

Case Name:

R. v. [REDACTED]

**Between
Her Majesty the Queen, and**

[REDACTED]
[2017] O.J. No. 4330

Information No. 15001346

Ontario Court of Justice
Toronto, Ontario

L.A.P. Chapin J.

Heard: June 1, 2017.
Oral judgment: June 1, 2017.

(15 paras.)

Counsel:

A. Jamieson, Counsel for the Federal Crown.

A. Stastny, Counsel for [REDACTED]

REASONS FOR JUDGMENT

1 L.A.P. CHAPIN J. (orally):-- [REDACTED] is charged with trafficking cocaine and being in possession of \$100 of police buy money on February 20th, 2016, in the City of Toronto. The Crown called two witnesses. The defence did not call any evidence.

2 At the outset of the trial, the defence conceded that the person arrested trafficked .88 of a gram of cocaine to an undercover police officer and was in possession of the police buy money issued to the undercover officer earlier that day.

3 On February 20th, 2016, a number of Toronto Police Service officers with the Drug Squad were engaged in an investigation of an individual who was purported to be selling cocaine. Detective Constable Nickerson's role was to act as the undercover officer. He received information that an individual, using the name Prince, was selling cocaine. A physical description of the target and a telephone number were provided to Officer Nickerson. He called the individual using a police cell phone and arranged to meet with him at the McDonald's restaurant located at 2362 Finch Avenue West in Toronto.

4 Officer Nickerson dialed the number and a male answered. Officer Nickerson had notes of the conversation, but they were not verbatim, although they were made shortly after the telephone call. A male answered the phone and said, "Yo." And the officer said, "Hello." The male said, "Who is this?" The officer said, "Yo, it's B." The male asked, "B who?" And the officer said, "Brandon." The male said, "Who?" And the officer repeated the name Brandon. The male asked, "I know you?" And the officer said, "You know my boy Dino. I was just gonna see if you were around." The male said, "Oh, okay. Okay. So, what do you want?" And the officer said, "I got like a hundred bucks, man." And the male said, "You good with a hundred of soft?" The officer said, "Yeah, bro." And the male said, "Okay. Come to the McDonald's at Weston and Finch and call when you're there." The officer said, "Okay." And the male asked, "How long though?" The officer replied, "I got a whip. I can be there in half an hour. I'm just coming from VP and Eglinton." The male said, "Okay. Call when you're there." The call ended at that time. The officer explained that "soft" is a street term that refers to powdered cocaine. "Whip" is a street term for car and that "VP" was short form for Victoria Park Avenue. Officer Nickerson advised the officer in charge of the investigation, Officer Hutchings, what had taken place.

5 A briefing was held at 41 Division with the team members and a description of the target was provided along with a photograph. After the briefing, Officer Nickerson was provided with \$100 of police buy money and was directed to attend the meeting with the target. He arrived on scene at 9:37 p.m. and called the same phone number after parking and a male answered. Officer Nickerson recognized the voice as the male he had been speaking with earlier. The male said, "Yeah?" when he answered the phone and the officer said, "I'm here, bro." The male asked, "At the McDonald's?" Officer Nickerson said, "Yeah, I'm in a black pick-up truck." The male asked, "Yo, you got the \$100?" Officer Nickerson said, "Yes, of course." And the male said, "Okay. Wait inside the bathroom of the McDonald's." Officer Nickerson said, "Wait inside? Bro, I'm sitting in my truck." The male said, "Yeah, that is good for you. Go wait inside." The officer said, "Yeah, okay."

6 Officer Nickerson notified Officer Hutchings of the conversation and went into the men's bathroom inside the restaurant. There was a single stall and a single urinal in the washroom and he went into the stall and checked his pockets to make sure there was nothing in them, other than the \$100 of police buy money in his left pocket. There was no one else in the washroom at the time. After a short period of time, he observed a male enter the bathroom, whom he described as approximately 18 years of age, a thick build, approximately six feet tall, wearing a dark grey track suit and a diamond stud earring. The male's hairstyle was parted in cornrows and he was wearing

black-framed glasses and maroon coloured Jordan shoes. Officer Nickerson recognized, at the time, that the male wasn't the target referred to in the briefing.

7 The male entered and locked the stall door, looked down and reached into his pocket. He pulled his hand out of his pocket and had a white plastic baggie. The male untied the knot and the officer could see inside and it appeared to be powder cocaine. Officer Nickerson asked, "Is it fire?", meaning was it high quality and the male replied, "Of course, you know that as my bro, right?" As the male was tying up the baggie, the officer reached into his left pocket and retrieved the police buy money and exchanged it for the cocaine. Officer Nickerson put the bag into his left pocket and the male counted the money. They had a brief conversation regarding a possible future purchase of cocaine and when the male left, Officer Nickerson gave the deal done signal, once he exited the washroom. The male was arrested. However, Officer Nickerson did not observe it as he was still in the washroom at the time. Officer Nickerson identified the accused in court as being the male who had sold him the cocaine on that evening. This was an in-dock identification as Officer Nickerson had not been shown a photographic line-up after the arrest.

