has failed to prove beyond a reasonable doubt that the accused is Gates Wesley Robert Jen because there is no admissible evidence that this is his name, they are in fact saying that there is no direct evidence of how this person was identified by the police or, to put it plainly, how the police obtained his name.

[72] The fact that the police wrote a name on the Information does not establish the identity of this person[19]. It is merely an indication that the Informant *believed* the perpetrator to have this name. In the particular circumstances of our case, the exclusion of evidence only applies to information obtained *as a result* of the breach. It does not affect information that *may have been* acquired *before* the breach. Such evidence may be inadmissible on other grounds and may not be used to prove identity at trial, but the Informant may still act on that information for the purpose of providing a description of the accused on the Information.

[73] I find that if I am able to draw an inference from the proven facts that the defendant is the person that the Informant had in mind when he swore the Information, then I may also infer that this person is the person named on the Information.

[74] The Defense submits that I cannot take judicial notice of the court's proceedings to draw this inference, on the premise that this would violate the accused's right not to incriminate himself. It is now well established that an accused has the right to resist any effort to force him to assist in his own prosecution[20].

[18] Idem at para. 19
[19] R. v. Williams [2005] O.J. No. 4429
[20] R.J.S. v. the Queen, [1995] 1 S.C.R. 451at p. 512

[75] In *R. v. Evaglok*, Vertes J. reviewed the decision of *R. v. Bazinet* and commented that proof of identity required to address two separate issues:

> The first is the issue of identification of the person before the court as the person who committed the offence. (*my emphasis*) Unless admissions are made by the defence, this is an element requiring proof in every criminal trial. The second issue is the connection between the person named in the charge and the person before the court. Based on the authorities my opinion is that, if the person before the court does not raise an objection, the court is entitled to assume that the person appearing in court and answering to the charge is the person charged.[21]

[76] With respect to the lack of objection in our case, it must be noted that identification became an issue at trial upon the ruling of this court which excluded the evidence pertaining to the name of the accused. It is therefore not completely fair to hold as an admission of identity the fact that counsel acknowledged at the beginning of each court sitting that the accused was present. The primary purpose of this acknowledgment is to confirm the court's jurisdiction over the accused[22]and I am prepared not to draw any other inference from this statement.

[77] However I must address the evidence tendered by the Crown during the testimony of Cst Scott Newberry, and again in Exhibit 15, which the Defense now tells me to disregard. Scott Newberry served a Promise to Appear to the person, whom he said is the accused in the courtroom, and whom he released from the hospital. This statement was agreed upon by the Defense.

[78] Tribunals have consistently confirmed that "a court has at all times the power to look at its own records and take notice of their contents."[23] What matters is how judicial notice is used.[24]

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[21] 2010 NWTCA 12 at paragraph 21
[22] R. v. Levene, [2008] O.J. No. 5964 at paragraph 21
[23] For example, see R. v. Hunt [1986] O.J. No. 1210; R. v. Tysowski [2008] S.J. No. 408 and R. v. Ouellette [2005] A.J. No. 1043 and R. v. Evaglok, [2010] NWTCA 12, at paragraphs 11 and 17
[24] R. v. Evaglok (supra) at paragraph 24

[79] To quote Vertes, J. in *Evaglok*, "to take judicial notice of the court's process is only a circumstance, but only one circumstance among others, from which the trier of fact might infer the identity of the accused."[25]

[80] If, as in the matter of *Levene*, the only evidence of identification were the Promise to Appear, I would agree with the Defense and I would decline to take judicial notice of the court's process. However in our case, unlike in *Levene*, the name of the accused is not an element of the offences. I find that I may take judicial notice of the Promise to Appear and its contents as one of the circumstances relevant to identification.

The ultimate inference

[81] The Crown invites the court to infer that Gates Wesley Robert Jen, the name showing on the Information, is the name of the person who has been present in court to answer the Promise to Appear.

[82] The first step is to ask whether the Crown has proved beyond a reasonable doubt that the person who sat in court throughout the trial *is* the person who committed the offences.

a) In-dock identification

[83] Constables Kowalchuk, White and Newberry, and the taxi driver, all pointed out the accused as the passenger who was arrested on April 12, 2012.

[84] I remind myself of the unreliability of in-dock identification, which is nothing more than an opinion expressed by the witnesses that "he is the one".[26]

[85] I further note that the fact that this opinion was offered by police officers does not entitle it to any special consideration.

[25] R. v. Evaglok, at paragraph 27
[26] McWilliam's Canadian Criminal Evidence, 5th Edition, chap. 32:20

[86] However, this opinion is entitled to significant weight in our case, because:

i) It came from four different witnesses and was not contradicted;

ii) Khokon Nasir-Uddin, the taxi driver, in fact *recognized* his passenger, saying that he knew him although he did not know his name;

iii) The police witnesses had never seen the passenger before, but they spent many consecutive hours in his presence from the time of arrest until his release from detention;

iv) The police observed the passenger at close proximity, without obstructions;

b) Continuity

[87] There was an uninterrupted chain of observation and contact between the taxi driver and the passenger who boarded the taxi and remained therein until the interception on April 12, 2012; and also between the police and the passenger: the police were in contact with him through text messages and then they arrested him in the taxi at the point of interception. Then the passenger remained detained until his release on a Promise to Appear, on April 13, 2012.

c) Connection with real evidence

[88] The ringing telephone in the taxi, coinciding with Cst Kowalchuk dialing 445-0088, and a cellular phone being found in possession of the passenger, connects him to the transaction. The drugs found in the passenger's feces further confirm that he swallowed them to avoid detection, which consolidates the connection.

[89] As a result of this evidence, I am satisfied that the Crown has proved beyond a reasonable doubt that the person sitting in court is the person who committed the offences.

[90] The second question is whether there is a connection between the person named in the charge and the person before the court.

[91] The fact that the passenger accepted the Promise to Appear addressed to Gates Wesley Robert Jen is the final link in the circle of identification.

[92] The original Promise to Appear is attached to the record. It is signed "Gates Jen". No expert evidence was called to identify this signature, but I find that this constitutes *prima facie* evidence of similarity of name. This evidence establishes the connection between the person named on the Information and the person before the court.

[93] I am satisfied that I may properly draw the inference, from the totality of the evidence, that this person is Gates Wesley Robert Jen.

CONCLUSION

[94] I find the Accused guilty on both counts.

DATED THIS 25TH DAY OF JULY, 2014
AT YELLOWKNIFE, NORTHWEST TERRITORIES

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CHRISTINE GAGNON, T.C.J.

R. v. Gates Wesley Robert Jen, 2014NWTTC 21

Date: 2014 07 25
File: T-1-CR-2012-000820

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GATES WESLEY ROBERT JEN

REASONS FOR RULING

of the

HONOURABLE JUDGE CHRISTINE GAGNON
