

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Martin, 2005 NSPC 32

Date: July 15, 2005
Case No.(s): 1530292, 1530293,
1530294
Registry: Halifax

Between:

Her Majesty the Queen

v.

Dean Victor Martin

Judge: The Honourable Judge C. H. F. Williams, JPC

Heard: Decision rendered orally on July 15, 2005
in Halifax, Nova Scotia

Written decision: Released on August 5, 2005

Counsel: Christopher Nicholson, for the Crown
Roger A. Burrill, for the Defence

By the Court

Introduction

- [1] In the early morning of April 15, 2005, a man, described as African Canadian, entered the Needs Convenience Store located at 6130 Chebucto Road in the Halifax Regional Municipality and, after a brief conversation with the night clerk, Michael Jefferson, robbed him. Although Jefferson could not identify the perpetrator, the store's security video camera had captured the images of the robber and the incident.
- [2] Earlier that evening, Constables David Robinson and Chris Marinelli of the Halifax Regional Municipality Police Force were on routine patrol, in what was described as an area that was plagued by robberies. They saw the accused, Dean Martin, at a Domino Pizza Parlour that was not far from the crime scene. Because they knew him from prior contacts, they stopped and spoke with him mainly to ascertain his business at this establishment. Satisfying themselves that all was well they left but subsequently discovered that an outstanding warrant was in force for his arrest.
- [3] Shortly after this encounter the Constables received information concerning the robbery and went to the crime scene. They spoke with Jefferson and viewed the store's security video tape. On viewing the tape they remembered that when they saw Martin, at the Domino Pizza, he was wearing similar attire as the robber on the security tape. Combining their memory recall with their familiarity and knowledge about him, the Constables concluded that the image of the robber, on the videotape, was that of Martin. As a result, they arrested and charged him with the robbery.

Summary of the Evidence

- [4] Michael Jefferson was the night clerk at the Needs Convenience Store at 6130 Chebucto Road on April 15, 2005. He permitted an athletic built, "very dark black male" with a moustache and beard to enter the store. On entry, the man engaged him in conversation and, in a loud aggressive tone of voice, essentially demanded to know where Jefferson kept any money. Going behind the counter the man seized the cash till that contained \$150.00 and left the store. Jefferson subsequently called the police. Nonetheless, as the only eyewitness to the crime, the police did not show him any of the still photographs that they eventually panned from the store security camera, nor requested him to view any photographic lineups, or at all.
- [5] Constables David Robinson and Chris Marinelli who were on routine patrol that evening encountered the accused at a nearby Domino Pizza Parlour and briefly spoke to him to confirm his reasons for being at this establishment. Satisfying themselves that his presence was legitimate they left. Soon after departing, the officers ran a computer check on the accused and became aware that he, the accused, had an outstanding arrest warrant. They

then tried to locate him but were unsuccessful. About the same time, they also received information of the robbery. Going to the crime scene they spoke to Jefferson and viewed the store security video tape of the incident.

- [6] On viewing the tape, together and in collaboration, both officers recollected that the accused was wearing dark clothing, a unique headdress and red gloves when they saw him earlier. As a result, they concluded and declared, without more, that through prior contacts with the accused and their memories of his clothing, that the image captured on the security video was positively that of the accused. Additionally, Constable Scott Graham, who stated that he knew the accused for ten years and having arrested him before and having dealt with him at least fifty times, viewed only Exhibit 2, which is three cropped images from the store security camera. Similarly, without stating any supportive distinguishing physical characteristics or indicia of identification other than mere recognition, he simply declared and identified one of the images as that of the accused.

Issue

- [7] Consequently, this case is a consideration of the reliability of the identification evidence.

