

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacPhee*, 2003 NSPC 055

Date: 20031112
Case No.(s): 1335310
1335312
Registry: Halifax

Between:

R.

v.

James Robert MacPhee

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

Heard: Decision on rendered orally on November 12, 2003,
in Halifax Nova Scotia

Counsel: Daniel A. MacRury, for the Crown
Brad G. Sarson, for the Defence

BY THE COURT

Introduction and Summary of Relevant Evidence

- [1]** At about supper time on July 22, 2003 when employees of the Kentucky Fried Chicken fast food outlet in Fairview, Halifax Regional Municipality were busy accepting orders from their customers, a man handed Crystal Cooper, the cashier, a note demanding money. Realizing that she was being robbed, she obtained the keys to the cash register from her supervisor, opened it, put the money into a cup and gave it to the man who then quickly left the restaurant. Because of what they considered being the odd behaviour of the man two other customers, Wallace Dominix and Lorraine Miles, paid some attention to what he was doing but were not fully aware that a robbery was in progress. Except for the manager, Cathy Comar, who was alerted when Cooper received the keys, and who made it a point to observe the man's face, the other employees, Selena Snow and Colleen Zwicker, paid no particular attention to what was happening as they were not aware that a robbery was in progress.
- [2]** During the robbery, Cooper thought that the man was holding concealed under his shirt a gun as she saw something that looked like a trigger guard. The police arrived on the scene and obtained a security video that showed the crime when in progress. However, that video did not display any facial views of the perpetrator. Nonetheless, several days later while investigating another incident involving the use of a firearm, Constable Gary Gallant detained a man for that occurrence. But, in the Constable's view, given certain characteristics of this incidence with the robbery, such as the proximity of place and time, the man's possession of a gun-like object, his height, weight, size, short hair and wide nose, descriptions that the Constable had received from eyewitnesses of the robbery and from his own recollection of viewing the video recording of the robbery, the Constable believed that he had in custody the robbery perpetrator.
- [3]** Informing the detainee that he suspected him to be the robber the Constable requested the robbery investigator, Constable Michael Cecchetto, to be put together a photographic lineup. Compiling a photographic lineup, Constable Cecchetto showed it to the robbery eyewitnesses but only one, Cathy Comar, was 100 percent sure that the picture she selected was that of the perpetrator. The others were either unsure or unable to select any photograph. In any event, the police have charged the accused, James Robert MacPhee, with the robbery, breaches of his Undertaking, for failing to reside at a specified residence and failing to "keep the peace and be of good behaviour."

Issue

- [4] As the Crown's case essentially relies upon the testimony of Cathy Comar and in light of the other eyewitnesses' testimony, this case is a consideration of identification evidence and whether the Crown has proved beyond a reasonable doubt that the accused was the person who robbed Crystal Cooper.

Findings and Analysis

- [5] The resolution of this case turns upon the issue of the identification of the robber. I accept and find that Lorraine Miles, who was standing behind the man in the store did not see his face. However, she described him as wearing a ball cap and sunglasses. Additionally, he was wearing a scarf around his neck, sneakers and socks, his head was shaved with a row of sores, and his right hand showed an area of dried blood. The police did not show her the photographic lineup.
- [6] Cathy Comar's description of the robber to the police was that he was a white male about twenty-two years old, five feet six inches tall and slim built. He was wearing an aqua-blue sweater and tinted sunglasses through which she could see his eyes which were dark. Further, he was closely shaven with a goatee and having dark-brown hair that was cut short. Although he looked familiar, he could have been anyone who came to the restaurant but when the police showed her the photographic lineup she selected No. 8, that of the accused, and remarked that she was one hundred percent sure that he was the person who robbed the restaurant. She testified that what stirred her memory was the shape of his eyes and the shape of his face, the cheek bones and the jaw line. Further, on her in court identification, she remarked that the accused eyes and shape of face was similar, and his smooth face and slight built was also similar to that of the perpetrator. Additionally, the person shown on the store security video tape was the same person in the photo lineup and the same person in court.
- [7] Selena Snow's description to the police was that the robber was skinny and was wearing a hat and black sunglasses. She could not remember if he had any facial hairs. Although she did not get a close look of his face when the police showed her the lineup photographs, she was undecided between No. 5 and No. 8 but selected No. 8. Her remarks were that if she could "picture him with a hat and sunglasses and a white thing around his neck it looks like him." She further remarked that she was only 50 percent sure that he was the person in the restaurant.
- [8] When Colleen Zwicker described the robber to the police, she informed them that he was a tall thin young man about five feet ten inches to six feet tall and who wore a baseball hat. His hair was light and he had no facial hair. She had some difficulty selecting a photograph but picked No. 8 and remarked that she was only 30 percent certain. Additionally, she described that his pointed chin, hollowed cheekbones and thin lips attracted her attention. I, however, formed the impression that she was describing the photograph as she was

testifying, in court, rather than recalling what she described extrajudicially.

