

The case of Nyki Kish

Just before midnight on 8th August 2007 two young businessmen, Ross Hammond and George Dranichak, went to use an ATM machine on West Queen Street, Toronto, Canada. It was a warm and pleasant night and there were many people about, including restaurant workers, passers-by, taxi-drivers, streetcar passengers, residents and so-called 'pan-handlers' (also referred to as 'street kids' or 'squeegee kids').

A few minutes later, and into the 9th of August, Hammond lay bleeding by the steps of a church a couple of hundred yards or so west along Queen street, having sustained 5 stab wounds to the chest, one of which completely penetrated the anterior right ventricle of his heart. He died two days later in hospital, extensive efforts to save his life having proved fruitless.

On 1st March 2011, 24 year old Nicole ('Nyki') Kish was convicted of second degree murder. Nyki is now serving a life sentence with no chance of parole before 2023 and her prospects for release will be complicated by the fact she maintains her innocence.

I am an English solicitor of some 30 years' standing with extensive experience of criminal practise in a common law jurisdiction akin to Canada's. In my opinion, the case against Nyki was not proved beyond a reasonable doubt. More, I believe she is innocent of the crime for reasons I will develop later.

Nyki's case was adjudicated without a jury by Justice I Nordheimer, who delivered a lengthy written judgment setting out his reasons to convict. Put at its simplest, the judge first set out the well-known legal principles which apply to the treatment of identification evidence - and then proceeded to disregard them.

Before addressing the judge's decision, the reader will be assisted by a summary of the events leading to Hammond's death. Unfortunately, a brief and digestible summary is far from easy, so complicated is the web of eye-witness evidence on which the trial centred. What can be said with reasonable confidence is the following, and it will assist the reader to have this mental picture in mind:

Queen Street runs east - west. It is a busy, well-lit thoroughfare, with shops and restaurants on both sides and streetcar tracks running in both directions. The incident started on the north side and evolved in a westerly direction, seemingly crossing the street more than once and fragmenting. An important set of events occurred about 40-50 yards west of the ATM machine, at the junction where Niagara Street joins Queen Street from the south.

What seems clear is that, following a request for money which was rudely and offensively rebuffed, an affray broke out involving the two men and a considerable number of street kids, both male and female. Dranichak managed to extricate himself and decamp but things did not work out so well for Hammond. At some point he wrested a knife from one of his attackers and, having done so, stabbed Nyki in her left forearm. He left the scene by clinging to the side of a taxi travelling west, jumping or falling off about 150 yards away before slumping to the ground, still in possession of the knife.

Two things must be understood before going any further into the facts. First, this was a complicated, confusing incident, or series of incidents, which took place at night and involved a large number of people, maybe as many as twenty. No eye witness saw everything that happened and even where two witnesses saw the same thing they invariably gave differing accounts of what they saw. This is entirely normal and anyone who has witnessed or been involved in such an incident will be familiar with the extreme difficulty of reconstructing what they saw. As a striking illustration, despite their being the focus of the melee, no one saw Hammond get stabbed and no one saw Dranichak leave the scene. Nor did anyone see Nyki get cut. Judge Nordheimer expressed matters thus:

‘ ... a difficulty that is common to many criminal cases ... arises from the fact that, in order to try and determine who caused the death of Ross Hammond, I must reach my conclusions based on the evidence of close to twenty different witnesses to the events that lead to his death. In addition, there is forensic and other evidence to consider. None of the witnesses are one hundred percent clear in their recollections of what they saw nor are their recollections entirely consistent from one witness to the next. No one should be surprised at either of these realities. No one remembers every detail of what they observe. No one sees an event in exactly the same way as another observer of that same event. No one remembers the very same things as others do. All of that is simply human nature.’¹

Second, there is the law governing the treatment of identification evidence upon which the conviction ultimately rested and which is absolutely crucial in this case. The severity of the problem is well known to the law (and well illustrated by the conflicting testimony given at Nyki’s trial). Judge Nordheimer himself discusses the difficulty in his judgment but with an unfortunate slant encapsulated in this extract:

‘I am well aware of the frailties that come with eye witness identification. We caution jurors very strongly about these frailties and the need to take special caution in approaching such evidence. Having said that, however, recognizing that there are risks associated with eye witness identification cannot at the same time paralyze triers of fact from reaching conclusions based on such evidence when the trier finds it reliable. In other words, we must not become so fearful of the problems associated with the evidence of eyewitnesses that we effectively abandon that evidence or refuse to act on it.’²

(Emphasis added)

Cases in which juries are not so cautioned will invariably be vulnerable to appeal, where identification lies at the heart of the conviction, as it does here.

As a graphic and surprising illustration of the problem, I have seen a surveillance video accepted by the court as showing Ross Hammond in reasonably clear view (albeit within the limitations imposed by the quality of the recording) at some juncture during the

¹ Paragraph [2] of the judgment 1st Mar 2011. All references to paragraph numbers hereafter will be to the corresponding numbered paragraph of this judgment.

