IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R.*** v. ***MacKenzie,*** 2003 NSPC 051

Date: 20031021
Case No.(s): 1288983
Registry: Halifax

Between:

R.

v.

Daniel John MacKenzie

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally on October 21, 2003, in Halifax Nova Scotia
Counsel:	Eric R. Woodburn, for the Crown Brad G. Sarson, for the Defence

BY THE COURT

Introduction

[1] In the afternoon of March 20,2003 at about 1400 hours, Jennifer Barrett and her room mate, Tara Milner, arrived at their apartment at 5670 Ontario Street in the Halifax Regional Municipality. They observed that the entrance door that was previously secured was opened and they also heard noises of someone inside their apartment. On entering, they saw a man whom they did not know and who had no permission to be there, carrying a bag that they subsequently discovered contained some of their personal possessions. Following a brief verbal exchange the man exited the apartment with the bag and rapidly walked away. However, from their encounter and observations of the stranger, Barrett and Milner were able to describe him and the bag, that he had in his possession, to the police**.**

[2] The police prepared a photographic line-up and showed it to Barrett and Milner and they selected a photograph as that of the man whom they saw in their apartment. The accused was arrested and charged with the offence of break and enter and committing theft. However, at trial, the Crown neither showed the eyewitnesses the photographic line-up and Instruction sheet nor elicited from them specifically what photograph each selected, if at all, from the photographs they were shown**.** They, however, identified, in court, the accused as the man that was in their apartment on the day in question.

[3] The Crown attempted to prove the identity of the perpetrator as the accused through the police investigator who showed the photographs to the eyewitnesses, by seeking to have him relate, in his testimony, as the truth of the matter, what the eyewitnesses said and did, in his presence, when he showed them the photographic line-up. The defence objected to this approach submitting that it offended the rule against hearsay evidence. On the other hand, the Crown submitted that its approach was an exception to the hearsay rule in that it was to add cogency to an observed out of court act of identification.

Issue

[4] This case is therefore a consideration of the manner in which photographic line-up should be proved. It is also a consideration of trial fairness in the presentation of identification evidence in cases of extrajudicial identification.

Relevant Evidence and Findings of Facts

[5] On the evidence, I find that Barrett and Milner had a limited and stressful opportunity to observe the stranger whom they unexpectedly found in their apartment**.** Further, I accept and find that they were, however, able to give a description to the police that specified that the perpetrator was wearing a toque**,** had a salt and pepper beard, around five feet eight or nine inches, not a big person and was wearing a dark navy blue bomber jacket. I accept and find that a tracking dog team followed a human scent from the crime scene on Ontario Street to a multi-unit boarding house on Black Street which was nearby. Also, I accept and find that from the description received, the police thought that they knew who was the perpetrator and accordingly prepared a photographic line-up.

[6] Meanwhile, at Black Street, a tenant invited an officer, who was on surveillance duty, inside to the tenant's apartment where the officer encountered the accused and arrested him. I accept and find that the police took the accused to his own unit and when inside, took the opportunity to look around but neither saw nor seized anything that could have been connected to the reported crime. Additionally, I accept and find that the police conducted no formal search of the accused apartment or the place where he was arrested to determine whether anything fitting the description of the clothing, the bag or the goods reported to have been taken in the break and enter and theft were present. Further, I accept and find that when the police arrested the accused at about 1520 hours, he was not wearing the same clothing as was described by the eyewitnesses.

[7] The investigating officer showed the eyewitnesses the prepared photographic line-up. On their testimonies, I accept that the eyewitnesses selected a photograph of the person whom they said was in their apartment without their permission and who took some of their property, also without their permission.

Analysis

[8] Identity was the central issue at trial. Here, however, the fundamental difficulty with the identification procedure, in my view, was that the Crown adopted a strategy that was rife with hearsay problems. First, although they testified that the police showed them a photographic line-up, the victims, who actually saw the perpetrator and who ostensibly identified him from a photographic line-up, were never shown the photographs that they presumably saw and to positively identify them, under oath, as the photographic line-up that they, in fact, did see and on which they commented, if at all. Second, although they also testified that they made a selection, without specifying which, from the photographic line-up, they were never shown any Photographic Line-up Instruction sheet to verify their selection or any recorded comments that they might have made. Nevertheless, they both made in court identification of the accused as the perpetrator of the crime, as alleged.

