

R v Truong [2007] NTSC 20

PARTIES: THE QUEEN

v

TRUONG, TONY WINH

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 20612453

DELIVERED: 23 March 2007

HEARING DATES: 8-9 February 2007

JUDGMENT OF: MILDREN J

CATCHWORDS:

EVIDENCE – Circumstantial evidence – witness expert in shoe manufacture and retailing – no formal qualifications – admissibility

EVIDENCE – circumstantial evidence – examination of photographic images to determine levels of identification by expert – admissibility of expert evidence

References:

Cross on Evidence (loose-leaf edition) para [29060]

Citations:

Distinguished

Smith v The Queen (2001) 206 CLR 650

Followed

Clark v Ryan (1960) 103 CLR 486

Kotzmann (No 2) (2002) 128 A Crim R 479

R v Tang (2006) 161 A Crim R 377

Referred to

Lewis (1987) 29 A Crim R 267

REPRESENTATION:

Counsel:

Prosecution: G McMaster
Accused: A Woodcock

Solicitors:

Prosecution: Office of the Director of Public
Prosecutions
Accused: Maleys

Judgment category classification: B
Number of pages: 13

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Truong [2007] NTSC 20
No. 20612453

BETWEEN:

THE QUEEN

AND:

TONY WINH TRUONG

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 23 March 2007)

- [1] The accused is charged with two counts of aggravated robbery whilst armed with an offensive weapon, namely a knife. The first count relates to a robbery which occurred at the Novotel Atrium Hotel on The Esplanade, Darwin at about 2:18 on the morning of 9 March 2006. The second robbery is alleged to have occurred at the Bank of South Australia, Casuarina, at approximately 11:02 also on the morning of 9 March 2006.
- [2] The Crown case is that the accused and his wife attended at the casino, Gilruth Avenue, Darwin at 12:18 am. According to security footage taken from the casino he was then wearing white and blue or black coloured sneakers, white board shorts and a black or navy blue jacket. At 2:07 am,

security footage from the casino shows that the accused and his wife left the casino wearing the same clothing.

- [3] The Crown case is that the robbery at the Novotel Atrium occurred at 2:18 am and that the accused then returned to the casino at 2:27 am wearing different clothes. The security footage then shows him as wearing red board shorts, a different sweater and a different coloured t-shirt. The shoes, however, appear to be the same.
- [4] There are a number of eye witnesses to the robbery at the Novotel Atrium who give various descriptions of the robber. None of the eye witnesses are able to identify the accused as the robber. There is no security footage of the robbery. The eye witnesses are able to give evidence some of which is consistent with the accused's description as seen from the footage taken from the casino.
- [5] A police reconstruction was carried out which shows that it was possible for a person to have left the casino, carried out the robbery and returned to the casino in about 14 minutes.
- [6] The Crown has available security footage taken from outside of the bank which indicates that the person who committed the robbery arrived at the front of the bank's premises at about 10:03 am. The robber was wearing white three-quarter length board shorts, white and blue sports shoes, a blue or black jumper/jacket which had a hood and that he was wearing a white skull cap and white gloves. At 10:59 am the offender was seen talking to

another person who gave the offender something. At 11:02 am, the offender entered the front door of the bank, jumped the counter and committed the robbery. The robbery took a total of 25 seconds.

- [7] The offender left behind a footprint on the counter at the bank.
- [8] Subsequently the accused was interviewed by the police in a formally recorded record of interview in which he admitted to being the person showing in the casino footage. Police obtained a warrant and searched his premises, during which certain items were seized. The accused produced a pair of white runners which he said he was wearing that night. He claimed that he put masking tape over the white shoes in order to keep his shoelaces done up because he used the white shoes whilst playing football. He told the police that the white shoes that he was seen to be wearing in the video footage taken from the casino were the same white shoes which he delivered to the police.
- [9] No white board shorts similar to those which he was wearing as shown in the footage were found. A jacket with a logo on the back was found. The logo on this jacket reads, "Chicago Bulls".
- [10] In his record of interview, the accused said that after he and his wife left the casino they went to the Esplanade. They had an argument. He says that he left his vehicle and walked to the park in order to cool off. He said then that he returned to the vehicle, made up with his wife and they proceeded to have sex. As a result he stained his pants and changed them from the white ones

to the red ones. They then went to Uncle Sam's where they purchased food and consumed it. After that they returned to the casino.

