

Case Name:

R. v. [REDACTED]

**Between
Her Majesty the Queen, and**

[REDACTED]

[2014] O.J. No. 6600

Ontario Superior Court of Justice
Toronto, Ontario

J.B. McMahon J.

Heard: July 2, 2014.

Oral judgment: July 2, 2014.

(35 paras.)

Counsel:

G. Kim, Esq., Counsel for the Crown.

A. Stastny, Esq., Counsel for the Accused.

REASONS FOR JUDGMENT

1 J.B. McMAHON J. (orally):-- The accused, Mr. [REDACTED], proceeded before me judge alone on a two Count indictment. Robbery with a Firearm and Robbery with an Imitation Firearm. At the end of the Crown's case, the Crown, Mr. Kim, fairly conceded there was insufficient evidence to satisfy the Court beyond a reasonable doubt on the Robbery with a Firearm Count, and invited me to enter an acquittal, which I have done. The trial proceeded on the one Count of Robbery with an Imitation Firearm.

2 The Crown's case turns on two witnesses, the complainant, Mr. [REDACTED], and his sister, Ms. [REDACTED]

It was Mr. [REDACTED] evidence on the evening of November 10th, 2012, he attended a party at his sister's boyfriend's apartment on the 10th floor of 10 [REDACTED]. Later that evening after consuming some drinks and smoking a joint with another individual he had a brief altercation with the accused at the party over allegedly touching the accused's girlfriend's buttocks. Mr. [REDACTED] left the apartment on his evidence, went downstairs to leave when he was accosted by five men. It was his evidence that one of the five men was the accused who he knew from his interaction from the party upstairs and further had seen him on one prior occasion at another party a few months before.

3 Mr. [REDACTED] also described the accused as only one of the men and there was a young man who he knew as Tibo (ph) was the person on the directions of Mr. [REDACTED] that searched him at gunpoint. Tibo was a young person the complainant knew by name and had met on several prior occasions in the past, the last time a couple of years before. On his evidence, Tibo put the gun to his stomach and took over \$200.00 in cash from Mr. [REDACTED]. After the robbery Mr. [REDACTED] returned to his sister's apartment on the [REDACTED] floor and called 911. He did not know Mr. [REDACTED] by name and simply said to his sister he had been robbed by the tall guy that he had seen at the earlier party and the sister provided the name of Mr. [REDACTED], he then passed it on to the police. The police arrived shortly after the 911 call at 4:05 in the morning and he and his sister met them in the apartment lobby. He then gave a written statement to the police, identifying the accused as being the man who ordered Tibo to search him, and it was Tibo who pulled the gun on him and robbed him.

4 The complainant's sister would not provide any statement or cooperate with police. Mr. [REDACTED] in his statement and in his video statement the next day, provided descriptions of several of the men, including the man he identified as Mr. [REDACTED].

5 On November 11th, the next morning, it is an admitted fact that Mr. [REDACTED] ran into Mr. [REDACTED] in the lobby of the apartment building and stabbed him in the belief that that was the man who had robbed him the night before. Mr. [REDACTED] now himself facing an aggravated assault charge and other charges based on the stabbing of Mr. [REDACTED], the person he believes committed the robbery.

6 At trial, Mr. [REDACTED] positively identified Mr. [REDACTED] as the person who robbed him. No line up involving a photo of Mr. [REDACTED] was ever conducted because it was believed at the time this was a case of recognition identity as opposed to stranger identification.

7 Before examining the evidence of Mr. [REDACTED] and his sister, I will first consider the evidence called by the defence, Ms. [REDACTED]. She provided two key pieces of evidence. One, she was with her son at home from around 2:30 a.m. to the next morning. If the robbery took place in this period of time, she would be his alibi. And two, while at the party on the 10th floor with her son and family, the family never went into the bedroom and displayed money as described by [REDACTED] in her evidence.

8 In oral argument, Mr. Statsny for the accused, fairly conceded I should put little weight in her evidence as to the alibi as she was not sure of her times. I agree completely. Further her alibi

disclosed a few weeks ago is inconsistent with her initial statement to the police as to how long she was home before the robbery was reported by the complainant.

9 I remind myself, simply because I reject her evidence as to alibi, I can draw no adverse inference against the accused by doing so. Further, the rejection of the alibi evidence does not shift the burden of proof from the Crown.

10 The second key piece of her evidence is she denies that there was ever a family meeting at the 10th floor party where money was displayed in a bedroom. This was contrary to the evidence of ██████████ who provided the information of such meeting for the first time in a statement to the police when subpoenaed here at trial.

11 In assessing Ms. Alexander's evidence I recognize she has a vested interest in the outcome of her son's trial. I found her not to be an impressive witness. She was both confrontational and evasive. She continued to interrupt the questions of Mr. Kim in cross-examination. Her evidence as to time was all over the map. I do not find she was a reliable witness. At the end of the day on her evidence, I am not sure whether she is telling me the truth about no meeting taking place. Simply put, I cannot accept her evidence.