[9] Thus, this was not the case where the witnesses had previously identified the perpetrator and now, in court, could not do so and it became necessary that proof by another witness that the

person identified by the witnesses was in the dock. See for example; ***R. v. Swanston*** (1982), 65 C.C.C.(2d) 453 (B.C.C.A.). Therefore, in my opinion, if the police testimony was being tendered, as submitted by the Crown, to prove the truth of the other witnesses' extrajudicial identification as independent evidence going toward identity of the accused, his testimony would offend the rule against hearsay evidence. If, however, it was not to be tendered to prove the truth of the other witnesses' extrajudicial identification but to add cogency to those witnesses' in court identification from a prior extrajudicial identification, in my view there would have been no hearsay problems.

[10] However, the difficulty here was that the victims established no nexus between any extrajudicial identification and their in court identification. The reliability and weight of their in court identification was diminished as they did not establish any linkage by describing any distinguishing features, apart from a goatee, between the accused and the man they saw in their apartment. They did not make any reference to what they ostensibly identified in the line-up and the accused. Therefore, I think that Constable Longley's testimony could not be received to prove the truth of the earlier identification when the victims themselves never spoke to nor identified any photograph to support an earlier identification. Further, as the eyewitnesses did testify and were competent witnesses, the Constable's testimony could not be admissible under the reformed approach to the hearsay rules although neither necessity nor reliability was expressly addressed by the Crown. See: ***R. v. Tat*** (1997), 117 C.C.C. (3d) 481 (Ont.C.A.).

[11] Moreover, I think that to accept this approach to photographic line-up evidence, as advanced by the Crown, would, in practical terms, deny the defence the right, at trial, to test on cross-examination, the reliability of the eyewitnesses' testimony on the important issue of earlier identification. Additionally, as the dynamics and the interplay between the eyewitnesses and the police during the initial identification procedure could not be assessed at trial, and as the police testimony is offered to prove the truth of the eyewitnesses' out of court statements, such testimony would have no probative value and the accused inability to cross-examine the eyewitnesses on this aspect of the case would, in my view, render the trial unfair.

[12] The Crown's view that the witnesses' previous out of court identification from a photographic line-up would add nothing to their testimony, under oath, as such testimony would violate the rule of prior consistent statements, in my view and respectfully, miss the point concerning the best evidence rule and the purpose of cross-examination of witnesses to test the reliability of their testimonies. Additionally, such testimony could have strengthened the value of the witnesses' in court identification by establishing that they did identify the person in the dock at a time when they had a fresh recollection that was not diminished by the passage of time.

[13] Therefore, I think that it is appropriate to point out that it is imperative in photographic line-up evidence for the Crown to adopt a fair approach. Consequently, I think that the following approach (adapting as a guide and reference point, John L. Gibson, ***Criminal Law Evidence,***

Practice and Procedure, Copr.© 2003 West Group, CRLEVIDPP 42(B)), would be a proper and acceptable way to lead such evidence:

1. A group of twelve photographs of the same sex, similar age, appearance and race are prepared for a "line-up," including the suspect and each photograph is numbered.

2. The witness (or witnesses) is given an Instruction to Photographic Line-up sheet that would inform them, in terms that explain that the suspect photograph may not be included, the witness (or witnesses) are not compelled to select a photograph but if they do, that they should note their selection, with any comments, on the sheet, sign it and return it to the officer.

3. The officer who arranged the line-up, the officer who dealt with the witness (or witnesses) and the witness (or witnesses) who identified the accused should be called to take the stand.

4. At trial, the officer who prepared the "line-up" should establish, in testimony, that:

    (i) he or she placed the suspect's photograph, based upon a description of the perpetrator of the crime given by an eye witness, with a number, in a line-up selection on a particular date;

    (ii) he or she identified the accused, by name, as the same person whose photograph was placed in the line-up;

    (iii) he or she placed in the line-up photographs of other persons who had similarities as to, sex, age, hair colour and length, race, and weight;

    (iv) he or she enters the photographs as exhibits.

5. The officer who dealt with the witness (or witnesses) should establish, in testimony, the following:

    (i) the date, time, and place where he showed the photographs to the witness;

    (ii) the reason why the photographs were shown to the witness;

    (iii) that the witness was given an Instruction to Photographic Line-up sheet that informed the witness in terms as set out in (2) above, and that he did not in any manner influence the selection by the witness;

    (iv) that the witness selected a photograph and wrote the number of the photograph selected and any comments made, on the Instruction to Photographic Line-up sheet;

(v) that the officer received, signed or initialled the Instruction sheet and kept it until brought to court;

(vi) point out the photograph selected by the witness and identify the accused, by name, as the same person whose photograph was selected, from the line-up, by the witness;

(vii) enter the Instruction sheet as an exhibit.

