

CITATION: *Police v Boota* [2008] NTMC 063

PARTIES: ERICA ANN SIMS

v

HAROLD HENRY BOOTA

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: *Justices Act* (NT)

FILE NO(s): 20815372

DELIVERED ON: 19 September 2008

DELIVERED AT: Darwin

HEARING DATE(s): 19 August 2008

JUDGMENT OF: Jenny Blokland CM

**CATCHWORDS:**

EVIDENCE – Motive – Identification  
*R v Murphy* (1985) 63 ALR 53 (CCA)  
*Pitkin v The Queen* (1995) 80 A Crim R 302  
*Hanning v Peach* NT (SC), 17 August 2005

**REPRESENTATION:**

*Counsel:*

Complainant: Mr Fisher  
Defendant: Mr Dolman

*Solicitors:*

Complainant: ODPP (Summary)  
Defendant: NAAJA

Judgment category classification: C  
Judgment ID number: [2008] NTMC 063  
Number of paragraphs: 17

IN THE COURT OF SUMMARY JURISDICTION  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20815372

[2008] NTMC 063

BETWEEN:

**ERICA ANN SIMS**  
Complainant

AND:

**HAROLD HENRY BOOTA**  
Defendant

REASONS FOR DECISION

(Delivered 19 September 2008)

JENNY BLOKLAND CM:

**Introduction**

1. This case commenced as a seemingly simple contested hearing of a charge of unlawfully damage to property contrary to s 251(1) of the *Criminal Code* (NT). The allegation was that in the late evening of 31 May 2008, the Defendant smashed a glass panel door at the Parap Fine Foods Store. The evidence primarily consisted of video footage of the offence being committed by a person whose head and face was covered with a shirt or other cloth or clothing and therefore, the identity was obscured.
2. To prove the person committing the offence was the Defendant, the prosecution sought to lead evidence of video footage that a few days earlier, (on 27 May 2008), the Defendant had attempted to take a bottle of beer from Parap Fine Foods; that he attempted to place it back in the wrong spot of the shop and was told words to the effect of “get out and don’t come back” (witness James Hawkes) or, “could you please leave the store, we don’t want

you in here, I don't work to support you to come in here and steal things from us ...": (witness Paula Tsounias). Ms Tsounias also told the Court "he wasn't very happy about being spoken to, I suppose, like that". The prosecution sought to lead that evidence as evidence of motive; that the defendant had a motive to return to the shop on 31 May 2008 and inflict the damage as alleged; that motive being part proof of bolstering the evidence of identification that the Defendant was the person who was filmed.

3. The second issue concerns a variety of identification evidence commencing with the identification of the person who took the bottle of beer being the one and the same as the unconcealed person at the scene and the concealed person caught on CCTV who did the damage. (The video of the unconcealed person was received on a *voire dire* basis as VD2 and the video of the concealed person as VD3).

### **Summary of the Evidence**

4. Mr James Hawkes, manager at Parap Fine Foods gave evidence that he watched the video of a man putting a bottle of VB down his pants while walking to the check-out and then putting one bottle down on the check-out to pay for it. He identified (over objection) the Defendant as being that man. He and his colleague (Ms Tsounias) proceeded to apprehend him; the man denied it, took them to the back of the shop, pulled the bottle out of his pants and put it on a shelf; he proceeded to apologise and was told "Get out and don't come back".
5. Mr Hawkes said he had seen the man around the shops, in the city and saw him on video footage of the 31 May 2008 incident showing the commission of the criminal damage offence. The footage of all relevant incidents was played to the Court – Mr Hawkes identified himself, Ms Tsounias and the man he identified as the Defendant. In relation to the video taken outside of Parap Shops on 31 May 2008, he explained the camera only operates when there is movement and pauses when there is no movement. Mr Hawkes told

the Court the “unhooded” person who was in the video at the front of the shop was the same person apprehended in the shop on 27 May 2008. He identified the Defendant in Court as being that person. He also said the “hooded” person captured on the video actually committing the crime was *without a doubt* the same person apprehended on 27 May 2008. He identified the Defendant in Court as being that person. In cross-examination, Mr Hawkes said he thought the two persons in VD2 and VD3 were the same given the “slouching” posture and “lazy, slow” walk. He agreed he couldn’t see the colour of the shoes, shirt and pants on the video and agreed the bands he had spoken of on the shirt could not be seen in VD3.

