

IN THE PROVINCIAL COURT

R

vs

CHRISTOPHER CHURCH
(Cite as R v. Church 2001 NSPC 34)

DECISION

The Honourable Judge C. H. F. Williams, JPC
Delivered orally December 7th, 2001

Counsel: Mr. P. Carver, Crown Attorney
Mr. B. Sarson, Defence Attorney

R v. CHRISTOPHER CHURCH

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Introduction

On January 21, 1998, Christopher Church, the accused, was at work employed as a cook by Audrey Alexander who owned the Harvey's Restaurant, in Bayers Lake, Halifax Regional Municipality. The accused completed work and left at 1400 hours. Later that evening when Ms. Alexander wanted to use her Canadian Imperial Bank of Commerce Visa card, she discovered that it was missing from her purse. During the day she had placed her purse containing the card in a small office at the Harvey's Restaurant. This office was accessible to staff who were on duty, including the accused.

Also, on January 21, 1998, at 1723.17 hours and 1723.46 hours, two youths used the stolen Visa card to purchase two watches from Renaissance Jewellers, Park Lane Mall, Halifax Regional Municipality. Ashwani Rai is the owner of the jewellery store. He recalled that one youth, who looked like the accused, made one selection and gave him the card. However, he could not recall any distinguishing features or characteristics concerning that youth. Even though the signature on the transaction slip read "Daniel Richardson," he neither compared nor checked the card to verify the user's identity. He had never seen these youths before and was not "paying much attention" to them. Additionally, he did not give to the police any initial or any description of the youth who came into his store. Also, the police did not ask him for any such description. In any event, when the police showed him a Photographic Line-up, he selected the accused's picture with the written comment, "it's him."

Additionally, the Visa authorities informed Ms. Alexander of the unauthorized use of her card. Through her husband she made enquiries of local merchants concerning its use. One local merchant, not Mr. Rai, advised that a "young lad, clean cut with short hair, 140 pounds" made purchases at his store. In addition, her Visa statement showed the unauthorized transactions. She suspected the accused and accordingly informed the police of her suspicions. She gave the police photographs of her staff from which the investigator compiled a forensic photographic line up.

The police subsequently arrested the accused and charged him with unlawfully using the credit card. He, however presented alibi evidence to show that this is a case of mistaken identity.

This case therefore raises the issue of the reliability of an eye-witness identification.

Analysis

The Crown submitted that circumstantially there is evidence that the accused took the card, was positively identified by Mr. Rai and that his alibi evidence was a fabrication. On the other hand, the Defence submitted that the alibi evidence was reliable, the photographic line up was weak and the defendant was not the only one who had an opportunity to take the card.

I am however reminded that an eyewitness identification can be unreliable and calls for considerable caution. *R. v. Bullock* [1999] O.J. No. 3106 (C.A.), *R. v. Nickolovski*, (1996), 111 C.C.C. (3d) 403 (S.C.C.), *R. v. Duhamel* (1980), 56 C.C.C.(2d) 46 (Alt. C.A.), *R.v. Atfield* (1983), 25 Alta. L.R. (2d) 97, [1983] A.J. No. 870 (C.A.)

Here, I must also be mindful of the guidelines stated by Twaddle J.A., in *R. v Sophonov (No.2)* (1986), 25 C.C.C. (3d) 415 (Man. C.A.)(leave to appeal to S.C.C., refused April 22, 1986), adopted and approved by Roscoe J.A.. in *R. v. Shermetta*, [1995] N.S.J. No.195 (C.A.), at para. 46.

" The guidelines may be stated thus:

- (i) the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification;
- (ii) he should instruct them as to the reasons for the need for such a warning and make some reference to the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could all be mistaken;
- (iii) he should point out that although identification by one witness can support that of another, even a number of honest witnesses can be mistaken;
- (iv) he should direct them to examine closely the circumstances in which the identification by each witness came to be made;
- (v) he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

On the evidence, I accept that two youths were in Mr. Rai's jewellery store and used the stolen credit card to purchase two watches. In my opinion, however, Mr. Rai's recollection of the event was ambivalent. First, he recalled that one youth purchased a watch with the card and then attempted to purchase the other watch when the transaction was rejected. Thereupon, the youths left the store and returned five minutes later. The reason why they left was because they had used the card in another store and that transaction had "maxed" out the card so they had gone back to cancel that transaction

to allow more credit room on the card. On their return to his store, five minutes later, they used the card to purchase the second watch.