[11] Police tried to re-enact the version of events given by the accused. Their evidence will be that it took 26 minutes at very conservative times to carry out these movements.

[12] The Crown case against the accused is circumstantial. The Crown will be relying principally on two expert witnesses, Mr Trevor Hunter an expert in running shoes, and Senior Sergeant Alan Piper from the Forensic Services Branch Brisbane who examined the images and determined levels of identification available from the images. Objection was taken to the admissibility of this evidence. At the conclusion of the voir dire, I ruled that the evidence is admissible and would not be rejected in the exercise of my discretion for reasons to be given at a later time. These are those reasons.

The evidence of Mr Hunter

[13] Mr Hunter's evidence given at the committal was relied upon by both parties for the purposes of this ruling. His evidence at the committal was that he had been working for Nike Australia for eight years. For the last two years he has been the Footwear Product Line Coordinator for Australia, New Zealand and the Pacific Islands. Mr Hunter lives in Melbourne. Prior to that he was the Floor Manager at the flagship store at Nike Melbourne.

- [14] He is currently involved in creating catalogues, online catalogues and detecting counterfeit work for police and customs in both Australia and New Zealand.
- [15] As part of his duties, he is involved in determining what products come into Australia. Every quarter he goes to the world headquarters for Nike to work with the staff who create the lines to find out what is going to be best for the local region. In the course of his duties he receives about 1,000-2,000 pairs of samples each season which he then has to catalogue and as a result he sees the entire line of products which Nike produces. From this he selects the shoes that he considers are needed for sale in Australia. His evidence was that each manufacturer of running shoes has distinct logos or designs. Each manufacturer uses certain technologies to produce cushioning in the heel or forefoot. There are discernible types of uppers which are made only by one manufacturer or the other, as well as discernible marks within shoes which are indicative of the manufacturer.
- [16] Mr Hunter gave evidence that he was contacted by the Northern Territory police in May 2006 and shown an image of the robber jumping the counter. The images shown to him include previews of the shoes that the robber was wearing. When he saw the shoes he was able to recognise them immediately as a certain type of Nike shoe. Mr Hunter gave detailed evidence concerning the design of the shoe as seen in the photographic images which he was able to recognise as being peculiarly a Nike Impact TR3 training shoe. In his evidence he was also able to point out certain features which he indicated

distinguished this shoe from other brands and other types of Nike training shoes.

- [17] He also gave evidence that he was shown images of the accused at the casino and the particular shoes that he was then wearing. In his opinion the shoes shown to be worn by the accused were Nike Impact TR3 cross-trainers. He gave his opinion by pointing to a number of characteristics of the shoes as shown in the photographic images.
- [18] He also gave evidence as to the quantity of Nike Impact TR3 trainers imported into Australia. His evidence was that the total number of shoes thus imported was 2,328 pairs across all sizes. He also gave evidence that within the Northern Territory there were three stores that ordered this particular shoe. The total number of pairs ordered into the Northern Territory only numbered 20 pairs across all sizes.
- [19] Mr Hunter was also shown photographic representations of the footprints that were left at the bank. He was able to recognise an identifying mark in the footprints used by Nike in their cross-training shoes in the TR line. In his opinion the footprint was consistent with the TR2 and TR3 Nike Impact trainer.
- [20] The challenge to the evidence was that it was not shown that Mr Hunter was an expert because he had not undergone any kind of scientific training.