6. Senior Constable Todd gave evidence he viewed video footage at Parap Fine Foods and recognised the Defendant in one video at the front of the shop; he saw Mr Boota in the footage outside the shop and a later time, possibly on the same day, he saw the footage of the Defendant inside the shop. Senior Constable Todd located Mr Boota on 3 June 2008 wearing the same clothing as viewed on the first footage, a white striped shirt, black pants, black shoes and long hair in a bun. He agreed the CCTV footage (VD2 and VD3) outside the shop may show the pants worn as dark, but that they could be blue, black or brown. He agreed the shoes were dark, he agreed the light coloured shirt could be a number of colours. He said the shirt was a stripy shirt, a dark polo with a collar and dark around the edges and sleeves. He agreed he did not keep the Defendant’s clothes after he spoke to him. He said they were the same clothes as in the CCTV.
7. Constable Derksen gave evidence that the footage he first saw of the Defendant (VD2) was when he was “hanging around the area” and then returning with “his shirt over his head”; he said he knew Mr Boota and recognised him in the video. He said it was dark, but the footage was not in black and white. He said he could not tell the difference between different dark colours and different light colours in the footage. He said he could tell

it was Harold Boota by body shape, even with his shirt off, by the bun in his hair and clothing.

8. Ms Tsounias gave evidence of an earlier incident on 27 May 2008 detailed above. She said she was shown the video and asked to have a look at it and said “it looks like the fellow that was cross the other day because we took the long necks off him”. She said of the footage with the man with the shirt on his head “It looked like the same gentleman”. She said of the first video when he was outside the shop “I think it’s the fellow that was here the other day that was angry, it looks like him”.

### **Discussion of the Evidence**

9. At the hearing I indicated that I would not allow the evidence of the uncharged act on 27 May 2008 to be used as evidence of *motive*, although given it is so inextricably connected to the identification evidence, in my view, it needed to be led as later identifications by various witnesses were referred back to the incident of 27 May 2008. Some witnesses viewed the video of 27 May 2008 after the video of the offence being committed. The “motive” evidence is simply not clear and probative enough to ground a motive on the part of the Defendant to prove that he harboured such intense feelings days later that he would return and break the window. An alternative view of the incident of 27 May 2008 is that the person would have been thankful they were just able to leave. Evidence of motive is more readily probative in relation to inferring intent. In any event, it is clear that motive must be proven beyond reasonable doubt before guilt can be inferred: *R v Murphy* (1985) 63 ALR 53 (CCA). In my view, it would be impermissible to use evidence of the incident of 27 March 2008 as *motive* evidence as submitted.
10. In relation to the identification evidence given by various witnesses, I decided to admit it over objection and then evaluate it. To find the charge proven, I have to be satisfied beyond reasonable doubt myself the person in

*Exhibit VD3* is actually the Defendant. Although other evidence bearing on the identification can be helpful, especially for example if a person has changed their appearance between the incident in question and their Court appearance, it is the trier of fact who must be satisfied beyond reasonable doubt of the identity of the perpetrator.