6. The witness (or witnesses) who were asked to view the photographic line-up should, in testimony, establish:

(i) that the witness attended to view or the police attended to show the photographs;

(ii) the date, time and place that the witness saw the line-up and that the line-up was for the purpose of identifying a perpetrator of the crime whom the witness had seen at a prior time and had given a description to the police, and that the case was presently before the court;

(iii) that the witness received an Instruction sheet, as in (2) above, which terms he or she understood or were explained to them by the police;

(iv) the number of photographs viewed in the line-up, whether each photograph had a number, and the manner in which the police showed the photographs;

(vi) that the witness recognized a person from the photographs shown and wrote the number of that photograph on the Instruction sheet with any comments;

(vii) the involvement of the person recognized in the incident (e.g., “he is the man I saw in my apartment.”)

(viii) whether the person whose photograph was selected is in court today;

(ix) that the person in court was the same person in the selected and was also the same person recognized, at an earlier time, at the crime scene;

(x) that the witness gave the Instruction sheet to the attending officer and now recognized the Instruction sheet (Exhibit) and also can identify, recognize and confirm the witness’s signature and handwriting on it.

[14] Further, I think that it is also important that the witness give specific evidence of distinguishing features sufficient to establish a nexus or linkage between the perpetrator and

the accused purportedly identified by the line-up photograph. See for example: ***R. v. Smith*** (1952), 103 C.C.C. 58 (Ont. C.A.),

[15] There was not one scintilla of circumstantial evidence connecting the accused with the crime. No physical evidence was found at the crime scene and no property from the crime was found in his possession or in his apartment when he was arrested. Therefore the case for the Crown rested on the alleged identification of the accused by Barrett and Milner.

[16] I am, however, reminded by defence counsel that eyewitnesses' identification can be unreliable and calls for considerable caution. Accordingly, I must instruct myself and bear in mind the guidelines with respect to caution when considering evidence of identification as determined in ***R. v. Turnbull et al*** (1976), 63 Cr. App. R. 132 as adopted and amplified in cases such as ***R. v. Sophonov (No.2)*** (1986), 25 C.C.C. (3d) 415 (Man. C.A.), ***R. v. Shermetta***, [1995] N.S.J. No. 195 (C.A.), ***R. v. Atwell*** (1983), 25 Alta. L.R. (2d) 97 (Alta. C.A.), and ***R. v. Nikolovski*** (1996), 111 C.C.C. (3d) 403 (S.C.C.). He posited that there was limited opportunity for the witnesses to see the accused; he was a total stranger to them; he had no distinguishing marks or facial characteristics and his in court identification was fraught with the usual dangers. There was of course the photographic line-up that was never addressed properly by the witnesses.

[17] On my assessment of the total evidence I found that the eyewitnesses to the crime did not adopt a prior statement as true so that the statement became part of their evidence at trial and is admitted for its truth. ***Deacon v. The King*** (1947), 89 C.C.C.1 (S.C.C.). See also: ***R. v. Campbell*** (1977), 38 C.C.C. (2d) 6 (Ont. C.A.). They were never shown the Instruction sheet to adopt any comments made and they were never shown the photographs to adopt the one that was their out of court selection to identify the accused.

[18] The Crown posited that Constable Longley's testimony would be an exception to the hearsay rule. I respectfully disagreed. The Crown appeared to be relying on the passage of Doherty J.A. in ***Tat*** at para 35 (pp.497-498):

> My review of the Canadian case law reveals two situations in which out-of-court statements of identification may be admitted. Firstly, prior statements identifying or describing the accused are admissible where the identifying witness identifies the accused at trial. The identifying witness can testify to prior descriptions given and prior identifications made. Others who heard the description and saw the identification may also be allowed to testify to the descriptions given and the identifications made by the identifying witness: R. v. Christie, [1914] A.C. 545 (H.L.), per Viscount Haldane at 551, per Lord Atkinson and Lord Parker at 554; R. v. Langille, supra; R. v. Birkby, supra, at 44; R. v. Alexander, supra, per Gibbs C.J. at 403-404, per Mason J. at 426-427 (H.C.); Cross and Tapper on Evidence, supra, at 307-308; Wigmore on Evidence, vol. IV, Chadbourne Revision (Toronto and Boston: Little, Brown

& Co., 1972) at pp. 237-78. In Langille, supra (the authority relied on by the trial judge), the identifying witnesses identified the accused at trial. Osborne J.A. held that prior statements of that witness identifying or describing the perpetrator were admissible. He said at p. 556:

> Evidence of descriptions given before an in-court identification, and particulars of an identification made before trial are admissible as original evidence going to the issue of identification.