[21] It is true that Mr Hunter does not possess any formal engineering, scientific or other tertiary qualifications, but in order to be an expert the authorities recognise that expertise can be gained by actual experience. For example in *Clark v Ryan* (1960) 103 CLR 486, a case involving the behaviour of articulated vehicles, Dixon CJ said at 490-491:

“If it had been desired to prove how in fact semi-trailers of the kind driven by the defendant Clark do in practice behave, perhaps a witness or witnesses experienced in their actual use might have given admissible evidence, not of opinion, but of the fact.”

[22] As *Cross on Evidence* puts it at (loose-leaf edition) para [29060]:

“There are fields in which the witness's skill could never, or need not, derive from scholastic studies, but rather from practical experience, e.g. that of an Aboriginal tracker trained from the age of seven by his grandparents in tracking, particularly human and animal foot print recognition, and experienced in it over many years, or, where Turkish attitudes are in question, persons who either had lived among Turks or had studied their attitudes, or a heroin addict identifying a substance as heroin, or the rules and procedures of gambling games and video surveillance of those games, or a mechanic with much practical experience of engines.”

[23] Similar arguments as were pressed before me by Mr Woodcock, were dealt with by the Court of Criminal Appeal in *Kotzmann (No 2)* (2002) 128 A Crim R 479. In that case the Crown called employees of Adidas to give evidence that certain clothing (being pants and runners) shown in the bank security photographs were Adidas products of a certain style and type.

[24] At page 494 Winneke P said:

“In the course of this application, counsel for the applicant contended that the comparison of the apparel worn by the robber with that

tendered in evidence was a jury question and not a question for expert evidence. It was said that, whilst the witnesses may have been qualified to express an opinion as to the make and style of the garments they were shown, it was not within their field of expertise to make a comparison between those garments and the garments revealed as being worn by the robber in the photographs. This was not a basis upon which the judge had been asked to exclude the evidence. In my view this argument lacks substance. It is also my view that his Honour was correct in allowing the evidence of these witnesses to go before the jury. Only people who are expert in the manufacture of the "Balance" windcheaters could express an opinion (as was in fact expressed) that the windcheater demonstrated to have been worn by the robber was in fact the same model of windcheater represented by exhibit C. Furthermore, without the evidence of those expert in Adidas fabrics and the models of Asics shoes, the jury would have been in no position to come to a conclusion that the model of tracksuit pants worn by the robber and the type of shoes in which he was clad were comparable to the remnants of fabric and shoes found in the incinerator.”

[25] In my opinion, it has been amply demonstrated that Mr Hunter is indeed an expert in this type of footwear and is qualified to give the evidence which he will be called upon to give. This evidence will not prove by itself that the accused is the robber who committed either of the robberies. It is only circumstantial evidence which together with other evidence will be relied upon by the Crown in order to prove his guilt at the trial.

[26] Clearly the evidence is admissible. There are no reasons why the evidence should be excluded in the exercise of my discretion.

The evidence of Senior Sergeant Alan Piper

[27] No objection was taken to the qualifications of Senior Sergeant Piper, but I consider that I should record what his qualifications are as well as the nature of the evidence that he proposes to give.

[28] Senior Sergeant Piper holds an Associate Diploma in Applied Science from the Queensland Institute of Technology and a Bachelor of Science degree from the James Cook University of North Queensland. Since 1999 he has been engaged in the examination of images and the determination of levels of identification available within the images. In 2002 he received a scholarship to enable him to travel to the United States, United Kingdom and Holland in order to obtain expertise in this area. Whilst in the United States, he attended at the FBI laboratories at Washington and also the Quantico FBI Academy where he attended the Scientific Working Group on Imaging Technology. Whilst in the United States he gained practical experience in making scientific comparisons between the characteristics of objects including clothing. His evidence was that he had been engaged in this kind of work for the last seven years.

[29] This witness gave evidence that he examined images of the accused at the casino, the images of the armed robbery at the Bank of South Australia, a photograph of the Chicago Bulls jacket as well as photographs of the shoes including TR 3 Impact Nike trainers and the shoes which the accused gave to the police.