12 In rejecting her evidence as to alibi and not being sure about whether she was present for any family meeting I must carefully assess the evidence of both Mr. ██████████ and his sister, ██████████. In assessing this case and their evidence I instruct myself on the frailties of identification evidence and the fact that honest but mistaken identification witnesses have led to wrongful convictions. Wrongful convictions have also been registered in cases of apparent recognition identification. I must carefully examine all the circumstances surrounded the purported identification as well as whether there is other evidence to support the identification of Mr. ██████████ as the robber as described by Mr. ██████████.

13 In assessing Mr. ██████████ evidence, I have absolutely no doubt that he was robbed at gunpoint that evening, by several men. I have no doubt that he honestly believes that the accused, Mr. ██████████, is one of the robbers. This is the reason why he stabbed the accused the next morning and has been subsequently charged. The issue however is whether the evidence of ██████████ and his sister, ██████████ is sufficiently reliable to prove the Crown's case beyond a reasonable doubt. There are several aspects of Mr. ██████████ evidence that I find troubling in assessing his reliability and purported identification of Mr. ██████████ as the person directing the robbery.

14 One, Mr. ██████████ had seen the accused on only two prior occasions, earlier that evening and at another party several months before. Mr. ██████████ indicated, however, that the man who put the gun to his stomach he knew by the name of Tibo. On his evidence he had met Tibo on numerous occasions. Mr. ██████████ had a far better ability to recognize the gunman due to the numerous prior interactions between himself and the man he calls Tibo. He acknowledged this in cross-examination.

15 It is an admitted fact that after the preliminary hearing, Mr. [REDACTED] positively identified from a sequential line-up properly conducted by the police, the man he believed was the actual gunman, Tibo. When asked by the officer how certain he was on a scale of one to 1ten, one being not certain and ten being absolute certain, Mr. [REDACTED] said it was ten. Mr. [REDACTED] absolute identification of the gunman turned out to be a case of mistaken identification. The police have now eliminated the person that Mr. [REDACTED] is certain was the gunman as a potential suspect in this case. Mr. [REDACTED] was an honest but mistaken witness in relation to this purported recognition identification.

16 I recognize that he had not seen Tibo in a couple of years and he had seen Mr. [REDACTED] earlier in the summer and minutes before, during which they had a dispute at the party. The fact remains that Mr. [REDACTED] wrongfully identified the person who he knew by name and had seen several times before, albeit two years before. I find this fact significantly impacts on my assessment of the reliability of his identification of Mr. [REDACTED]

17 Two, Mr. [REDACTED] has admitted he was somewhat high from drinking and smoking marijuana that evening when he was robbed. His ability was somewhat impaired on his own admission by the consumption of drugs and alcohol. Though not a significant factor, it does affect his ability to make accurate observations.

18 Three, at trial he described Mr. [REDACTED] as wearing a white shirt, which seems to be confirmed by the 16 year old cousin of Mr. [REDACTED], who I found to be a credible witness. Mr. [REDACTED], however, in his first two statements to the police, described the accused as having a red shirt. At that point at the preliminary hearing he could not remember the colour of the shirt. While there are many possible explanations for the inconsistency as evidenced in the inconsistency between his evidence and the other witness, I find it to be troubling in assessing his reliability. It was suggested that maybe he was wearing a red T-shirt over the white T-shirt because it was cold that night. No other witnesses at trial at any time mentioned a red long shirt.

19 Four, at trial in examination in-Chief, Mr. [REDACTED] describes Tibo as wearing either a hoody, khaki or brown in colour. In cross-examination he volunteers that Tibo, he is certain, was wearing a green or blue T-shirt with a large peace sign on it. He then explained that it was the person behind Tibo who had the khaki coloured item of clothing on. He was asked to explain the difference between what he said in examination in-Chief as to what Tibo was wearing and what he said in cross-examination. And he could provide no explanation for the glaring inconsistency. This is another factor to consider in assessing his reliability.

20 Five, the description of the robber provided by Mr. [REDACTED] both in the statement to the police and at trial generally matches Mr. [REDACTED] description as to height, body build and colour. Mr. [REDACTED] however says that the robber he identified as [REDACTED] had short hair or shaved hair. On the evidence of the Officer-in-Charge who I found to be credible and fair and the accused's mother, the accused at the time had cornrows and longer hair. This is a material inconsistency between what the robber was described as, and what the accused looked like. Mr. [REDACTED] specifically describes in his

descriptions some of the other robbers as having cornrows, but specifically describes the robber he believes to be Mr. [REDACTED] as having short hair. If Mr. [REDACTED] is correct in his description of the robber having short or shaved hair then the person who robbed him could not be Mr. [REDACTED]. See *R. v. Quercia*, 1990 CanLII 2595, Ontario Court of Appeal. The other alternative, if Mr. [REDACTED] is incorrect on his description of the robber's hair, it is another significant fact that negatively affects my assessment of Mr. [REDACTED] reliability.