Findings of Facts and Analysis

- [8] I accept and find that a robbery did happen. Further, there is no dispute that the incident was recorded by the store's security video camera. Additionally, I accept and find that the only human eyewitness to the crime was Michael Jefferson, the store clerk, who actually saw and spoke with the robber who was a black male. Likewise, I accept and find that the police did not show Jefferson any of the photographs, Exhibit 2, that they had cropped from the security video, nor did they request him to identify the perpetrator from any photographs, or at all. Instead, I accept and find that the police, for identification purposes, solely and in self-collaboration, relied upon their own opinions and powers of recognition of the accused from viewing the security videotape and cropped picture.
- [9] Here, there was only one human eyewitness to the robbery and he has stated that the robber was a total stranger whom he had never seen before or after the incident. He asserted that the police did not request him to identify the perpetrator by any of the acceptable and established protocols recommended to determine identity, or at all. **See: *The Inquiry Regarding Thomas Sophonow, The Investigation, Prosecution and Consideration of Entitlement to Compensation Recommendations***, (Winnipeg: Manitoba Justice, 2001); ***R. v. Hibbert*** (2002), 163 C.C.C. (3d) 129 (S.C.C.). However, I think that the store security camera with its impartial videotape is a critical silent witness to the event. Nonetheless, I also think that it is only a factor that must be weighed and assessed carefully with all the other evidence, direct and circumstantial, if any, of the true identity of the offender. It is not, without more, the ultimate proof of identification.
- [10] Defence counsel has reminded me, and I agree, that there have been many cases of honest

but tragic mistakes in eyewitnesses, identification. Likewise, he avers that tunnel vision on the part of the police may have caused them to focus solely on the accused, even though discrepancies existed between their prior observations of him and the security videotape and still photographs, that no other person registered in their thoughts and, as a result, they eliminated other suspects.

- [11] Here, in effect and in my view, we do not have any real human eyewitness identification evidence but rather opinions concerning recognition by non-eyewitnesses from a videotape. These opinions, however, made no reference to any actual eyewitness supportive evidence of identifying descriptors with any nexus to the videotape but, in my view, contained the possibility of contamination and self-reinforcement. Case law and authorities have shown that identification errors may not be any intentional acts of unfairness by the police but rather could be the results of social and psychological factors. See for example: *R. v. Gannon* [1999] N.S.J. No. 303 (Prov.Ct.); *R. v. Quercia*, (1990) 60 C.C.C. (3d) 380 (Ont. C.A.); *R. v. Brown and Angus*, (1951) 91 C.C.C. 141 (B.C.C.A.); *R. v. Turnbull and Others*, (1976) 63 Cr. App. R. 132 (H.L.); *Summary of Findings and Recommendations of the Royal Commission on the Donald Marshall Jr. Prosecution (Excerpts from "Digest of Findings and Recommendations")* [1990] N.S.J. No. 18 (QL).
- [12] Additionally, I think that the identify of a person is a mere opinion that is based upon what an eyewitness remembers as the attention-getting features of an individual. *R. v. Smith*, (1952) 103 C.C.C. 58 (Ont. C.A.); *R. v. Sophonow (No.2)*, (1986) 25 C.C.C. (3d) 415 (Man. C.A.). From the evidence, it is clear that the police had prior contacts with the accused. He has an arrest record and has done time in prison where one officer, who was then a prison guard, became familiar with him. On the night in question, officers who were familiar with him, saw him at a pizza parlour in the neighbourhood of the crime scene and spoke with him. The stated reasons for speaking with him was that the police, as it was an apparently high crime area, wanted to ascertain and to confirm that his presence at the establishment was legitimate.
- [13] Except for Jefferson's description that the robber was a "very dark black male" there was no evidence that the police received any other description from this only human eyewitness. There was no eyewitness evidence of any detailed descriptions of the robber such as his height, weight, or clothing. Likewise, there was no evidence that Jefferson saw anything that the police used to determine their identification and that he related such aids to identify the person whom only he alone saw in the store. Further, the police presented no physical evidence that connected the accused to the crime scene. Thus, in my view, the vague description of a black man that could fit that of many black men is not the identification of a specific black man.
- [14] With respect to the videotape and photographic evidence, I think that when the officers went to the crime scene and viewed the videotape from the image depicted, they then recalled, in my view, subjectively, the manner of dress that they saw the accused wearing earlier in the evening. True, the videotape, Exhibit 1, and the cropped photographs, Exhibit 2, show a

person wearing dark clothing. However, I should say, that in my view, videotape images as with photographs, although admissible, generally are used to illustrate, to support and to explain a witness' evidence. Because photographs and videotapes can provide cogent evidence to support a particular possibility, I think that is necessary that what they do depict represents an accurate, clear and undistorted supportive proof of the fact in issue for which they are tendered. *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.).