- [9] The description that Crystal Cooper gave to the police was that the robber was between age twenty and twenty-five years old, five feet five inches tall and wore a light blue shirt with a scarf, which colour she could not recall, around his neck. He also wore green coloured sunglasses through which she could see his eyes which were light in colour. He was scruffy looking, skinny with a long face with a few days' growth of facial hair. When the police showed her the lineup, she was unable to select a photograph.
- [10] Wallace Dominix description was that the robber wore a green T-shirt and was tall and skinny. He wore a ball cap with something white around his neck and he had no facial hair. Although he saw the man face on, he took no notice and was unable to select any photograph from the lineup. However, he was shown a more recent photograph of the accused that was never shown to or included in the other lineups displayed to the other eyewitnesses, and although, in my view, it was highly irregular, no issues, in this case, turn upon this point.
- [11] There is no dispute that the restaurant was robbed by a skinny young man who wore sunglasses. Six eyewitnesses who had an opportunity to see him have testified and gave those common features. These eyewitnesses however varied on his height, detailed facial characteristics, whether or not he had any facial hair, his hair colour and whether he even wore a hat. The impartial videotape recording did not show at any time the robber's face so I am left with what the eyewitnesses can recall. Unfortunately, none of them, except Comar is absolutely positive that she can identify the robber from the photo lineup and the video and conclude that the accused was the robber. Consequently, Comer's testimony must be considered and weighed in light of the total evidence as to whether her testimony of identification is credible and reliable.
- [12] The Crown submitted that Comar had a clear and direct view of the robber for almost one full minute. She gave a description in which she said that she could see his eyes. Three days later when she viewed a photo lineup she did without hesitation pick the accused's photograph. At the time of the robbery she was making a conscious effort to remember his face so that she could later identify him.
- [13] On the other hand defence counsel submitted that I should be cautious in accepting, without doubt, Comar's testimony. He pointed out that Cooper who had the same period of time to observe the robber as did Comar and who could also see his eyes, described them as light in colour compared to Comar's assertion that they were dark. Concerning the identification by Snow, the video showed that she apparently did not know what was happening and was going about her duties serving customers and not paying any attention and had no clue of the robbery until it was all over. As to the description made by Zwicker, she only had a small period of time to observe anything and she was describing the picture that was before her in court rather than recalling an actual memory of the robber's features.

- [14] The defence also pointed out that Dominix was under the least stress and that he saw the most recent photograph of the accused after the incident and still could not identify him as the person who was in the restaurant. Additionally, I should take care and consider that Comar's 100 percent certainty may not necessarily be 100 percent accuracy.
- [15] I am 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. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.) Further, I must bear in mind and instruct myself on the guidelines with respect to caution when considering evidence of identification. *R. v. Sophonov* (No.2) (1986), 25 C.C.C. (3d) 415 (Man. C.A.) (leave to appeal to the S.C.C. refused April 22, 1986) at 438.
- [16] Here, I find that Comar had a limited opportunity to view the robber. It was a stressful situation. The man was a stranger and ordinary looking with no distinguishing facial marks. She stated that he had a goatee while others who had similar opportunity to see his face described him as having no facial hair or scruffy looking with facial growth. She commented on the shape of the shape of his eyes and the shape of his face, the cheek bones and the jaw line without being specific what shape arrested her memory. Was his face long, round or oval? Was his eyes slanted, small, full or round? Besides being light or dark, which are hues or shades of some colour, what really was the colour of his eyes?
- [17] When she asserted that she was 100 percent sure of her identification of the stranger that too, in my view, could be fraught with dangers. It is common, in our human experience, for us to greet someone whom we felt sure that we know only, to our embarrassment, to discover that the person whom we were so sure that we knew turn out to be a total stranger. Thus, it is reasonable to conclude that mere recognition without supportive distinguishing marks is a risky foundation for a conviction. See, *R. v. Spatola* (1970), 10 C.R.N.S. 143 (Ont.C.A.).
- [18] Here, I find and conclude that there were too many variants in the crucial descriptors of the robber given by the eye witnesses. Further, I think that with identification evidence, it is not a question of adding up similarities or subtracting dissimilarities but whether there is proof beyond a reasonable doubt. See, *R. v. Atfield* (1983), 25 Alta.L.R. (2d) 97 (C.A.), at 100. Moreover, I think that as the identity of a person is a mere opinion based upon what an eyewitness remembers to be the outstanding features of the offender it is critical that the witness state unequivocally and clearly and not in very vague generalities, as here, what were the outstanding features, at the time of the event, that impressed her memory. See, *R. v. Smith* (1952), 103 C.C.C. 58 (Ont.C.A.), *R. v. Brown and Angus* (1951), 91 C.C.C. 141 (B.C.C.A.).
- [19] In my view there was no circumstantial evidence that rationally and conclusively enmeshed the accused. No traces of his person was found at the crime scene. No clothing or apparel that matched that of the robber was found in his possession. Neither was any item seized

from him, on the second occurrence, shown to the eyewitnesses of the robbery for possible identification. Thus, I think that although Comar might have had confidence in her identifying the robber, in my view, there were frailties in her description of the perpetrator. I find that her description was too vague where certitude was essential. When I weighed this factor with the other evidence, it was not as positive an identification as it appeared to be at first blush.

- [20] Consequently, on my consideration and assessment of the total evidence, I find and conclude that, on the evidence which I accept, Comar's description of the robber was a mere recognition without any supportive distinguishing marks, an assertion of resemblances rather than a positive identification. Further, on the total evidence of identification, on which I have commented, in my opinion, Comar's in court identification of the accused as the robber is unreliable. I therefore find that it would be unsafe for me to conclude beyond a reasonable doubt that she was correct in her identification of the accused as the robber. At the end of the Crown's case on a motion by the defence the offence of failing to reside at a specified address was dismissed for want of sufficient evidence.

Conclusion

- [21] On the comments and the analysis that I have made and on the authorities to which I have referred, I am not satisfied that the evidence of the identification of James Robert MacPhee as responsible for the robbery has been proved beyond a reasonable doubt. I find him not guilty as charged and will enter an acquittal on the record. In light of this finding the offence of failing to keep the peace and be of good behaviour cannot succeed. Accordingly, I find him not guilty as charged and will enter an acquittal on the record.