21 These are the reasons why I have found Mr. [REDACTED] not to be a reliable witness. Put simply it would be unsafe to base a conviction on his purported identification of Mr. [REDACTED] as the robber. I must of course not consider Mr. [REDACTED] evidence in isolation, I must consider the totality of the evidence of identification.

22 I also had the benefit of the complainant's sister who lives on the [REDACTED] floor and prepared much of the food for the party on the [REDACTED] floor that was being hosted by her then boyfriend. It was her evidence at trial that she was back and forth to the party about every half hour or so since she quite understandably had to check on her kids that were alone on the [REDACTED] floor apartment. It was her evidence that the accused, his cousin and his friends were at the party and at some point they all left. Later she was on the balcony and saw the accused out in the parking lot with some other individuals. She also saw the accused come back to the [REDACTED] floor with five or so of the young men who she had recognized earlier in the party.

23 She describes seeing the accused and his cousins come back into the apartment a short time later. Minutes later, on her evidence, the accused, his cousins, the accused's mother, and other family members all go into the one bedroom of the apartment. Ms. [REDACTED] describes how she opened the door, saw the accused and other family members including the accused's mother, some had cash in their hands and she closed the door. Sometime later she returned to her apartment to find her brother, the complainant, complaining of being robbed by the tall guy and his friends. If believed, Ms. [REDACTED] evidence provides some circumstantial evidence to support Mr. [REDACTED] claim that Mr. [REDACTED] participated in the robbery. It provides Mr. [REDACTED] with an opportunity and inferentially he was in possession of the proceeds of the robbery.

24 In assessing Ms. [REDACTED] credibility and reliability, there are some very troubling aspects of her evidence. One, that evening she is not prepared to cooperate with the police or provide a statement. Two, it was her evidence that she does not burden her brother that evening with the information that she had just seen the man the brother says robbed him of a large sum of money on the [REDACTED] floor, having a private meeting with his family with cash being displayed. Further, in this private meeting she sees various members including Mr. [REDACTED] holding quantities of cash. It makes little sense to me that having this important information she would not provide it to her brother that evening. Her explanation was simply that she had forgotten. Such an explanation does not make sense to me. She would have just heard her brother complain about being robbed at gunpoint by Mr. [REDACTED] and Tibo and she just saw the same man with lots of cash being displayed after returning from an area that she saw him in about the time he would have been robbed.

25 The third concern is in the days and weeks after the robbery, the Officer-in-Charge diligently made efforts to get a statement from ██████████, however she again refused to cooperate with the police.

26 The fourth factor to consider, the first time she provided a statement was 17 months after the event. And she did so after she had been subpoenaed by the Crown. Up until then she had been completely un-cooperative. She provides two reasons for not cooperating with the police. One that was in an intimate relationship with the accused's relative at the time and did not want to basically rock the boat. And two that she was scared of retribution for assisting.

27 It is important to note that the person she had the intimate relationship with was deported from Canada two months after the event, in January 2013. Their relationship ended. The reason for not cooperating because of that relationship no longer was valid for the last 17 or 18 months. As to the fear factor, everyone knows everyone in this community. She had already had a sit down with the accused mother after her brother had stabbed the accused and told the mother of her belief the accused robbed her brother at gunpoint. This is not a case of an unknown eye witness not wishing to come forward out of fear.

28 She also notes that she is aware that her brother who is facing serious charges for stabbing the accused could face potential deportation if convicted. It simply defies common sense and life experience to believe that she had this very important information that would assist in bringing the man to justice who apparently was involved in the robbery, but she does not do anything to assist her brother until the day of trial. I cannot accept her explanation for why she had not assisted in the case until the trial commenced, and it adversely affects my assessment of her credibility and reliability.

29 Also she, like the accused's mother, was also not an impressive witness. I found her to be confrontational and evasive, much in the way the accused mother was. For the reasons articulated, particularly the late disclosure, I find that I cannot find Ms. ██████████ to be a credible and reliable witness. I cannot accept her evidence that she saw the accused coming into the apartment, or that there was a meeting in the bedroom. She simply is not reliable.

30 As such at the end of the day I am left with the evidence of Mr. ██████████ to his purported identification of Mr. ██████████. As I have indicated, it would be unsafe to base a conviction on such frail recognition identification with the difficulties I have articulated. For these reasons the Crown has not met its onus of proving identification beyond a reasonable doubt. The accused is entitled to that reasonable doubt. And as such, for these reasons, I find the accused not guilty on Count 2, and there will be acquittal on that Count as well.

31 So folks those are the reasons of the Court. I have noted now on the indictment directed verdict not guilty to Count 1, adjourned to July 2nd for judgment, and I am putting for oral reasons, accused not guilty to Count 2 and signed it.

32 Gentlemen, Mr. Kim, that you very much.

33 MR. KIM: Thank you.

34 THE COURT: The officer and Mr. Stastny, a fair manner in which everybody conducted the trial.

35 MR. STASTNY: Thank you, Your Honour.