However, when his attention was drawn to the transaction time as confirmed on the transaction records, Exhibits 3 and 6, "17:23:17" and "17:23:46", the time when the purchases were made, he was equivocal and could give no satisfactory response. Significantly, however, he admitted that he could not fully recall the transaction as he was not paying much attention. Apparently, all that he was interested in was that he received payment for the merchandise. He did not check the signature on the transaction slip against that on the card. All that he can recollect was that the youth who gave him the card was "nice looking." He does not recall any facial hairs, clothing or any distinguishing characteristic of the youth. Additionally, bearing in mind that he was the only one who saw the youths, on the evidence, he gave no initial or any detailed facial or other characteristics or descriptors of them to the police nor did the police seek their description from him.

It was Audrey Alexander who informed the police when she contacted them concerning her stolen card that she suspected that the accused was culpable. Consequently, she gave the police two group photographs of her staff, Exhibits 1 and 2. The accused is depicted in those photographs and apparently his picture was also on police files. Mr. Rai never saw nor was he apparently aware of these photographs. Nonetheless, I find that as a result of the information from Ms. Alexander, Sgt.(retd.) James Ritcey, of the Halifax Regional Municipality Police Force, compiled a Photographic Line-up, Exhibit 4. He showed this exhibit to Mr. Rai who, on the evidence, selected photograph No.7 which is that of the accused.

Mr. Rai's assertion is however problematic. First, I remind myself that at times we honestly mistake someone for another. For example, how many of us can recall enthusiastically saying "hiya" to someone whom we think we know only to discover to our embarrassment that we simply did not know the person. Is this the case here? Second, I note, at trial, that when he was shown Exhibit 5, the Photographic Line Up Instructions, he never confirmed the comments that were attributed to him and recorded on the document. Viewing the document, I find that to be a significant omission in the chain of evidence. At trial, his testimony was equivocal. He testified that the photograph "looked like the guy who came in and used the credit card." Further, he testified that he "guessed [that the] person would be [in the] line up." In addition, when his attention was drawn to the fact that photograph 7 was the only one displaying an ear ring, he testified that, "I didn't look to see if the person had ear ring in ear." Significantly, he testified that when he looked at the photograph he said, "looks like this guy." However, on Exhibit 5, the "Photo Number Selection" "Comments on your Selection"- "its him", and the signature lines appears to be written and signed by the same person who signed as the officer showing photo, "J. Ritcey." Furthermore, I recall, on the evidence, Mr. Rai did not give to the police any description of the youth who was in his store. Thus, there was nothing to compare from an initial description against who were in the photographic line up. There is no reported explanation about what intrinsic or distinctive characteristics that triggered a recognition of the suspect's photograph. *R. v. Brown & Angus* (1951), 99 C.C.C.141 (B.C.C.A.), at p.147, *R.v. Smith* (1952), 103 C.C.C. 58 (Ont. C.A.). Thus, such a process, in my opinion, taints significantly the reliability of the photographic line up, particularly here, in light of Mr. Rai's

testimony of what he said when he viewed the photographs and the fact that he, at trial, did not adopt the written comments.

A photographic line up must be fair and that includes, in my opinion, the police receiving a description of the suspect, from eyewitnesses to the alleged offence, before they start compiling photographs for evidential purposes. Additionally, as was put by Hill J., in *Bullock*, at para.56:

While everyone in a forensic lineup cannot be identical, the subjects should be reasonably similar without conspicuous differences even if not all the subjects share all the descriptors advanced by the eyewitnesses.

