



further transactions after March 15, 2007 were unsuccessful, and the investigation was abandoned.

[2] On August 23, 2007, some five months later, Detective Pilon happened upon the Defendant at the Ottawa Police Station and identified him as the unknown individual from whom he had purchased crack cocaine. He was arrested and charged with two counts as follows:

Count #1 – Trafficking in crack cocaine contrary to s. 5(1), and s. 5(3)(a) of the CDSA;

Count #2 – Possession of less than \$1,000.00, i.e., \$60.00 being proceeds from a crime contrary to s. 354(1)(a) of the *Criminal Code of Canada* and s. 355(b) of the *Criminal Code of Canada*.

**Issue**

[3] The sole issue is identification.

**Crown Evidence**

[4] In evidence, Detective Pilon said that when he confronted the Defendant at the Ottawa Police Station that he slumped.

[5] Detective Pilon's evidence was that the entire transaction on March 15, 2007 took two minutes from the time he saw him 20' away on other side of the road from a phone booth. He crossed the road and moved to a storefront where he sat immediately next to the unknown individual with both facing the street as the transaction occurred. The unknown individual pulled two cigarettes from a pack and offered one to Detective Pilon. Detective Pilon not being a smoker, said he had to leave and did. Detective Pilon therefore did not see the unknown individual light and smoke the cigarette, if in fact he

did. His notes of the description of the unknown individual were that he was a Tamil or East Indian, with a ball cap, dark jacket, and white running shoes.

[6] Detective Pilon said when he saw the Defendant five months later it was like winning the lottery, and that he was absolutely sure he was the same individual. He did not however detail the descriptive characteristics that made him believe the Defendant was the same as the unknown individual. He made no comment concerning his voice since the Defendant said nothing to him. It was his conclusion and he was adamant.

[7] Detective Schoorl was part of the surveillance team on March 15, 2007. He was parked at a gas station at the southwest corner of Bank Street and Gladstone Avenue, could see the unknown individual (and Detective Pilon on the southeast corner) at what he described as approximately 70 metres away. He observed Detective Pilon cross Gladstone to the northeast corner to meet the unknown individual and then sit together on the windowsill for "less than a minute". He described the whole encounter as brief. He saw the exchange take place. Then the unknown individual walked west on Gladstone and turned north up an alley. At its closest, the unknown individual was 30 metres away from him. Detective Schoorl described him as a Middle Eastern individual with a ball cap and black jacket. He was large, over 6' tall, over 210 lbs. and with a heavy build.

[8] After the unknown individual disappeared up the alley, his attention was drawn to a beige Camry, license AXSC 476 registered to Ahmad Al-Shammari, the Defendant's brother. He did not see who was driving the Camry as it emerged from the



two cell phones – 613-899-5559 or 613-899-5555 – so that he could call him. The Defendant was left at Eric's apartment to watch TV and play video games. On that day, the Defendant became bored and called his friend Matthew Berry to come to get him, which he did. They drove to Osgoode where Matthew lived, played some video games and then went to the MTO license office on Walkley Road because Matthew needed to get a change in ownership. He said that just as he left the MTO office on Walkley Road, he received a call from Eric who upon learning where he was asked him to come to a gas station at the corner of Gladstone and Bronson to pick up the car. The Defendant said it was late in the day and dark when all of this happened. In cross-examination he agreed with the suggestion put to him that the MTO office closed at 5:00 p.m.

[14] The Defendant had his friend drive him to Gladstone and Bronson (which took about 10 minutes) where he waited for a few minutes and Eric drove up in the Camry. Eric gave him \$10.00 or \$20.00 for gas and the Defendant put gas in the car while Eric walked away towards his apartment, some 10 minutes walk away.

[15] There was an exchange between the Defendant and an individual at the gas pump who Eric pointed out to him was a cop. The Defendant identified Detective Schoorl as this individual.

[16] Several weeks later the Defendant said that he had come to the conclusion on the basis of a conversation with Eric, that in fact Eric was involved in illegal activity.

**Analysis**

[17] The question to be determined in this case is whether the evidence establishes beyond a reasonable doubt that the unknown individual or trafficker who sold .6 grams of crack cocaine for \$60.00 to Detective Pilon on March 15, 2007 at the intersection of Gladstone Avenue and Bank Street in the City of Ottawa is one and the same as the Defendant.

[18] The Defendant says that was not him. I must apply the test in *R. v. W. (D.)* [1991] 1 S.C.R. 742 as follows. If I accept his evidence and find him believable then I must find him not guilty.

[19] I found the Defendant honest and straightforward in his evidence. He was not combative or argumentative with counsel in cross-examination. I found his explanation of the events of March 15, 2007 quite plausible. The only questionable part of the story was triggered by the Defendant's agreement that he left the Walkley Road MTO office around 5:00 p.m. Since the surveillance team only got briefed at 6:22 p.m., and the buy took place just before 7:00 p.m., it would have been difficult for his car and Eric to be in the vicinity of Bank and Gladstone at 7:00 p.m. While the Defendant agreed with the Crown's suggestion that the MTO office closed at 5:00 p.m., he might have been mistaken. March 15, 2007 was a Thursday night with frequent late closing hours. Many MTO offices currently have late closings on Thursdays at 7:00 p.m., 8:00 p.m. or 9:00 p.m. He said it was dark.

[20] While I have some reservations as noted, I accept the Defendant's explanation.

[21] In accordance with *R. v. W.(D.)*, *supra*, if I do not accept his evidence however, I must determine whether I am in reasonable doubt on the basis of the evidence that I do accept.

[22] Detective Pilon was honest and straightforward in his evidence. I accept that he believes honestly that when he saw the Defendant on August 24, 2007 he believed he was one and the same as the drug trafficker on March 15, 2007 however he gave no descriptors which led him to his conclusion, even though prompted by counsel. He gave no evidence about hearing the Defendant's voice and noting the similarity with that on March 15, 2007 as a means of descriptor or identification. He reached his conclusion and gave no reasons, which one would expect to a trained observer – other than height, weight and skin colour.

[23] The Defendant says he is a non-smoker. Detective Pilon says he was offered a cigarette by the drug trafficker who was carrying cigarettes. That alone raises a reasonable doubt.

[24] There is no other evidence which points to the Defendant by way of confirmatory evidence. No photographs were taken by the surveillance team. No name or address was looked for in connection with the two cell numbers, both of which they were aware of on March 15, 2007. No investigation took place regarding the

Defendant's home address which had been connected through the Camry license plate to the Defendant's brother.

[25] I am not disbelieving of Detective Pilon, however, I am left with a reasonable doubt.

[26] I can do no more than quote Blair J.J.A. in *R. v. Goran*, [2008] O.J. No. 1069 at paragraph 33 who reaffirms Doherty J.A. in *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.) as follows:

The spectre of erroneous convictions based on honest and convincing, but mistaken, eyewitness identification haunts the criminal law. That ghost hovers over this case.

### **Conclusion**

[27] As a consequence and based on all of the foregoing, I find as follows:

Count #1 – Not Guilty

Count #2 – Not Guilty

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Mr. Justice Timothy D. Ray

**DATE RELEASED:** April 1, 2009

**COURT FILE NO.:** 07-G17360

07-G17444

**DATE HEARD:** March 30 and 31, April 1, 2009

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

HER MAJESTY THE QUEEN

- and -

ALI ENAD AL-SHAMMARI

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**REASONS FOR JUDGMENT**

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Mr. Justice Timothy D. Ray

**DATE RELEASED:** April 1, 2009