8 Officer Tughan was also a member of the team that evening and went to the location and took up observations inside the restaurant at approximately 9:30 p.m. At approximately 9:37 p.m., Officer Tughan observed the undercover officer arrive and park on the east side of the McDonald's, facing east against a fence near a condominium building.

9 At 9:44 p.m., Officer Tughan received information and a description from Officer Brown, another member of the team, that there was a male approaching the McDonald's who was described as being black, six foot one, 200 pounds, diamond earrings, black glasses, wearing a Roots track suit and grey running shoes. Officer Tughan concluded that he wasn't the target as he did not match the description provided at the briefing.

10 Officer Tughan observed the male approach the southeast doors of the restaurant and enter the restaurant and go into the washroom at approximately 9:44 p.m. When the deal was done, Officer Tughan saw the male exit the washroom approximately one minute later. The officer received information from Officer Hutchings that the deal had been done and directed other members of the team to arrest the male at 9:46.

11 Officer Tughan left the McDonald's through the same doors and saw his team members walk towards the male and arrest him. During the arrest, a cell phone fell to the ground and Officer Tughan conducted a phone test with Officer Nickerson to determine whether or not it was the cell phone that the undercover officer had called earlier that evening to arrange the drug transaction. The test was negative, meaning that it was not the cell phone the undercover officer had called.

12 Officer Tughan identified the accused, Mr. [REDACTED] as being the male he observed that evening. I note that there were no other black males in the courtroom at the time and that the officers made the in-dock identifications when Mr. [REDACTED] was sitting beside his counsel at the counsel table.

Analysis

13 In this case, Mr. [REDACTED] is presumed to be innocent unless and until the Crown has proven each essential element of the two offences beyond a reasonable doubt. Reasonable doubt is based upon reason and common sense. It is logically connected to the evidence or the lack of evidence. It is not enough for me to believe that Mr. [REDACTED] is possibly or even probably guilty. Reasonable doubt requires more. As a standard, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities. At the same time, reasonable doubt does not require proof beyond all doubt nor is it proof to an absolute certainty.

14 The frailties of eyewitness evidence have been firmly established in the case law as well as the academic research and commentary. See R. v. Hibbert, [2002] 2 S.C.R. 445 and R. v. Sarazin (ph), [2016] O.J. No. 5068 Ont. C.A. In R. v. McDonald, [2014] O.J. No. 867, (SCJ), Justice Hill described the problem with in-dock identifications at paragraphs 62 to 65 as follows:

"As a general rule, in-dock identifications, by an individual previously unacquainted with a suspect prior to the relevant event, are generally almost valueless in terms of reliable positive identification. Not only has time passed since the alleged crime, some 11 months in this case, but also the physical set-up of the courtroom recognizably presents the accused as the individual on trial and therefore as the suspect towards whom the finger of accusation has pointed: see *R. v. Hibbert*, supra at para. 49, *R. v. Lawrence*, [2014] UKPC 2, at paras. 9, 11; *R. v. Yigzaw*, 2013 ONCA 547, at paras. 25, 71; *R. v. Jack*, 2013 ONCA 80, at paras. 17, 21, 38; *R. v. Muir*, 2013 ONCA 470, at paras. 9, 11; *R. v. Cranham*, 2012 ONCA 457, at para. 11; *R. v. Manley*, 2011 ONCA 128, at paras. 20 to 22; *R. v. Brown*, 2009 ONCA 563, at para. 23; *R. v. Hasson*, 2008 ONCA 615, at para. 7; *F.A.*, [2004] O.J. No. 1119; at para. 47; *R. v. Izzard* (1990) 54 C.C.C. (3d) 252 (Ont. C.A.), at pp. 255 to 256. At paras. 50-1 of *Hibbert*, the court observed that: It is important to remember that the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere. The danger of wrongful conviction arising from faulty but apparently persuasive eyewitness identification has been well documented.

While an in-dock identification, strictly interpreted, is limited to identification of an accused person in the prisoner's dock or box, its scope is not infrequently extended to other in-court situations, for example when the accused person identified by the eyewitness is seated at counsel table or is otherwise in the courtroom and inferentially obvious to be the accused."

15 In my view, the Crown has failed to establish beyond a reasonable doubt that Mr. [REDACTED] was

the man involved in the drug transaction. The officers were not shown photographic line-ups after they arrested the accused, as is normally done, in order to ensure that a proper pre-court identification procedure is followed. The length of time they observed the male was very brief and neither officer had any previous interactions with accused. There was no evidence of identifying documents seized from the male arrested at the scene and there was no video surveillance from either the interior or exterior of the McDonald's restaurant at the relevant time entered as an exhibit. The identification evidence, in this case, comes from two in-dock identifications made by the officers in this case and therefore, it would be dangerous for me to convict based on that evidence. Mr. [REDACTED] is acquitted of both counts.