11. All witnesses give a form of “dock” identification in relation to the Defendant. In my view, given all the witnesses know the Defendant, in terms of linking him with the 27 May 2008 incident, I do not think that evidence can be seriously challenged. I warn myself that even honest witnesses well known to a suspect can make a mistake but in my view they know him well enough to make that link. On my observations in Court, I am satisfied beyond reasonable doubt that the Defendant was the same person as the one depicted in the video of 27 May 2008. That is readily apparent from observing the Defendant and the video footage.
12. In relation to the evidence linking the Defendant to being at the front of Parap shops thirteen minutes before the commission of the offence, I would admit that evidence of all witnesses who identify the Defendant. It does in any event accord with my own independent assessment and although I warn myself that recognition evidence by honest people can be mistaken, in this case, I am able to make my own independent assessment and conclude that the Defendant was present outside of Parap shops thirteen minutes before the incident. That has simply been a matter of observation of the Defendant in person on DV2.
13. In relation to the video of footage of the offence being committed, (DV3) I am not persuaded beyond reasonable doubt that the person committing the offence is the Defendant. First, it is obvious that his face cannot be seen. Although three of the witnesses given honest evidence that it is him, there are deficiencies in that identification that mean it cannot be proven to the criminal standard. Having the similar gait that Mr Hawkes describes is not

enough and is in my view very difficult to identify. Officer Todd acknowledged that although he relied significantly on the clothing being the same, he could not really tell the colours of the clothes beyond light and dark. Officer Derksen gave evidence that he thought Mr Boota's bun could be seen, but I do not think that it is clear enough that there is a bun, nor is it clear enough to positively identify the offender as Mr Boota – that part of the footage could also be part of the shirt. It would be dangerous to convict on that feature alone. Neither the shirt nor other clothing was kept or exhibited so no useful comparison has been able to be made in Court to see for example if a shirt owned by the Defendant looked like the one in the video when turned inside out. I am not allowed to speculate on that. It is not that I reject the Officers' evidence. In the investigation stage the material points to Mr Boota, but the Court has to warn itself of all dangers in the identification and must use the standard beyond reasonable doubt.

14. Ms Tsounias, who has known the Defendant for some time could only say of the person in VD3 "it looked like him". On the authorities, this is generally not a sufficient identification: *Pitkin v The Queen* (1995) 80 A Crim R 302. I certainly could not act on it to say that the matter was proven beyond reasonable doubt.
15. In a close comparison of the Defendant in Exhibit DV2 and the person depicted in DV3, I have noted the following matters after viewing it again in chambers: In VD2 it is difficult to perceive any colour – the shirt looks grey with dark coloured bands, the footage is grainy; apart from being dark, it is difficult to see the colour of the shoes. The person (who I have accepted by my own observations is the Defendant in DV2), appears to be dark skinned, possibly Aboriginal with a slight build. He not only walks up and down outside the shop but sits down for a while, drinks from a bottle of beer that he has been carrying and fixes his hair looking at his reflection in the window. His hair is in a bun. In VD3 the head cover looks grey, the person is not carrying a bottle of beer but is carrying a rock. He appears to be light

skinned. The prosecutor submitted this would be due to the light, but I have to decide on the basis of the evidence before me. There is not enough visible detail on the shirt to say it would have been the same shirt as VD2 turned inside out.

16. In my view the strongest point the prosecution evidence reveals is the 13 minute gap between the presence of the Defendant at the scene and the video of the actual offending. This adds significant circumstantial weight to the prosecution case, however I have previously been found to be in error in a matter involving a circumstantial identification, a matter where in my view the identification made was stronger than in the present case: *Hanning v Peach* NT (SC), 17 August 2005, unreported. In that matter, I had not properly excluded the hypothesis consistent with innocence and not appropriately warned myself of the dangers of identification evidence when the parties were well known to each other. In this matter, I cannot exclude beyond reasonable doubt that another person in the area was the one who returned “hooded” and broke the window. Although I admitted the evidence of identification concerning DV3, once the evidence is scrutinised to the level it needs to be, it does not satisfy to the criminal standard.
17. I will dismiss the charge.

Dated this 16th day of September 2008.

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**Jenny Blokland**  
CHIEF MAGISTRATE