- [15] Thus, from this perspective, I think that the Crown's theory, in tendering these exhibits, without more, must be that through the officers it could demonstrate that the accused was probably the robber rather than the videotape and the cropped photographs speak for themselves and are therefore probative evidence of what they depict. See: *R. v. Edwards*, [1998] N.S.J. 363 (Prov. Ct.); *R. v. Colley*, [2000] N.S.J. No. 78 (Prov. Ct.); *R. v. MacDonald*, [1999] N.S.J. No. 474 (Prov. Ct.). Therefore, in my view, these exhibits would be illustrative and serve only the useful purpose, if at all, to support the officers' testimonies and to show, among other things, how they arrived at their opinion.
- [16] Four officers apparently recognized the accused either from the videotape or from the derivative pictures. Constable Paul Cameron seized the store security videotape and viewed it. He paused it at frames 0:02:29 and 0:02:30 and declared that the images depicted was that of the accused. The Constable's opinion was based upon the fact that he had seen the accused many times in the past and was familiar with him. However, he was unable to say what about the videotape image that was eye-catching or unique to the accused that would have supported his opinion that in fact the image, that he saw, was that of the accused. In his conceptualization of the depicted image this witness opined that the person was wearing a tight fitting hat, sported a goatee and not a beard. Significantly, however, although the Constable knew that facial freckles were distinguishing features of the accused, he could not discern any facial freckles in the picture that he saw.
- [17] Constable Gordon Graham testified that he knew the accused for ten years and had, in the past, arrested him. He received, by e-mail from another officer, Constable Bowers, three computer generated pictures of the accused, Exhibit 2. Based on his past knowledge of the accused, he declared that two of the photographs that he received was the accused and had facial features that were similar to that of the accused. Notably, he did not view the security videotape nor could he state what was significant or distinctive about the pictures that arrested his memory and excluded all other persons but the accused. Moreover, he admitted that the accused had facial freckles that were distinguishing features but, in the picture that he viewed, the person depicted had no freckles.
- [18] Constables David Robinson and Chris Marinelli, while on routine patrol saw the accused before they received a report of the robbery. They had stopped and spoken to him. It was after they had viewed the videotape together and saw the robber's attire that they remembered the accused clothing and agreed with each other that the person depicted was the accused. They based their opinions partly on their memory of the clothing and their considerable work related acquaintance with the accused.

- [19] However, Constable Robinson testified that together, they viewed the tape and froze it on frame 0:02:29 and that was the image he identified as the accused. The Constable remembered that when he saw the accused at the Domino Pizza, he, the accused, was wearing red gloves, dark clothing, and a hat that had no peak. Even so, he agreed that in frame 0:02:29 he did not see any red gloves or a non-peaked headgear. In actuality, the frame that he used to identify the accused showed a person that was wearing a headgear with a peak and no red gloves. Moreover, this witness could not relate any distinguishing features on the videotape that impressed or stirred his memory and made him say that the image was that of the accused. Additionally, the unique and distinguishing features of the accused, freckles in his face, this witness, who knew about his uniqueness, did not see any in the frozen frame, or at all, to link the accused with the image that he saw.
- [20] On the other hand, Constable Marinelli testified that he too remembered, after viewing the videotape, that, at the Domino Pizza, he saw the accused wearing a dark coloured jacket, duvet cap and red stretchy gloves on his hand. This witness, however, testified that the frozen frame that he saw was 0:02:28 and asserted that this was the frame that he viewed together with Constable Robinson. This witness also saw Exhibit 2, the three still photographs but indicated that he had not seen photograph No. 1 of the Exhibit which was the still photograph of 0:02:28.
- [21] I observed that this photograph has red colouring in the front, scarf and hand areas. Additionally, I note that this witness said that he saw the frame 0:02:28 but did say that he never saw the cropped picture of that frame. Furthermore, Constable Graham testified that he saw Exhibit 2 and that photograph No. 1 was not useful for him to establish identity but that photographs No. 2, 0:02:29 and No. 3, 0:02:30 were helpful. Likewise, I observed that the Crown did not show Constable Marinelli photographs Numbers 2 and 3 for his comments, if any.
- [22] In my opinion, and I so find that Exhibit 1 and the cropped pictures Exhibit 2 are of poor quality. They do not, in my opinion, display any discernable facial characteristics or details of the person depicted except that the person could be a black person. When paused, whether at 0:02:28 or 0:02:29, the video is not clear and displays multiple areas of red coloured pigments or distortions on critical portions of the tape and photographs, without any acceptable explanation, or at all, which, in my view, diminished their accuracy and hence their reliability. Additionally, when I look at these exhibits and weigh them with the observations of the only human eyewitness in court description of a very dark black athletic “boxer built” male with a moustache and beard and compared the person depicted with the accused on the prisoner’s bench, as I have done, and to declare unreservedly and beyond a reasonable doubt, that they do depict the accused would be, in my opinion, a dubious and unreliable declaration of fact. I so find.
- [23] Here, it appears that the prosecution’s approach to establish identity was that the policemen’s testimonies of familiarity with the suspect were sufficient proof beyond a reasonable doubt. That approach, respectfully, ignores protocols that have been recommended and established