² Paragraphs [74]-[75].

fighting, as well as a high quality TV video showing him receiving treatment before being taken away by ambulance and I am simply unable to be sure, despite watching both films repeatedly, whether, as Nordheimer accepted without question, the man in the surveillance video is Hammond (there is no doubt it's Hammond in the TV film). Hammond was wearing a black, tight-fitting T shirt but the man in the surveillance video seems to be wearing a blueish shirt that does not look tight fitting. It was said there was some colour distortion in the surveillance video but other black items (rubbish bags, Nyki's clothing, peoples' shadows) all appear black. The only witness who identified Hammond as the man in the surveillance video was Dranichak. He would be best placed to identify his friend of course, but the point I am making is that I am not sure and I have re-run both films several times. That's how hard it can be – and this is a crucial piece of evidence too.

At the other end of the spectrum is the witness who is certain about who or what they saw but is later proved to have been mistaken, another well-known problem.

The problem with the judge's approach is that he seems to have elevated himself above the acute difficulty about which mere jurors must be cautioned 'very strongly' and arbitrarily cherry-picked his way through the evidence to come up with the following narrative, which I have substantially condensed from the much lengthier version in the judgment itself:

Hammond and Dranichak were approached at the ATM by Nyki herself. They rebuffed her request for money with abuse and obscenity and she reacted with offence and anger. She was joined by a male 'pan-handler', Doug Fresh, and the dispute moved west along the north side of Queen street. Nyki was seen to be knocked to the ground about a block west of the ATM, still on the north side. Fresh was thrown into a store front window another block west by one of the two men, again on the north side. Hammond and Dranichak crossed to the south side of the street and ended up by a streetcar which had pulled up at the junction of Niagara and Queen, travelling east. They were being pursued by 'three or four' street kids who included Nyki. A fight ensued right beside the streetcar between Hammond and Fresh. At this point, Dranichak made off unobserved and features no more in the narrative. During this fight, a female was seen to be punching at Hammond, seemingly in an attempt to stop him beating up Fresh. She had arrived at the scene with a knife in her mouth. Hammond desisted, crossed back to the north side, unarmed³, and became involved in a further fight, which included the same female. The judge held this must have been Nyki. Nyki inflicted the fatal wounds to Hammond's chest in this fight, Hammond then managed to wrest the knife from her grasp and inflicted a cut to her left arm before escaping in the manner described.⁴

³ In the surveillance video there is no knife in either of his hands, which the judge took as proving he had not already gained possession of the knife, ignoring the obvious possibility that he had taken and pocketed it.

⁴ I conclude this article with two alternative narratives of my own, either of which seem considerably more appealing than the court's.

So, we have essentially three incidents – (1) the initial confrontation near the ATM on the north side, (2) the fight in the vicinity of the streetcar on the south side, somewhat to the west of the first, and (3) the fight back on the north side, again near the streetcar, at which Hammond was lethally wounded, just before he took the murder weapon away from her and stabbed Nyki’s left arm with it.

Both Hammond’s and Nyki’s blood were found on the knife he carried away with him, a fact from which the judge drew the inference that the knife caused their wounds. He said:

‘In addition to all of this evidence, however, there is the salient fact that Ms Kish was stabbed. She was the only female who was stabbed. Common sense dictates that she must have been stabbed while participating in the second fight where Mr Hammond got hold of the knife. There is no other logical explanation for how Ms Kish could have come to be stabbed ... all of the witnesses I have mentioned have said that there was only one female involved in the second fight.’⁵

(My emphasis)

With respect to the judge, common sense dictates no such thing. Hammond could have obtained the knife in the first fight (if involved in it - which was by no means established) and slashed at Nyki as he crossed the road on the way to the second or when extricating himself from that fight. That his blood was found on the knife does not mean it was the one which killed him. His left hand was cut between thumb and forefinger and the tip of his right thumb was amputated in the struggle, so his blood could have got onto the blade that way.

Three further points should be made before I discuss the evidence the judge relied upon and that which he rejected. These are the main reasons I believe Nyki to be not merely not provably guilty, but wholly innocent:

i) Nyki is just over 5’ tall and, of course, female. She had no criminal history and particularly, no history of violence. Hammond was a powerfully-built man of 5’ 8” who, to judge by the course of events, was both able and willing to defend himself vigorously. He did not make off like Dranichak. I doubt whether Nyki had the strength, fighting skill and aggressive animus required to overcome Hammond’s defences so as to be able to inflict five frontal wounds, four of them in close proximity to the heart.

ii) aside from a tiny spec of Hammond’s blood found on one of her shoes, close to ground level, no blood, hair, fibres or DNA of Hammond’s was found on Nyki. No blood, hair, fibres or DNA of hers was found on him either. This is highly significant and contrary to *Locard’s* exchange principle, a venerable and powerful principle of forensic science which posits that every contact leaves a trace in both directions between attacker and victim. By comparison, Faith Watts, Fresh’s girlfriend, whose involvement the judge found to have been confined to the first fight, had Hammond’s blood and DNA on her boots and shorts in comparative abundance.

