

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

[REDACTED]

Before Justice M. Greene
Reasons for Judgment released on June 20, 2017

For the Crown I. Erdie
For Mr. [REDACTED] A. Stastny

[1] On January 20, 2016, Officer Caron received information that a male, who goes by the name “Junior”, was selling crack cocaine. She was further advised that “Junior” was a black heavy set male with hair in corn rows. Officer Caron received a telephone number for Junior and at 1:49pm telephoned him and made a plan to meet him at 48 Grenoble in order to purchase 1.5 grams of crack cocaine.

[2] Prior to meeting with “Junior”, Officer Caron had a briefing with her team. The briefing started at 2:20p.m. and ended at 2:25p.m. During this briefing, Officer Caron was advised that Junior’s real name was possibly [REDACTED] with a date of birth of [REDACTED]. She was also provided a photograph of Mr. [REDACTED]. Officer Caron could not recall for how long she looked at the photograph but it was long enough to put

her in a position to be able to identify him if she saw him again. Officer Caron testified that perhaps she looked at the photograph for one minute. Officer Caron further testified that when she looked at the photograph she noticed the overall structure of Mr. [REDACTED] face, that he had bigger cheeks and that his eyes were closer together. These latter observations were not recorded in her notebook.

[3] Officer Caron attended at the area of 48 Grenoble immediately after the briefing. Upon arriving, she parked in a parking lot located at the rear of the building and then telephoned Junior to advise that she had arrived.

[4] At 3:02pm, Junior telephoned Officer Caron and instructed her to drive to a different location. Officer Caron refused to do so. Moments later a male exited 48 Grenoble and entered her vehicle. Officer Caron testified that she immediately recognized the male as [REDACTED] because of his size and the bigger cheeks. His size in particular stood out because he was 6'2 and approximately 250-260 pounds. It was unusual for the officer to see dealers that are this large. Officer Caron identified the defendant, the only black male in the courtroom, as the person in the photograph from the briefing and the person she met on January 20, 2016.

[5] Junior, upon approaching the vehicle stated "hey girl" and then smiled. At this point Officer Caron noticed that Junior had two gold teeth on the left side of his mouth and two diamonds inside the teeth. Once Junior entered the vehicle, Officer Caron became 100% certain it was the same male from the photograph. It was the braids, the bigger cheeks and that his eyes were close together that gave her confidence it was the same person.

The teeth were not visible in the photograph nor were they visible in court. None of these distinct characteristics were recorded in her notes.

[6] Officer Caron drove with Junior for some time and had a drug related conversation after which he sold Officer Caron .8grams of crack cocaine for \$100.00. Junior then exited the vehicle and walked to 48 Grenoble.

[7] After completing the deal, Officer Caron recorded a description of Junior. She described him as 6'2, heavy set, approximately 200 pounds, black raider's hat, braids, dark blue jacket with hood and dark blue pants. She further noted that it was the same male from the briefing photograph.

[8] [REDACTED] was arrested a couple of months later.

Issues

[9] The only issue raised at trial was identification. That is whether the defendant was in fact the person who sold .8 grams of crack cocaine to Officer Caron. There was no dispute that Officer Caron honestly believed that [REDACTED] was the person who sold her the crack cocaine. Instead the issue was whether the identification at trial was sufficiently reliable to support a finding, beyond a reasonable doubt, that [REDACTED] was the person who sold the .8 grams of crack cocaine to Officer Caron.

[10] Crown counsel argued that the evidence of identification was sufficient for the following reasons:

- i) The officer saw the photograph of the defendant prior to meeting him;
- ii) The photograph was provided to the court and it is clearly the defendant in the photograph;

- iii) The officer recognized the person who ultimately sold drugs to her immediately as being the person from the photograph;
- iv) The officer was able to identify unique and distinct characteristics about the defendant to confirm her identification;
- v) The officer was not expecting the person from the photograph to be the dealer, she just thought it was possible; and,
- vi) The officer recognized ██████████ in court as the person who sold her crack cocaine.

