

CITATION: R. v. Mey, 2011 ONCA 288
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COURT OF APPEAL FOR ONTARIO

Doherty, LaForme and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Nirorth Mey

Appellant

M. Halfyard, for the appellant

Matthew Asma, for the respondent

Heard: March 22, 2011

On appeal from the decision of the summary conviction appeal court dated March 27, 2009 by Justice Michael H. Tulloch of the Superior Court of Justice, dismissing an appeal from the conviction entered on December 4, 2006, by Justice Richard J. LeDressay of the Ontario Court of Justice.

Epstein J.A.:

A. OVERVIEW

[1] This is an identification case. It involves two assaults that occurred late one evening in, and just outside of, a crowded bar. Crown witnesses pointed out the appellant as the perpetrator. The appellant denied this, identified another person, named Mary San,

as the one who committed the assaults, and called evidence to support her position. The trial judge rejected the defence evidence and concluded that the Crown had proved that the appellant had committed both assaults.

[2] The appellant was convicted of assault and assault with a weapon and sentenced to six months in custody.

[3] Unfortunately, the trial judge did not see a videotape of the appellant's booking at the police station on the night of the altercations. The appellant appeared in the videotape dressed as she had been at the time of the fight in the bar. Her appearance in the videotape was consistent with her trial testimony describing what she was wearing that night and was, in at least one material aspect, inconsistent with the testimony of a key Crown identification witness.

[4] On appeal to the summary conviction appeal court, the appellant sought to introduce the videotape as fresh evidence. The Crown conceded that defence counsel at trial had not requested production of the videotape prior to trial and that he had therefore failed to provide the appellant with competent representation. The Crown argued, however, that counsel's ineffective assistance at trial did not result in a miscarriage of justice as there was no reasonable possibility that the videotape could have affected the verdicts. The summary conviction appeal judge accepted this submission and dismissed the conviction appeal. He allowed the sentence appeal and imposed a conditional sentence.

[5] We are asked to grant leave to appeal the decision of the summary conviction appeal judge refusing to admit the fresh evidence. The appellant contends that on a proper application of the law in *R. v. Palmer*, [1980] 1 S.C.R. 759, the videotape should have been admitted as fresh evidence, and a new trial should have been ordered.

[6] I would grant leave to appeal. First, given it is conceded that the appellant did not receive effective assistance of counsel at trial, the issue involving the fresh evidence goes directly and fundamentally to the proper administration of justice. Second, in accepting the Crown's argument that the fresh evidence could not reasonably have affected the result at trial, the summary conviction appeal court judge was not reviewing a decision made at trial, but was making a first-instance determination based on his assessment of the potential impact of the videotape on the trial evidence. Consequently, unlike most summary conviction appeals, this court is not asked to enter upon a second review of a trial decision. Furthermore, as my reasons will demonstrate, there is substantial merit to this ground of appeal.

B. FACTS

[7] On April 17, 2005 at approximately 1:00 a.m., the first complainant, Christina Cravero, was seriously injured upon being struck on the face with a beer bottle while on the dance floor of a crowded Burlington bar. Immediately, someone in the bar spoke to Chad Stephenson, who was working as a bouncer that night, and pointed out a young Asian woman as the assailant. Mr. Stephenson escorted the woman who was identified to him, outside of the bar. There, Mr. Stephenson was confronted by several men. During

the confrontation, the woman Mr. Stephenson believed to be responsible for the assault on Ms. Cravero, fled. Mr. Stephenson pursued her and was able to catch up with her because, according to his testimony, she was wearing high-heeled shoes and therefore could not run quickly. Stephenson struggled with the woman and she again managed to escape his grasp – this time by biting his arm for approximately ten seconds.

[8] Mr. Stephenson testified that his assailant was then picked up by two men and carried toward the bar's parking lot. Sameth Sey, a witness who met the appellant for the first time on the night of the offences, followed Mr. Stephenson as he struggled with the assailant. Mr. Sey gave evidence that the attacker was carried towards the parking lot and added that she and those assisting her in her escape drove away in a black car.

[9] Jim Goodwin, another bouncer at the bar, saw Mr. Stephenson's second struggle with the assailant. He testified that the assailant ran from Mr. Stephenson to a red Honda in which she then left the premises, contradicting Mr. Stephenson's evidence that she was carried away and Mr. Sey's evidence that the car she got into was black. Mr. Goodwin noted the make and license plate number of the car and passed this information on to the police.

[10] The red Honda was stopped at a R.I.D.E. spot check a short time later. The appellant was discovered in the front passenger seat of the car and arrested.

C. THE TRIAL DECISION

[11] The following is a brief summary of the identification evidence the trial judge reviewed in his reasons as being relevant to whether the Crown had established the appellant as the perpetrator of the two assaults.