⁵ Judgment para. [128]

iii) Nyki's only injury was the cut to her arm. Discussing the Amanda Knox case, this is what FBI agent and experienced crime scene expert, Steve Moore, said about fighting with knives:

'When I was on an FBI SWAT Team, we had an exercise designed to teach us the dangers of trying to fight off a knife attack. A red magic-marker played the part of a knife, and an "assailant" would attempt to attack another member of the SWAT Team with it. We did this in white t-shirts and open sleeves so we could see the wounds. Within seconds, the assailant had usually dispatched the victim with stabs and slashing attacks to the neck and torso, as the victim fought back desperately. Without exception though, the attacker was "cut". Always. And almost every time on the hands or fingers. This is because the victim, in attempting to fight off a knife, reaches for the hands, which deflects the knife into fingers or other parts of the hands. In addition to the "cuts", there were bruises and lacerations simply from elbows and arms flying.

'Also, folding knives⁶ have no 'hilt', a perpendicular piece between the knife handle and blade to keep your hand from sliding forward when using the knife for stabbing. When this happens, the attacker usually receives slash injuries to his finger just below (or in the vicinity of) the second knuckle. Amanda could not have known that. She had no such cuts. Rudy Guede, when arrested had such cuts across three of his fingers. One piece of evidence used against O.J. Simpson in his stabbing/slashing murder trial was that he had a severe cut on his finger, likely inflicted during a stabbing motion when his hand slid over the blade.'

(My emphasis)

A cut to the attacker's forearm is not the type of injury Moore describes as typical here.

There are subsidiary but other important points, too:

- If the woman who arrived at the scene of the fight by the streetcar really had the knife in her mouth (a bizarre fact attested to by a witness on the streetcar itself but contradicted by the person sitting right next to her) and that knife was the one recovered from Hammond, then one might have expected DNA from saliva to be found on it, especially because the knife handle was creviced so as to fold away the blade and the crevice might have provided a secure niche for such a deposit.
- By contrast to Nyki, Faith Watts had a fresh bite mark to her arm when arrested. One of the witnesses saw a woman *under* Hammond, who weighed well over 200 pounds. One might have expected some marks (cuts, bruises and/or scratches) on the woman from that alone.
- Then there is Nyki's skirt: black, very ample and reaching almost to the ground. Not only was it a distinctive identifier but also, one would have thought, an efficient collector of transferred blood, hair, saliva, DNA and/or fibres from Hammond, but no trace of his was found on it.

⁶ The knife Hammond acquired from one of his assailants was a folding knife with no hilt.

- At one point a woman, very likely Nyki, was heard to say in an accusatory manner: ‘you stabbed me’. That does not seem a likely mindset for someone who has just inflicted five wounds on her aggressor, at least one of them mortal.
- Nyki did not leave the scene. On the contrary, she walked right up to where Hammond himself was receiving medical attention to obtain treatment for herself, oblivious to the risk of identification (he was alive, conscious and capable of providing information to the police at this time and there were any number of people milling around who may have seen her stab him, had she done so). I disagree with the judge’s explanation - that the need for treatment trumped thoughts of fleeing the scene. Nyki’s wound was serious but not life-threatening and she must have known she would be likely to be arrested for an extremely grave crime had she repeatedly stabbed Hammond minutes before in front of numerous witnesses.
- A witness, Cam Bordignon, testified to hearing a male voice say, in the course of the second fight; ‘you die tonight’.
- One witness spoke of a female street-kid dragging or cajoling a male companion away from the scene. No one knows who they were.
- Most strikingly, another witness testified to seeing two males leaving the scene, one of whom proudly lifted up his shirt to reveal stab wounds while boasting of having been stabbed 19 times before. Evidently, there was at least one experienced knife-fighter at the scene. No one saw this person receive his wounds either (and nor did he hang around seeking medical attention, although he may well be the man seen repeatedly lifting his shirt to show others his bare chest in the surveillance video).

Now, I turn to the judge’s cherry picking. As a full review would be very extensive and severely test the reader’s patience the following are highlights only but could easily be substantially augmented. These points may be seen as my cherry-picking the case for reasonable doubt. Which is fine, as it’s an entirely legitimate exercise, wholly different from the one performed by the judge given that the burden of proof lay at all times on the crown to prove its case to the required standard:

(1) the woman at the ATM

Justice Nordheimer held this woman was Nyki⁷. In doing so he oversimplified the evidence and disregarded some of it. George Dranichak, the person best placed to make a positive ID, later identified the woman as Faith Watts from a police photograph. Indeed, the court also heard Dranichak was shown a photo line up within 24 hrs of the event and he did not choose Nyki nor did she match the description of the girl on the bike he gave the police. He said a second woman arrived on a bike and, from a CCTV film, identified her as Nyki. This person rode into him with the bike. It would have been difficult for the cyclist to have been Nyki, given she was wearing a very long and voluminous skirt - and there was no evidence she was riding a bike anyway. On the City

⁷ Para [80].

TV video she can be heard asking boyfriend Jeremy Woolley to get her back pack, a couple of hundred yards east, but she says nothing about a bike.

At a preliminary hearing in April 2009, Nalah Saleh gave evidence that she was the one who first asked Hammond and Dranichak for money at the ATM machine. Saleh did not give evidence at the full trial and there is no reference to her in Nordheimer's judgment. She testified she had a bicycle with her that evening and may have been riding it when she made her request. She said one of the two men told her to 'suck [his] dick', she crossed back to where her friends were on the other side of the street, including Nyki, Watts, Fresh, Jeremy Woolley (Nyki's boyfriend) and another male and female, all of whom then made their way in the direction of the two jocks.