[11] Defence counsel argued that the following frailties in the identification process should give the court a reasonable doubt about the reliability of the identification:

- a) The officer's evidence that she recognized the dealer as soon as he approached her as the man from the photograph is of limited reliability because she was expecting to see him;
- b) The specific features the officer identified as helping her confirm it was the defendant were not recorded in her notes and only referred to for the first time in court while the officer was looking directly at ██████████
- c) A photographic lineup was not conducted after the transaction to confirm that the defendant was the dealer. The first time the officer identified ██████████ was in court; and,
- d) There was no other confirmatory evidence. The telephone was not seized and tested, the phone records for the telephone number the officer called were not produced and no surveillance officers testified.

Analysis

[12] It is well established in Canadian Jurisprudence that in dock identifications where the perpetrator is a stranger are inherently unreliable and that honest people are often mistaken when making an identification of a stranger. This is why most police officers employ photographic line ups. The case law draws a clear distinction, however, between an identification and a recognition. Where the eye witness has seen the perpetrator before and recognizes the perpetrator this is deemed to be substantially more reliable than an in dock identification of a stranger.

[13] In the case at bar, Officer Caron did not view a photographic line up after meeting with the person who sold her the crack cocaine. Instead, she identified [REDACTED] as the perpetrator for the first time in court. Crown counsel argued that a lineup was unnecessary in the case at bar because the officer recognized Junior immediately as being the person she saw in the photograph presented at the earlier briefing. In other words, the Crown was not relying solely on the in dock identification of [REDACTED] as the person who sold her crack cocaine but instead relied on the officer's recognition that the person who sold her the crack cocaine was the same person she saw in the photograph provided at the briefing. There is no doubt that the person in the photograph is [REDACTED]. I have viewed the photograph and [REDACTED] and in my view, they are one in the same. Therefore, I agree with the Crown that given the facts of this case, the absence of a photographic lineup, while a concern is not determinative as the identification evidence is not limited to an in-dock identification.

[14] Counsel for [REDACTED] argued that the officer's evidence that the person in the photograph was the person who sold her drugs was also unreliable. This is because the officer was expecting the person in the photograph to be the dealer. Having been told that the seller was likely [REDACTED], she was pre-disposed to believe that the person approaching her was in fact the person from the photograph thus raising the real risk of a misidentification. In *R. v. King*, [2011] O.J. No. 5375 (SCJ), the trial judge outlined the reliability concerns of this kind of identification process,

Having officer Miranda view the photographs prior to the transaction taints his later identification of Mr. King after the transaction. Is officer Miranda identifying Mr. King from the observations he made during a two-minute interaction with him, or from his previous viewing of Mr.

King's photograph? There is no way to test the reliability of Officer Miranda's identification because anyone he picked out from the briefing book was already a suspect. There are no "fillers", which if identified by the officer, would show that his identification was unreliable. I appreciate that this was not the purpose of the briefing book but its use taints the identification process and provides no assurance as to the reliability of Officer Miranda's identification. (at paragraph 21)

[15] I note that in the case at bar, the officer testified that she was not expecting the person in the photograph to be the dealer. She testified that while she thought the person in the photograph may be the dealer, this was just one possibility. It was not definitively known that the person in the photograph was in fact the person they were looking for. The officer, therefore, had to keep an open mind about whom she would be meeting. With the greatest of respect to the officer, I am unable to completely rely on this evidence. There was a briefing. The defendant's photograph was provided as the only potential suspect. I appreciate that the officer had to keep an open mind when meeting the suspected drug dealer, there can be no doubt, however, that she was also looking for and expecting to see the person in the photograph. The whole point in showing her the photograph was so that she would know whom to look for. I therefore find the officer's evidence not credible on this one point.

[16] Counsel for [REDACTED] was very critical of the police investigative technique of providing a photograph to the undercover officer prior to the undercover purchase. He argued that this will always lead to a tainted identification process and a subsequent photographic line up will not resolve the problem because the tainting has already occurred. It will never be known whether the officer identified the seller or the person

they saw earlier in the photograph. I appreciate the concerns raised by counsel for Mr. [REDACTED] about the general process used in the case at bar. It should be noted, however, that there is nothing inherently wrong about the police providing a photograph to an undercover officer at a briefing so as to assist the officer in identifying the suspect and carry out the transaction. It is often necessary to do so for police protection and to carry out the investigation effectively. In many of these cases, however, the seller is arrested at the time of the transaction so identification is not a live issue. It is the fact that the seller was not arrested at the time of the transaction, coupled with the fact that no other surveillance officers testified to assist in the identification of [REDACTED] as the seller and the fact that no other confirmatory evidence was provided to the court that creates the identification dilemma in the case at bar.