[30] His evidence was that he then played the DVD's of the electronic images taken from the security cameras into a computer and examined each frame of each image in order to find individual images from which comparisons might be made. The purpose of this exercise was to see if there any consistent or inconsistent peculiarities between the shoes shown in the

photographs and those which the accused claimed to have been wearing and also as to whether there any consistencies or inconsistencies between the other clothing concerned. This involved selecting a number of images which he was able to find as giving the clearest representations of the objects being looked at. In the end result of his examinations he made four findings:

- (a) That the shoes worn by the robber were consistent in design with the images of the Nike Impact TR 3 trainers and also consistent with the shoes worn by the suspect in the casino images on two different occasions.
- (b) That the white shoes which the accused gave to the police were inconsistent with the shoes worn by the suspect and the shoes worn by the offender in the robbery.
- (c) That the jacket worn by the robber was consistent in design with the jacket worn by the accused in the casino images.
- (d) That the jacket with the Chicago Bulls motifs depicted in the images was inconsistent with the jacket worn by the male person in the casino and inconsistent with the jacket worn by the robber.

[31] In relation to each of these items he was able to demonstrate on the photographs areas of similarity or dissimilarity.

[32] In my opinion, this evidence is clearly admissible. It is not identification evidence. It is merely circumstantial evidence. I reject the submission that

the jury would be able to see these matters for themselves without the assistance of an expert. Mr Woodcock referred me to *R v Tang* (2006) 161 A Crim R 377, but in that case a similar objection to the admissibility of similarities between photographic images in circumstances not unlike the present, was dismissed: see para [120] per Spigelman CJ (with whom Simpson and Adam JJ agreed). Considerable time, expertise and skill was required in order to go through the photographs frame by frame in order to find the characteristics which made the comparisons possible. It would be impossible for a jury to perform this function for themselves. The quality of the photographs derived from the electronic images taken from the security cameras required the assistance of Sgt Piper's expertise. Because of the way some of the photos are cropped and enlarged it is not easy to understand the whole image without the assistance of the witness. Again the witness was able to give evidence as to what were real artefacts as shown in the photographs and what were not and this was important to understand the comparisons. That is not something that would be within the knowledge of a jury.

[33] Mr Woodcock referred me to *Smith v The Queen* (2001) 206 CLR 650. In that case the fact in issue was whether a person shown in security footage showing a bank robbery was the accused. Two police officers gave evidence that they had had previous dealings with the accused and that they recognised the person in the photographs as the accused. The Court, by majority, held that the evidence was irrelevant and inadmissible because the

witnesses' assertions of identity were founded on material no different from the material available to the jury from its own observation. However, that is not the case here. As the majority judgment recognised, the result in that case does not mean that the evidence of a witness that he recognises a person in a photograph will never be admissible: see paras [13]-[15]. Kirby J held that the evidence, although relevant, was identification evidence (and opinion evidence) which should have been excluded as being "nothing more than a lay opinion about a subject about which the jury were required to form their own opinion".

[34] However, the evidence of Sgt Piper is not identification evidence. This witness does not purport to say that the person shown in the video footage at the casino is the same person who committed the robbery. His evidence goes no further than to show points of similarity between the clothing worn by the robber and the clothing worn by the accused and points of dissimilarity between the clothing and shoes which the accused told the police he was wearing that night. In my opinion, that evidence is clearly admissible.

[35] Finally, I was asked to reject the evidence in the exercise of my discretion. Mr Woodcock referred me to the observations of Maurice J in *Lewis* (1987) 29 A Crim R 267 at 271, concerning how forensic evidence may have a prejudicial effect which far outweighs its probative value. I am unable to see how the evidence of this witness falls into that category. The witness' evidence concerning the similarities and dissimilarities he observed in the footage is such that the jury will be in a good position to evaluate that

evidence as to its cogency and reliability. I am not persuaded that there are any grounds to reject the evidence in the exercise of my discretion.