There were accordingly several women at the ATM at different points in time over the course of a very short period, of whom Saleh had a bicycle. Saleh also had a red top, not a black one like Nyki. It was the same shirt she later used to wrap Nyki's arm when it was bleeding. Make a mental note of that as it comes back into the story told by the streetcar passengers.

Importantly, Dranichak said the crowd of attackers quickly grew to 8-10 people as the fracas made its way initially west along the north side of Queen Street before crossing in a south westerly direction to the south side.

The judge found Nyki to be the woman on the bike on the strength of the evidence of bystanders Mystica Cooper, Laura Quigley and Shaun Park but, in doing so, he oversimplified or disregarded their evidence.

- i) Assuming he summarised it correctly⁸, the only female on a bike Ms Cooper saw had dark hair, wore shorts and looked Spanish. Ms Saleh is Algerian and Ms Cooper got a very good look at her because the bike rider asked her for a cigarette.

While I should make clear that Saleh only gave evidence at the prelim, before a different judge, and her evidence thus remained unknown to Justice Nordheimer, the fact remains that Cooper's bike rider did not resemble Nyki and we, who know about Saleh's evidence, can point to this is a clear instance of the judge working overtime to fit the facts to his theory and falling into error as a result.

- ii) Ms Quigley did not see the beginning of the incident and there is no reference to a bike rider in the judge's summary of her evidence⁹.
- iii) Shaun Park was watching from the south side and saw the early phase of the incident as it unfolded on the north side. The female he identified wore a dark top and 'perhaps black leggings with a skirt over top'.¹⁰ When he first saw her, as he left his restaurant for a smoke, she was calmly talking to a friend of his. Later he heard screaming and looking out, saw two males and a female on the far side of the street. This was the same female as he had seen with his friend. He made no reference to a bicycle and his description might or might not fit Nyki just

⁸ Para [13] .

⁹ Paras. [15] – [18] .

¹⁰ Para [30] .

as well as, one might think, several of the numerous people on the street at this time.

On the whole, while it is not unreasonable to place Nyki among the group of people in the initial incident on the north side of Queen street, starting at the ATM and moving west from there, it is a great leap, based on no clear evidence at all, and requiring that some evidence be disregarded outright, to have her as the woman on a bike who started the confrontation. This is important, because that woman, according to Dranichak, responded with affront and anger at his obscene response to her request for money and was thus animated in a way which might have justified, or at least explained, a certain level of aggression.

(2) the woman at the streetcar fight

Judge Nordheimer held the woman seen with a knife at the streetcar fight, on the south side of Queen street at its junction with Niagara, was Nyki Kish¹¹. His reasoning sort of goes backwards, from finding Nyki was involved in the final fight on the north side and that she was therefore the same woman as was seen with a knife, in fact *the* knife, on the south side. I will take matters chronologically however, while emphasising once again I am not attempting a complete review of the whole of the evidence, which would be a substantial undertaking, but highlighting aspects of it to illustrate the inadequate basis for the judge's approach.

The principal witnesses held by the judge to prove that Nyki was involved in the streetcar fight, armed with a knife, were two passengers on the streetcar itself: Molly Stopford and her friend Jonathan Paget. Their evidence is central to the judge's findings. Ms Stopford saw two men fighting, a 'jock' and a street kid. The jock was beating up the street kid pretty badly. Two females shouted at them to stop. They got involved, one more than the other. The 'involved' one wore baggy pants, had messy clothing and messy, light brown hair.¹² This is a far better description of Faith Watts, Fresh's girlfriend, than it is of Nyki (which, I stress, does not mean it *was* Faith Watts). This female had a knife of which Stopford was able to provide a description. It had a distinctive circular pattern at the junction of blade and handle. An oddity is her evidence that she 'had the knife in her mouth with the blade sticking out.'¹³ She later saw the same female being tended by another, who had removed her shirt to wrap it around her hand.

'Ms Stopford thought ... the female who took off her shirt was the female who had been with the other female in the fight but she admits she is not sure of that. She also admits she might be interchanging the two females in terms of which one had the cut arm'¹⁴

¹¹ Para [130] .

¹² Para [21] .

¹³ Para [22] .

¹⁴ Para [22] .

(My emphasis)

‘Ms Stopford does acknowledge that her recollections ... may have been influenced by media coverage.’¹⁵

We know the woman who removed her shirt to wrap around Nyki’s arm was Nalah Saleh. Both Faith Watts and Nyki were wearing black bras when arrested, while Saleh’s bra was white. The surveillance video running at the time of this incident, picked up Faith Watts clearly still wearing her tank top and shawl and tending to Nyki on the north side of Queen Street. So we know Stopford is very confused about who is who and about the number of females. She has conflated at least three (Nyki, Faith Watts and Saleh) into two and admitted she may have interchanged two of them. She also agreed there may have been more than two females. And of course, there may well have been more than three females at the scene. Three female ‘street-kids’ are visible in the surveillance video alone, which covers a tiny portion of the scene, and none of them is Nalah Saleh, which makes four. In reality there were certainly several more and nothing to differentiate them from ordinary passers-by, including Cam Bordignon’s girlfriend, who stopped to help Doug Fresh. This is an instance of over-simplification, a subject I address below.