[17] I note that in the case of *R. v. Kabanga-Muanza*, [2014] O.J. No. 2798 (SCJ), a case where the identification evidence was very similar to the evidence presented in the case at bar, the prosecution provided the court with additional evidence that helped confirm the reliability of the identification. In *Kabanga-Muanza*, there was evidence that the cellular telephone seized from Mr. Kabanga-Muanza at the time of his arrest had the same telephone number as the one the officer called to set up the drug transaction.

[18] This is not to say that confirmatory evidence is always necessary. In fact, the trial judge in *R. v. Kabanga-Muanza*, clearly stated that even without the confirmatory evidence of the cellular telephone he would have been satisfied beyond a reasonable doubt that Mr. Kabanga-Muanza was the person who sold the drugs to the undercover officer. In *R. v. Kabanga-Muanza*, the undercover officer saw the photograph of the

suspect prior to the transaction, met the suspect, confirmed that in his mind the suspect was the same person as the one in the photograph provided at a police briefing and then made an in dock identification at trial. The trial judge in *R. v. Kabanga-Muanza, supra*, found that the officer's identification was reliable despite the potential for tainting and the in dock identification. It appears from his reasons that he found the officer's identification reliable because the officer, at the time of the transaction, recorded specific physical details about the perpetrator and compared those details, including the differences, to the photograph he had seen at the briefing. The trial judge stated at paragraph 54,

Importantly, Officer Correia, the UC, testified that he "immediately recognized the defendant" as he came off the elevator "as the person whose photograph [he] had seen" a couple of hours before at the briefing at the 55 Division police station. Notwithstanding that recognition, however, as I will explain, its accuracy is tested and in my view proven by his ability to immediately also perceive differences between the appearance of the suspect as shown in the RICI photograph, and the appearance that that suspect showed as he stood in front of D.C. Correia in the elevator lobby on the second floor of the apartment building. he observed (i) that the "cornrow" braids went in a different direction on Mr. Kabanga-Muanza's head, (ii) that his complexion was darker than it appeared in the photography, (iii) that he was clean-shaven, unlike in the photograph, (iv) that he had a thin build, and (v) that he was "taller than me". He observed the detail of what the suspect was wearing, namely black shorts and black runners.

[19] In my view, the facts in the case at bar are distinguishable from the facts in *R. v. Kabanga-Muanza*. In *Kabanga-Muanza*, the officer appears to have taken detailed notes of what Mr. Kabanga-Muanza looked like at the time of the meeting and identified the similarities and differences between the photograph and the person he met. In the case at bar, while the officer testified that certain key facial features led her to conclude that the

defendant was the person she met, she failed to record those specific details in her notes. They were mentioned for the first time in court while looking at the defendant. In fairness, some features were included; namely height and weight which do assist to some extent in assessing the reliability of the identification. The other key and less generic features, however, namely the big cheeks and eyes being close together were not recorded.

[20] In my view, this difference is important. The officer, having failed to record at the time of meeting the dealer details of why she concluded that he was the same person, makes it impossible for this court to be confident in the reliability of her opinion that the person she met was the person from the photograph. It is also difficult to be confident that when Officer Caron identified ██████████ at trial as the perpetrator that she was identifying the person she met as opposed to the person in the photograph. I am mindful, that it is reasonable to infer that at a minimum, the dealer bore a resemblance to Mr.

██████████ I note that the officer had a good opportunity to view Junior, the lighting was satisfactory and the situation was not so stressful that it likely interfered with the officer's observations. All these factors increase the likelihood that the officer did in fact purchase crack cocaine from ██████████ as opposed to some unknown person. Nonetheless, the fact that the officer was expecting to see ██████████ at 48 Grenoble and her failure to record the key descriptors which explained why the officer formed the opinion that the man who sold her the crack cocaine was the man from the photograph causes me to have a reasonable doubt about the reliability of the officer's identification. I have a reasonable doubt about the officer's opinion that the man who sold her the crack cocaine was the same man in the photograph and I have a reasonable doubt about the reliability of the

officer's in court identification of [REDACTED] as the perpetrator. I am not certain that the officer was identifying the person whom sold her crack cocaine or the person from the photograph.

[21] I therefore find [REDACTED] not guilty of all charges.

Released June 20, 2017

Justice Mara Greene