[19] He continues at paras. 38 and 39:

> 38 Where a witness identifies the accused at trial, evidence of prior identifications made and prior descriptions given by that witness do not have a hearsay purpose. In his influential article, "Evidence of Past Identification", supra, Professor Libling explains the admissibility of the out-of-court statements where the witness makes an in-court identification in this way, at pp. 271-72:
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> > There is no hearsay problem with this kind of evidence. It is not admitted to prove the truth of the earlier identification, but to add cogency to the identification performed in court. As a general rule, a witness is not permitted to testify as to his own previous consistent statements because they add nothing to the in-court testimony. But evidence of previous identification strengthens the value of the identification in court by showing that the witness identified the accused before the sharpness of his recollection was dimmed by time. Furthermore it is important, in assessing the weight of the identification in Court, to know whether the identifying witness was able to identify the accused before he was aware that the accused was the person under suspicion by the police.
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> 39 I agree with Professor Libling's analysis. When such evidence is tendered, the trier of fact is not asked to accept the out-of-court statements as independent evidence of identification, but is told to look to the entirety of the identification process before deciding what weight should be given to the identifying witness' testimony. In this respect, evidence that the witness previously gave a description which matched the accused or previously selected the accused in a line-up serves no different evidentiary purpose than

> would evidence showing that the identifying witness had an ideal vantage point from which to observe the perpetrator of the offence. Both are factors which will assist in weighing the witness' in-court testimony.

[20] The difficulty here however is articulated at paras.36 and 37:

> 36 Clearly, the evidence of the prior descriptions given and the prior identifications made by the identifying witness constitute prior consistent statements made by that witness. Generally speaking, evidence that a witness made prior consistent statements is excluded as irrelevant and self-serving. However, where identification evidence is involved, it is the in-court identification of the accused which has little or no probative value standing alone. The probative force of identification evidence is best measured by a consideration of the entire identification process which culminates with an in-court identification: e.g. R. v. Langille, supra, at 555; DiCarlo v. United States, 6 F.2d 364 (2d cir. 1925) at 369, per Hough J., concurring; Clemons v. United States, 408 F.2d 1230 (D.C. cir. 1968) at 1243. The central importance of the pre-trial identification process in the assessment of the weight to be given to identification evidence is apparent upon a review of cases which have considered the reasonableness of verdicts based upon identification evidence: e.g. see R. v. Miaponoose (1996), 110 C.C.C. (3d) 445 (Ont. C.A.).
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> 37 If a witness identifies an accused at trial, evidence of previous identifications made and descriptions given is admissible to allow the trier of fact to make an informed determination of the probative value of the purported identification. The trier of fact will consider the entirety of the identification process as revealed by the evidence before deciding what weight should be given to the identification made by the identifying witness. Evidence of the circumstances surrounding any prior identifications and the details of prior descriptions given will be central to that assessment. [FN4]
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> [FN4] Trial judges, of course, retain a discretion to exclude evidence of prior identification where its prejudicial effect outweighs its probative value: R. v. C. (F.) (1996), 104 C.C.C. (3d) 461 (Ont C.A.) at 477.

[21] Thus, on my assessment of the total identification process and on the above cited authorities, I do not think that this was even a situation where the Constable's purported evidence could be offered to show that the victims had previously identified the accused in the photographic line-up. In my opinion, the victims themselves did not connect the accused to the photographic line-up and they did not identify him as the person previously identified by

them in a particular photograph in the line-up. Consequently, in my view, there were insufficient descriptors of the accused on the issue of prior identification for me to make an informed determination of the probative value of the in court identification.

Conclusion

[22] I bear in mind that where the correctness of an identification is challenged and that the guilt of the accused depends wholly on the correctness of that identification there are many instances, as stated by many authorities, where responsible witnesses whose honesty was not in question and who had ample opportunities to make an observation have made positive identifications that were subsequently prove to be erroneous. See: ***R. v. Sutton,*** [1970] 3 C.C.C.152 (Ont. C.A.) approving the charge in ***The People v. Casey (No.2)***, [1963] I.R.33.

[23] Here, given my assessment of the total identification process, I was not persuaded by the strength of the in court identification of the accused by the witness. In my view, no sufficient linkage was established between the accused and any purported prior identification made or prior descriptions given by the identifying witnesses. They made no references to any characteristic which they could describe and they did not testify as to what about the accused impressed them or caused them to remember. They merely said in response to the question whether the person was in court, "Yes." Additionally, there was no circumstantial evidence linking the accused to the offence. Consequently, I found the in court identification to have little or no weight and, in the end, it was unreliable..

[24] On the view of the law which I take, I conclude that on the evidence before me it would be unsafe to find the accused guilty as charged. In other words, on the evidence before me, I am not satisfied that the Crown has discharged its duty for me to conclude beyond a reasonable doubt that the accused is guilty as charged. Accordingly, I find him not guilty as charged and will enter an acquittal on the record.