Although not mentioned in the judgment, in cross examination Stopford said she did not remember much about the less involved woman, who had baggy clothes and a white bra, because she took her shirt off. Almost certainly, this is Saleh who took her red shirt off to bind Nyki’s cut arm. As the judge himself saw the surveillance video he should have known the woman who took off her red shirt could not be Faith Watts (who appears in the same video with her shirt on) and accordingly that Stopford’s account was unreliable. She saw no one get stabbed and could not be sure the more involved woman crossed the street to the north side, where she did not witness the fighting either. If the judge had treated her as he did Dranichak, he would have had to dismiss all her evidence too.

Paget also saw the two males fighting. One a street kid and the other a preppy male. A female broke up the fight, he was unsure how, and was later seen in front of the streetcar being tended for a cut by another female. He said he was fairly certain the female with the knife was the female with the cut. Despite being ‘fairly certain’ he remembered very little of her appearance, not the footwear, pants, skirt, shorts, shirt or any facial features. He agreed there may have been more than two females.

As for the knife, he saw it in one of the female’s hands at the front of the streetcar, was not sure whether she brought it with her when breaking up the fight and then claims to have seen it again in the hands of the jock who made off by taxi. He admitted that his belief the woman who was cut was the woman who had the knife was based on his understanding that he who brings a knife to a fight is the one most likely to get injured.

Neither witness was *sure* the woman with the knife was the woman with the cut. Both admitted this. If they could not be sure, then nor could the judge. Not without his ‘backwards’ reasoning from the second fight, which is based on a questionable deduction that, because the blood of both Hammond and Nyki were found on the same knife, that knife must have caused their injuries.

¹⁵ Para [24] .

(3) the woman at the final fight (north side)

The judge lists five witnesses who saw the final fight on the north side of Queen street: Melissa Gallately, William Patsiopolous, Nataja DeSilvia, Cam Bordignon and Lindsey Williams¹⁶. There are others too, but taking these five will suffice:

i) Melissa Gallately¹⁷ – saw the fight from her apartment across the street. She claimed she saw a female ‘with flailing arms’ wearing a longer dark skirt, a black tank top and dark matted or dreadlocked hair. She heard this woman say ‘stab’ in the early part of the fight.

Problems with this evidence - the description is not a bad fit for Nyki but this witness made no mention of ‘the flailing arms’ until the trial, nearly four years after the incident. She failed to mention them in her police statement or when giving evidence at the prelim. The judge found her reliable nevertheless while contrariwise preferring, e.g. in the case of Woosen Hailimerian, what was supposed to have been said to the police over what he said at trial.¹⁸

ii) William Patsiopolous¹⁹ – this key witness arrived by bicycle from the south at the junction of Niagara and Queen. He saw a fight on the north side involving a male and a female. He saw a man banging on the side of the streetcar and said this may have been the same man. The man had a knife in his hand. Mr Patsiopolous was approached by the female in the fight. She had a cut arm. He helped her out. He called 911 and she was heard to say on the recording she was stabbed by a Canadian.

Problems with this evidence – the judge seriously distorted and/or misunderstood the evidence given. Mr Patsiopolous *did not say he saw a female in the fight at all!* He turned left into Queen street and saw a man with a knife banging on the north side of the streetcar. This disturbed him and he made a U-turn to go east where he ran into Nyki. He saw the same man (certainly Hammond) engage with a taxi and get dragged along. Despite this huge anomaly, the judge said:

‘I am satisfied that Ms Kish was the female who was involved in the second fight. That conclusion could be drawn on the evidence of Mr Patsiopolous alone.’²⁰

(my emphasis)

Equally problematic – the 911 recording does not support the judge’s finding. It records Faith Watts (most probably) saying ‘*she’s* Canadian’ referring to Nyki, either by reference to her entitlement to free medical care or in answer to a question from Mr Patsiopolous. This tallies with Mr Patsiopolous’s recollection as he testified at the prelim that he asked where she was from and a friend of hers replied ‘oh no, she’s Canadian’. Christine Bivens, who knows her daughter’s

¹⁶ Para. [103]

¹⁷ Paras. [40]-[42]

¹⁸ In fact the judge misunderstood Hailimerian’s statement to the police – see further below.

¹⁹ Paras. [37]-[39]

²⁰ Para. [121]

voice, is positive it is not her on the tape and, having listened to it myself, I think it's a different female speaking.

- iii) Nataja DeSilvia²¹ - saw the fight, involving a female and a few males with another female present. The female had a tank top and dreadlocks and yelled out he had stabbed her when he departed by hanging onto the taxi.

Problems with this evidence – this witness had a reasonably close view of the fight but did not see the female stab anyone. She also testified that Jeremy Woolley (Nyki's boyfriend) received a stab wound to the arm. No one saw that either and it does not fit the judge's 'one knife' theory which I discuss later.