[12] Following her arrest, the police brought the appellant back to the bar. Meghan Gibbons, a friend of Ms. Cravero, confirmed that the appellant was the individual who had attacked Ms. Cravero on the dance floor. In his evidence, Mr. Goodwin also claimed that he identified the appellant to the police as the woman who had escaped Mr. Stephenson's grasp after biting him, although the police officers present at the scene denied that he did so.

[13] Mr. Goodwin had earlier provided the police with a description of the attacker. He described her as a skinny Asian female between 19 and 23 years old, 5'9", and 120 pounds, with long dark hair and wearing a black shirt. At trial, Mr. Goodwin again described her as an Asian female between 100 and 120 pounds with long dark hair. He was unable to describe the clothes she was wearing on the night of the assault but did provide an in-court identification.

[14] Mr. Stephenson testified that the assailant was of average height with a slim build and longer, dark hair. After providing this description, he refreshed his memory by referring to the statement he had given to the police on the night of the assault and added that the perpetrator was Asian and was wearing a tank-top, jeans and high-heeled shoes. At trial, Stephenson also identified the appellant as the perpetrator.

[15] In her evidence, Ms. Gibbons confirmed her earlier description of the assailant as “a really pretty Asian girl” with long dark hair and big eyes wearing a dark shirt, and added that she was approximately 21 to 22 years old, 5’5” tall with bronze highlights in her hair. She also specified that the black shirt was a sleeveless halter-top.

[16] Ms. Cravero twice described the assailant to police prior to trial as a 20-25 year old Asian female with long, brown hair and a slim build wearing a dark-coloured sleeveless shirt. At trial, she described the perpetrator in more detail, noting that she was 5’5” to 5’6” with straight, mid-chest length hair with orange, bronze or brown-coloured streaks and bigger eyes.

[17] At trial, both Ms. Cravero and Ms. Gibbons identified the appellant as the perpetrator.

[18] The defence called four witnesses in order to bolster its position that the real assailant was Ms. San.

[19] Mr. Sey, who, as mentioned, met the appellant for the first time on the night of the incident, claimed that he had witnessed the attack and that the appellant had not been involved. He testified that the real perpetrator was a 5’6” Asian girl with black hair wearing an all black dress and that it was this woman who struggled with Mr. Stephenson before escaping in a black car.

[20] The trial judge rejected Mr. Sey’s evidence for several reasons. First, Mr. Sey testified that the appellant’s hair was blonde on the night of the incident, which the trial

judge concluded was inconsistent with a photograph of the appellant that was taken three weeks later. Second, his explanation that he saw the complainant and the assailant apprehended by bouncers on the stage of the bar immediately following the attack contradicted the evidence of other witnesses that the assailant was apprehended near the door. Third, after claiming during his examination in chief that he could identify only the appellant in a photograph of four women, he admitted during cross-examination that he also recognized Ms. San, but offered no explanation for this change in evidence. Finally, despite knowing Ms. San for eight months prior to the trial, he testified that he could not recall if she was at the bar on the night of the incident or if she was the woman he saw struggling with Mr. Goodwin. The trial judge concluded that Mr. Sey was tailoring his evidence to assist the appellant.

[21] The second defence witness was the appellant. She testified that Ms. San was at the bar that night and that she saw her strike Ms. Cravero with a beer bottle. She added that she later witnessed the struggle between a bouncer and Ms. San and heard the bouncer scream “she’s biting me.”

[22] The trial judge dismissed the appellant’s evidence as not credible. He noted that her evidence that she had not seen Ms. San since the day after the attack contradicted that of her boyfriend, Thoeun Thack, who testified that the appellant had seen Ms. San on several occasions since that night. He identified the appellant’s failure to advise the prosecution until the beginning of the trial that Ms. San was the assailant as an additional factor negatively affecting her credibility. The trial judge further found that the

appellant's testimony that she had blonde hair on the night of the incident was contrary to the evidence. This evidence included a photograph taken several weeks later, the appellant's denial that she had coloured her hair between the incident and the day the photograph was taken, a second photograph taken several weeks before the incident, the appellant's hair colour at the time of trial, and the description of her hair in the police arrest report.

[23] The third defence witness was Mr. Thack. He was also at the bar on the night of the incident and testified that the appellant told him that someone had been hit with a beer bottle. He explained that he accompanied the appellant outside where he saw Ms. San struggling with a bouncer.

[24] His evidence was also rejected for several reasons. First, the trial judge noted his several charges for drug offences and failure to appear for court as well as his "obvious bias" given his relationship with the appellant. Second, his evidence that Ms. San was struggling with the larger of the two bouncers who testified for the Crown (Mr. Goodwin) contradicts the evidence of the other witnesses, which clearly established that it was Mr. Stephenson. Finally, his evidence that the appellant was in the back seat of the red Honda and that Ms. San had already escaped the bouncer's grasp before he approached the bouncer, contradicted the testimony of the appellant that she was in the front seat of the car and that Mr. Thack approached the bouncer in an attempt to free Ms. San.