Here, we have no initial or any description of the suspect as observed by the only eyewitness to the offence. What we have is the introduction of a photograph on the suspicion of a third party who was not a witness to the event as charged. The group employees' photographs were never shown to Mr. Rai as a preliminary step in the identification process. Therefore, from the evidence, a reasonable inference can be drawn, and I do find, that the police had subjectively concluded that the accused had stolen the credit card from his employer and had subsequently used it. I find that this approach is troubling when without any initial descriptors from Mr. Rai he is asked to view a third party subjective photographic line up. Likewise, this approach, I think, reinforced by Mr. Rai's comments at trial, could be viewed as an attempt by the investigator to influence the eyewitness and to confirm his own subjectivism and that of Audrey Alexander.

The accused testified and pleaded an alibi. Thus, in practical terms, he is not denying that someone used the stolen credit card, only that it was not him who did it. He declared that Mr. Rai was mistaken in identifying him as the youth in the store as he was elsewhere at the time in question. As I stated in *R. v. Rapin*, [1999] N.S.J. No. 219 at para. 6:

Usually, evidence of an alibi is sufficient to raise a reasonable doubt. Thus, if I believe the alibi I must acquit. If I do not believe the alibi but it raises reasonable doubts I must also acquit. Even if it does not raise a reasonable doubt then based on all the other evidence I must still determine whether the Crown has proved beyond a reasonable doubt the offence charged. See for example, *R. v. Horne* 30 W.C.B. (2d) 193 (Alta C.A.); *R. v. Parrington* (1985), 20 C.C.C. (3d) 184 (Ont. C.A.). On the other hand, if the alibi is false, I am entitled to consider that evidence with all the other evidence in deciding whether the Crown has proved guilt beyond a reasonable doubt. See for example: *R.v. Lizotte*, [1951] S.C.R. 115.

Here, I accept that Ms. Alexander's credit card was stolen. I accept that a young man used the stolen credit card to purchase watches in Mr. Rai's jewellery store. Additionally, I accept that the accused left work at 1400 hours. On the evidence, the alibi that he was at his girlfriend mother's house at the time in question appears to be scripted. The alibi witnesses were vague, evasive and equivocal.

The accused appeared to be the source of their memory recollections and they all had an interest in the favourable outcome of the trial. Believing them wholly was difficult.

Nonetheless, this case, in the end, turns exclusively on the eyewitness identification of Mr. Rai. It is not a question of arranging similarities. Rather, the issue is whether there is proof beyond a reasonable doubt on the identification evidence that the accused committed the offence as charged. As was put by Belzil J.A., in *Atfield*, (A.J. No. 870) at para.6:

It goes without saying that correctness of identification must be decided by examining the whole of the evidence left on the scales at the end of the case and not by selectively picking and accepting those items of evidence which support correctness while disregarding contradictory evidence not specifically rejected for cause, which might leave correctness in doubt. The accused is entitled to the benefit of the most favorable interpretation of discrepancies in evidence which cannot otherwise be resolved. Such an examination in this case, conducted without first accepting or rejecting the correctness of identification but to determine if it is so, leads to the conclusion that the eye witnesses were mistaken, albeit honestly so, and compels the acquittal of the appellant.

In my opinion, this case falls within the foregoing principle.

Conclusion

In the result, I conclude and find that Mr. Rai's evidence of identification does not amount to a positive identification of the youth who was in his store. If anything, he was expressing an opinion as to the identity of the youth who presented the stolen credit card. It seems to me that it is not possible to elevate his statement that photograph No. 7 in Exhibit 4, "looks like this guy," into a positive identification of the accused as the youth who was in his store. On the evidence, I find that the conditions that could provide for a positive identification were limited, contradictory, conflicting and unreliable. Mere recognition without any supportive distinguishing characteristics is a risky foundation for a conviction. *R.v. Spatola* (1970) 10 C.R.N.S. 143 (Ont. C.A.).

When I assessed the witnesses as they testified I concluded that although not fully believable, the alibi evidence, in my opinion, did raise a reasonable doubt. Therefore, when I weigh and assess all the evidence I am not satisfied beyond a reasonable doubt of the identity of the youth who was in Mr. Rai's store and who presented the stolen credit card to purchase the watches. In the result I am not satisfied that the Crown has proved beyond a reasonable doubt that the accused, Christopher Church, unlawfully used a stolen credit card at the Renaissance Jewellery Store on January 21, 1998.

I find the accused not guilty as charged and I will enter an acquittal on the record.