- iv) Cam Bordignon²² - defence witness. He saw both the first and the second fight but did not see any female involvement in the latter.

Problems (for the crown) with this evidence – this witness evidences a possibility to which insufficient consideration was given: that there were two fights going on simultaneously. He saw the two jocks cross from north to south, being followed by 'street punks'. One fight was one-on-one – jock *versus* punk and was at the front and side doors of the streetcar on its south side. Two females assisted the defeated punk, one of them a friend of Mr Bordignon himself (we can be sure about *that* identification). The other was on the north side on the road or sidewalk. He did not believe any females were involved. Chillingly, he heard *a male* yell, 'you die tonight'.

- v) Lindsay Williams²³ - also, a defence witness, she saw the fight as she walked up Niagara towards Queen. She saw no females involved but saw a group beating up one person.

Problems with this evidence – none at all for the defence.

Summing that up, we have a witness whose trial testimony materially diverged from her statement to police and sworn prelim testimony, both given closer in time to the actual events, a witness whose evidence the judge completely misunderstood, a witness who testified to a male person receiving a stab wound, and two who saw no females involved in the fight at all. On any view, that is factual and identification evidence of a very weak kind on which to base the judge's finding that Nyki was involved in a life and death fight with Hammond.

This short summary by no means does justice to all the evidence about this fight but anything which interfered with the judicial narrative was either dismissed as unreliable or misconstrued e.g:

- Saad Mir a taxi driver saw Hammond *on top of a female with blond hair and a pony tail*. A blond woman who is most certainly neither Nyki nor Faith Watts can be seen in the surveillance video in the vicinity of the north side fight. Mr Mir may have seen her or, of course, someone else entirely.

²¹ Paras. [43]-[46]

²² Para [54]-[55]

²³ Para [56]

- Woosen Hailimerian testified to seeing a female *with black pants*. The judge misconstrued a statement given to the police by confusing the expressions ‘a black dress’ and ‘in black dress’ despite the confusion being satisfactorily cleared up at trial at which a tape of his police interview itself was played.
- Raymond To²⁴, called by the defence, saw a fight involving three males directly outside his store, which was directly opposite where the streetcar was stopped. The fight was right beneath him as he looked out of his window. He was sure no female was involved and probably had the best view of anybody. The judge dismissed his evidence as unreliable, despite its being corroborated by Lindsay Williams and Cam Bordignon.

Of course, it must be accepted that at some point Nyki got close to Hammond: close enough for him to cut her arm. But she does not have to have been fighting with him for that to happen. In the surveillance video, if it’s actually him we see, he is very mobile, running into shot and moving out again quickly. He must have evaded his attackers at some point and he may well have swung at anyone within arm’s reach when doing so. As stated below, others received cuts and it was not suggested any of them committed murder.

Oversimplification

It is clear the judge greatly oversimplified the evidence to make it fit his theory. A crucial example is his insistence there were only two knives, one of which belonged to Fresh and was found to have no blood on it. The finding enabled him to imagine he could track the single, solitary knife supposedly used to stab both Nyki and Hammond (like the magic bullet in Dealey Plaza). It was seen in her mouth or hand at the streetcar fight and somehow transported across the road to the second fight where Hammond took it away from her before dropping it by the church steps. As that was the only ‘active’ knife it follows she must have stabbed him with it, or given it to someone to stab him and that he stabbed her back before decamping.

The judge said:

‘ ... the blood of Ross Hammond and the blood of Nicole Kish were found mixed together at the hinge of the knife, that is, where the blade meets the handle. It is again an irresistible inference from that fact that that the same knife caused the wounds to both.’²⁵

(my emphasis)

With respect, it is no such thing. Hammond could have been stabbed by another knife altogether but got his blood on the one he wrenched away, either in the course of doing so or simply by holding it with his injured and bloodied hands. There was no expert’s evidence before the judge to the effect that blood *at the hinge* signified anything and it is not clear whether his reference to this is merely descriptive or actually a stepping stone in his reasoning. If the latter, there is no evidential basis for it and it is not explained.

²⁴ Para [111]

²⁵ Para [131]

He continued:

‘Still further is the fact that the only other knife that we know was present in the course of these events, belonged to Douglas Fresh. Not only was Mr Fresh still in possession of that knife when he was arrested, it was tested for blood and none was found.’²⁶

(my emphasis)

This passage is deeply troubling. It borders on a finding that there were only two knives at the scene, one of them, Fresh’s, wholly unused. It not only ignores the overall reality of the situation, in which a melee involving numerous people by no means all, or even a majority, of whom were accounted for and searched, but also specific evidence suggesting, directly or otherwise, the presence of other knives e.g.

- the two men seen by Shaun Park walking away, one of whom was lifting his shirt and showing off stab wounds;
- the man seen lifting a torn shirt in the surveillance video to display wounds (who may or may not be the man seen by Park)
- the wound to Jeremy Woolley;
- the male and female seen by Mr Gallately hastily departing from the scene;
- the male voice heard by Cam Bordignon saying ‘you die tonight’
- strikingly, Fresh alone had two knives on him, one a sort of Swiss army-type affair (a ‘Leatherman multi-tool’) but nonetheless featuring a serviceable blade.
- Faith Watts also had a Leatherman multi-tool in addition to the knife Hammond took away with him.