[25] The defence also called Jamie Reid, the D.J. at the bar on the night of the incident. He testified that, following the assault, which he admitted he did not witness, he saw a man who was not a bouncer bear hugging a young woman near the front door. He could not describe the woman or confirm that she was in any way involved in the assault. The trial judge found this witness credible but of no value.

[26] The trial judge did not accept the defence evidence. He further found that it did not raise a reasonable doubt.

[27] On the basis of the Crown's evidence, the trial judge found that the same person attacked both Mr. Stephenson and Ms. Cravero and that the assailant was either the appellant or Ms. San. The trial judge then concluded that, having regard to all of the identification evidence, the Crown has established that the appellant was the perpetrator of both offences.

D. THE SUMMARY CONVICTION APPEAL DECISION

[28] Having decided not to admit the fresh evidence, the summary conviction appeal judge, in lengthy reasons, dismissed the appeal against conviction. He rejected the argument that the verdict was unreasonable. He also rejected the argument that the trial judge erred by placing an evidentiary burden on the appellant to prove that Ms. San was the perpetrator. While he found that the trial judge erred in drawing a negative inference from the fact that the appellant failed to identify Ms. San as the perpetrator prior to trial, the summary conviction appeal judge concluded that this did not affect the result, given

the other factors that supported the trial judge's conclusion that the Crown had made out its case against the appellant.

E. ISSUES

[29] The main issue on appeal is the consequence of the summary conviction appeal judge's refusal to admit the fresh evidence. The appellant also argues that the summary conviction appeal judge erred by unilaterally relying on the *curative proviso* after finding that the trial judge made a legal error. This error is conceded by the Crown.

[30] Given that I would allow the appeal on the basis of the decision by the summary conviction appeal court not to accept the fresh evidence, it is not necessary to deal with the *proviso* argument.

F. ANALYSIS

[31] I must first deal with the manner in which the summary conviction appeal judge disposed of the motion to introduce fresh evidence.

[32] After referring to the fresh evidence as "problematic" as it related to the identification evidence provided by Mr. Stevenson, the summary conviction appeal judge simply concluded that the proposed evidence was not sufficiently cogent to warrant admission.

[33] In my view, the treatment the summary conviction appeal judge gave to his assessment of the potential probative value of the fresh evidence eliminates any basis upon which deference can be shown to his assessment.

[34] There are a number of ways in which the appellant was prejudiced by the fact that the trial judge did not see the booking videotape. Put another way, there are a number of ways in which the videotape evidence could have affected the verdicts.

[35] First, the fresh evidence must be viewed in the light of the fact that the Crown had not presented a strong case. The evidence relevant to the only issue for the trial judge's determination, namely, identification, had many of the well-known frailties that such evidence carries with it. Some of the evidence involved cross-racial identification. Some involved in-dock identification. There were significant inconsistencies among the evidence of the Crown witnesses, particularly the two bouncers. The eyewitness evidence was provided by witnesses asked to recall events that took place suddenly in a dark crowded bar over a short period of time. The identification evidence was also tainted by the production of the suspect, sitting alone in the back of a police car, to two identification witnesses at the scene of the offences.

[36] Second, the fresh evidence potentially undermines the evidence of Mr. Stephenson, the only Crown witness who gave evidence linking his assailant to the person who attacked Ms. Cravero.

[37] Mr. Stephenson's testimony that the perpetrator wore high-heeled shoes was a central part of his evidence as the footwear explained why he was able to catch up with her after she broke free of his grasp the first time and why she was picked up and carried towards the back parking lot after escaping from him the second time. The videotape the

appellant sought to admit as fresh evidence, which proves that the appellant wore flat-soled boots on the night of the assaults, is clearly inconsistent with Mr. Stephenson's description, particularly his assertion that the appellant was wearing high-heeled shoes, an aspect of his description that was an integral part of the narrative. As such, the fresh evidence is highly relevant to the reliability of Mr. Stephenson's identification evidence.

[38] In my view, this conclusion alone is sufficient to warrant the admission of the fresh evidence.

[39] However, I go on to note the potential impact the fresh evidence could have on the appellant's credibility. At trial, the appellant gave a description of what she was wearing at the bar. This description was entirely consistent with the videotape, evidence that she did not know existed at the time of her testimony. The independent corroboration of the appellant's evidence in this respect could only help bolster her credibility.

G. DISPOSITION

[40] For these reasons, I would grant leave to appeal the decision of the summary conviction appeal judge. I would allow the appeal from that decision, set aside the conviction and direct a new trial.

RELEASED:

"DD"
"APR 12 2011"

"Gloria Epstein J.A."
"I agree Doherty J.A."
"I agree H.S. LaForme J.A."