to avoid wrongful convictions. By way of example only, the police did not conduct any photographic or physical lineups involving the suspect and the only human eyewitness did not participate in the identification process. Furthermore, the initial identifying officers viewed together and without any controlled process or procedure the videotape of the incident. They had earlier seen the accused and had consciously stopped and spoke with him to determine if his presence in the area was legitimate. This could suggest an unconscious bias toward the accused based on their subjective knowledge about his past. Additionally, it was only after they had viewed the videotape that they made any notation of the accused apparel. Was this, however, a cognitive and genuine recalled memory that was neutral of and uninfluenced or tainted by their subjective knowledge and current information about him?

- [24] I think that their assertions on viewing different and separate portions of the tape; their apparent adding up of similarities; their subjective self-reinforcement and their failure to mention any distinctive physical characteristics about the accused was not only troublesome but were also material as to how much I could rely on any of their testimonies as proof beyond a reasonable doubt on the issue of identification evidence. Furthermore, as such proof would, without doubt also determine whether or not it was indeed the accused who committed the crime I think that any unsupported subjectivism, contradictory evidence or discrepancies in the evidence that could not otherwise be resolved benefitted the accused. See for example: *R. v. Young*, [1999] O.J. No. 2663 (C.A.); *R. v. Atfield* (1983), 25 Alta. L.R. 97 (C.A.).
- [25] Nonetheless, what was more troublesome was the unorthodox and unconventional approach with the inconsistencies in the processes and procedures adopted to declare identification of the suspect. Prospective police witnesses together viewed the videotape of the suspect and reinforced each other's opinion as to whom they believed was the robber. The police made still photographs of the robber that some officers viewed and others did not when they came to their conclusions. The only human eyewitness who saw and spoke with the robber did not see these photographs to establish a nexus, if any, between the photographs and videotape and the person who robbed him.
- [26] Significantly, however, despite their claims of familiarity with the accused none of the officers could state any physical descriptors or any distinguishing characteristic of the accused that prompted them to say that the images that they saw were him. I accept that the extent of their acquaintance with the accused would have some bearing on the cogency of the identification as well as the circumstances in which the alleged recognition occurred. However, none of them viewed a proper forensic lineup or anything resembling one. Although each officer who declared a positive identification was equally in a position of observing the videotape or photographs, their inconsistencies in details, such as it was, in my view, did not go toward their credibility but rather it highlighted the psychological and inherent frailties and dangers of human observation and recollection.
- [27] It would appear, and I conclude as it is reasonable to infer from the evidence, that the police

selectively picked and accepted those frames from the videotape that could support their subjective opinions while disregarding, even on those very frames, contradictory evidence that would leave their correctness in doubt. Therefore, in my view, what they presented were unsupported opinions that the robber was the accused. They stated that they recognized him from photographic images but could not state any support for their opinions.

- [28] Thus, the adopted approach, in my view, if condoned by the court, would tend to corrupt the established and recommended identification processes and procedures. Likewise it would tend to be unfair to the accused as it intentionally removes from the only human eyewitness a consideration of photographs and other media that the authorities possess and known to them to resemble the suspect, if at all. Further, as determined in *R. v. Spatola* (1970) 10 C.R.N.S. 143 (Ont. C.A.), bare recognition without supportive distinguishing marks is a risky foundation for conviction.

Conclusions

- [29] I therefore conclude that there were inherent frailties in the identification evidence. It did not persuade me beyond a reasonable doubt that the accused was the robber. Moreover, I think that it lacked that high standard of evidentiary proof that would have given it any probative value and, as a result, it would be unsafe to enter a conviction.
- [30] Put another way, on the evidence presented and on the analysis that I have made, I find that the Crown has not proved beyond a reasonable doubt the guilt of the accused on all counts of the Information tried before me. Consequently, I find him not guilty as charged on all counts tried before me and will enter acquittals on the record.