More generally, it doesn’t take much searching on the internet (or imagination) to realise it is common for Toronto pan-handlers to carry knives. On 7th January 2012 The Face.com reported one of them being shot by police in a shopping centre when so armed. Only months before the incident in Queen street the Digital Journal related a typical incident of a refused request for money being met with threats backed with a knife. The report concluded:

‘The streets of Toronto are getting dangerous. Hopefully other panhandlers don’t think this is the right approach.’²⁷

There is also important over-simplification with respect to Dranichak, who just seems to disappear from the action. It is a very real possibility that Dranichak was in fact the jock fighting on the south side of the streetcar while Hammond was simultaneously engaged on the north side. This is important because, if correct, there would have been no transportation of the knife from south to north as found by the judge. A number of considerations point in this direction:

²⁶ Para [131]

²⁷ Filed by KJ Mullins on 26th May 2007.

- i) Dranichak's own evidence that he left by taxi before getting anywhere as far west as Niagara was not believed by the judge and is clearly false;
- ii) he had ample reason to lie about his involvement, firstly being a US citizen who was liable to deportation and secondly because this was a serious affray for which he could have been prosecuted;
- iii) he was the one who threw Doug Fresh into the store front window and therefore the person with whom Fresh may have wished to settle accounts in the further fight involving Fresh on the south side, he also said Fresh at one point tried to gouge out his eyes;
- iv) the two jocks appeared essentially indistinguishable to all onlookers;
- v) no one, including particularly the streetcar passengers Stopford and Paget, saw Hammond travel from the south side to the north side;
- vii) Cam Bordignon came upon the action from the west, while walking towards the streetcar and Niagara and Queen. He saw two jocks coming from north to south in a south western direction²⁸, followed by 'street punks' and he thought he saw two fights, one between a jock and a punk which the jock won, and taking place between the front and side doors of the streetcar and the other on the north side either on the road or sidewalk. This evidence seems to falsify Dranichak's account;
- viii) the person perhaps best placed to see, the streetcar driver, was confident there were two fights going on, one on either side of him. He did not give evidence at the trial though, but made sworn statements to both prosecution and defence;
- ix) if there were two fights in sequence, one might have expected Stopford and Paget to have seen them both, simply by turning their heads from one to the other, but neither was able to differentiate the two struggles in time;
- x) it makes more sense that Dranichak was able to decamp *after* beating up Fresh at a time when he and Hammond had become separated by the streetcar, than beforehand when walking south west following the ATM incident with the street kids in hot pursuit and in no mood to permit escape;
- xi) it is not clear why Hammond would cross from the south side over to the north again. If it were to escape his pursuers one might have expected someone to have seen this multiple movement from south to north, just as several witness saw the initial diagonal movement from north to south. If he were not being pursued or somehow forced to cross back, why should he have done so?

Other problems with the safety of the verdict

I am unable to make a full list as my familiarity with the case is insufficient, but there are too many alarm bells ringing for all of them to mean nothing. Without repeating what has already been said, these are some more:

²⁸ Para [54]

- witnesses who gave crucial evidence at the prelim did not testify at trial, in some cases due to difficulty in locating them or to the crown's indifference to keeping track of them (e.g. Nalah Saleh and Faith Watts);
- the defence budget was severely constrained by limited state funding, the effects of this will have been very profound, especially in relation to crucial forensic science issues;
- Nyki was not judged by a jury of ordinary citizens but by judge alone contrary to the norm in most common law jurisdictions; an English jury would have to have been persuaded by at least 10-2 majority (I do not know the equivalent Canadian requirement) a fundamental safeguard Nyki did not have;
- unbelievably, Hammond's shirt was not tested and defence attempts to have this done were obstructed;
- equally incredibly, the police negligently lost or erased two crucial surveillance videos which cannot fail to have contained relevant evidence; the defence application for a stay of proceedings was dismissed and related applications for lesser relief were simply ignored altogether;
- there may have been an element of political pressure to convict someone so as to make an example to the city's population of street kids (described as 'a 30 year scourge' in one online article I turned up when researching this one).

Reasonable doubt

The crown had to prove the case beyond reasonable doubt. That is not an elusive or difficult concept. It requires that the jury must be *sure* of guilt. If any reasonable alternative explanation of the facts remains the verdict must be for acquittal. A doubt must be 'reasonable' for this purpose, not whimsical or fanciful.

The judge reached his view despite the absence of any evidence from anyone of seeing Nyki Kish stab Ross Hammond. I understand the police took more than 50 statements. People actually watching the incident did not see her inflict these wounds. It follows the judge needed the most compelling evidence, beside direct eye witness testimony, to be sure of guilt beyond reasonable a doubt. His focus fell upon *'the'* knife. He was unable to see how any other knife could have stabbed both Hammond and Nyki because he was sure the knife in the woman's mouth on the south side was the same one seen in Hammond's hand on the north side and he was sure because Molly Stopford said it was the same one.

But there was nothing very distinctive about this knife. Enter 'folding knives' in Google and select 'images' and you will see dozens of similar knives with a circular shape at the junction of blade and handle. It's obviously an integral design feature in this kind of knife and nothing very special. Also, Stopford could have related her memory of the knife she saw being taken away back to the one she saw in the woman's mouth and confused the two. Mr Patsiopolous misidentified the knife Hammond took away with him as a butter knife and he was very likely describing the same object Molly Stopford saw. If people can be as egregiously mistaken about other people's faces and clothes as the witnesses on Queen street were, they can certainly be mistaken about a small object

like a knife, their view of which being at all times a partial one only (the handle being mostly concealed by the carrier's hand).

In England and Wales, the leading case on identification evidence over the last third of a century has been R –v- Turnbull [1976] 3 All ER 549 which is available online at:

<http://www.scribd.com/doc/43548197/R-v-Turnbull-and-Others-1976-3-All-ER-54>

The head note²⁹ reads:

‘Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. Provided that the warning is in clear terms, no particular words need be used. Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. If in any case, whether being dealt with summarily or on indictment, the prosecution have reason to believe that there is a material discrepancy between the description of the accused given to the police by the witness when first seen and his actual appearance, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases, if the accused asks to be given particulars of any description, the prosecution should supply them. Finally, the judge should remind the jury of any specific weaknesses which have appeared in the identification evidence.

‘Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However, where in the opinion of the judge the quality of the identifying evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification. That other evidence may be either corroboration in the legal sense or something which convinces the jury that the identification is not mistaken; any odd coincidence, if unexplained, may be supporting evidence. The judge should identify to the jury any evidence which he adjudges capable of supporting the evidence of identification and he should tell the jury if there is any evidence or circumstances which cannot support an identification.

‘The judge should tell the jury that the absence of the accused from the witness box cannot provide evidence of anything, although they may take into consideration the fact that identification evidence has not been contradicted by the accused. ... A failure to follow these guidelines is likely to result in a conviction being quashed, and will so result if, in the judgment of the Court of Appeal, on all the evidence, the verdict is either unsatisfactory or unsafe. However, the Court of Appeal has no jurisdiction to retry a case; it is for the jury in each case to decide

²⁹

i.e. a summary made by the law reporters.

which witnesses should be believed. The Court of Appeal will only interfere on matters of credibility if (1) the jury have been misdirected as to how to assess the evidence, (2) there has been no direction at all when there should have been one or (3) on the whole of the evidence, the jury must have taken a perverse view of a witness.

(my emphasis)

This shows the problems of identification are universal, as one would expect. There is no reason to suppose Canadians to be any better at identification than English people. The circumstances on Queen street are of a kind known to pose extremely difficult problems and the tangled thicket of conflicting identification in Nyki's case is a true classic of the *genre*. We may *wish* things were simple but they are not, and the wish itself is a dangerous psychological weakness from which not even judges are immune. If anything I would suggest, as a breed, they are more likely than a panel of jurors to embark on the type of inappropriate problem-solving exercise seen here.

I repeat part of the extract quoted on p2 above, but this time with some added emphasis:

‘ ... a difficulty that is common to many criminal cases ... arises from the fact that, in order to try and determine who caused the death of Ross Hammond, I must reach my conclusions based on the evidence of close to twenty different witnesses to the events that lead to his death.

With respect, it was not the judge's task to determine who had killed Ross Hammond but only to decide whether the evidence showed beyond a reasonable doubt that Nicole Kish did so.

My own problem-solving

I offer these alternative theories, either of which is consistent with innocence. Each is based soundly on the evidence before the court. I do not assert that either one necessarily represents the truth, but they both seem much more plausible than the judge's theory.

1st hypothesis:

i) Nalah Saleh asked the jocks for money and received an obscene response. She told her friends who included Nyki, Watts, Fresh, Woolley and a couple of others. This group engaged with the jocks on the north side of Queen street, where Fresh was thrown into a shop front window, Nyki was pushed over and rubbish bags were thrown about.

ii) the two jocks broke off and headed SW towards the streetcar, with an increasing number of street kids in pursuit, Fresh leading the way. On the way, they got split up, Dranichak going to the south side of the streetcar and Hammond to the north of it.

iii) Faith Watts was on the north side and had her knife snatched from her by Hammond (there is little doubt the knife was hers – she said it was and the judge so held). This may in fact have happened very early on, following the ATM incident. There was a melee involving him, a number of males (one of whom shouted 'you die tonight'). Arms were flailing. Hammond was stabbed in the chest by one or more male attackers and desperately made off, swinging at anyone in the way. Nyki was too close and got cut. It

was probably Hammond who was seen hammering on the streetcar by Patsiopoulos, holding the knife, before he waylaid a taxi and got carried or dragged away from the scene.

iv) at just about the same time, Dranichak was fighting and beating up Fresh on the south side of the streetcar before making off once he had the upper hand.

2nd hypothesis:

This is even simpler. The woman with the knife in her mouth was Faith Watts and after intervening in the fight on the south side she went directly north and fought with Hammond, who snatched her knife and, in the course of swinging wildly at his attackers, caught Nyki on the arm.

Appeal

Nyki remains in jail pending appeal. Her case badly needs a fresh look and I hope she gets a decent break soon.

Clive Wismayer

6th June 2012