

In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2017 No. 27

R

-v-

JAHMIKO TROTT

C Richardson for the defendant

C Mahoney for the Crown

Before C Greaves, J

Date of hearing: 23rd February 2018

Date of ruling: 23rd February 2018

RULING

Criminal law-Police and Criminal evidence Act-Code D-admission of Police video recognition evidence.

Introduction

1. On 14th May 2017 the Complainant was enjoying Mother's Day with his cousin in an apartment in the Court Street area. A gunman said to be the Defendant, Mr Trott, embarked upon that house, demanded to be let in and pursued the complainant, who escaped from the house onto the street. There, the two engaged in a scuffle. Several shots were let off. Another person said to be the Co-defendant, Mr Burgess, joined the melee. The Complainant escaped and fled to the police station where he made a report and in video audio interviews recorded by DC Donawa and others named the Defendant Trott as the gun man and Mr Burgess as his assister.
2. As a result one of the interviewing officers DC Mathurin put out a lookout by police intranet for the arrest of the Defendant Trott and shortly after, Mr Burgess as well.
3. CCTV showing the events on the street were recovered from two nearby establishments very shortly after. Both defendants were arrested shortly after and charged.

4. Shortly before the trial the Complainant's cousin came forward and gave a statement to the police and evidence during the trial identifying both defendants by way of recognition and without an opportunity firstly to view the CCTV or apparently to have discussions with the complainant who was apparently in safe keeping since the incident.
5. It may be helpful to refer to the statements of DC Roberts and PC Hart.
6. Roberts said that on 20th July 2017 he was asked by D/Sgt Smith to conduct a CCTV recognition procedure with PC Hart.
7. He explained the process to her, informing her, what place the CCTV referenced and that should she recognise anyone she should state that and how she was able to do so.
8. Present were DCs Sabeau, the operator and Donawa, note taker.
9. Hart identified Jahmiko Trott and answered questions Roberts contemporaneously wrote down. Those answers are in the attached forms.
10. In respect of the first viewing in Part A, entitled, to be completed before the viewing, he wrote down yes to the question whether she knew the identity of the suspect and no, to the following question whether she was given any information about the name or identity of the suspect.
11. Those two answers are prima facie contradictory and defence counsel complained that the presence of DC Donawa reasonably lead to an inference, the burden of disproof laying upon the Crown, that Hart might have been influenced by her. The answers were likewise in the viewing of the second CCTV form A.
12. It appears to me however that those notations might not have been answers given by PC Hart but were entries written down by D/Sgt Roberts likely given to him by D/Sgt Smith prior to commencement of the viewing. I think I am able to say that because of the heading of the form A which is to be filled in before the commencement of the viewing.
13. Even if I am incorrect on that point I do not at this point consider that apparent conflict to be fatal. I expect that it will be fully explained before a jury if that time comes and can or would be followed by a proper direction.
14. In part B, entitled, to be completed during the viewing. The officer recorded the several persons PC Hart identified and the reasons for such identification.
15. She recognised someone she said looks like Jahmeko Trott, from his facial hair, bone structure in his face. She said she had known him a long time-only met him earlier this year, 6 months, not in her capacity of work but that his sister and one of her close friends went to school together and she met him in a social setting in the beginning of the year.

16. She described what he was wearing, including his distressed jeans, dark sneakers, skin tone and recognised the area as the junction of Curving Ave and King Street.

She said she has seen him once a week in her work capacity as a patrol officer on Front Street, Court Street, and she would get a good look at him.
17. She described him as 5' 10''-11''. She sees him both day and night time. And when she speaks to him it's less than a minute, Hi.
18. She said she saw him earlier that day on Mother's Day at Hamilton Princess in the parking lot, Mother's Day 14th May 2017. He was wearing button up shirt or polo shirt, dress pants and was with Manai Roberts Jnr.
19. In the second viewing from camera 2, second clip she referred to a man in a hoodie running across the street and is recorded as saying, "It resembles Jahmiko Trots clothing I saw from camera 6 from King St/Curving Ave." then she referred to this Jahmiko Trott fighting with an unknown man and recognised another man as Troy Burgess joining in.
20. PC Hart in her statement dated 20/7/17 said, before viewing the CCTV Roberts completed the Part A and when asked, she stated she had not been told what footage she would be shown.
21. She viewed camera 6 and observed a male walking along Curving Ave onto King Street she recognised to be Jahmiko Trot based on his facial hair and bone structure.
22. She repeated her descriptions, sightings etc. and went on to refer to the other persons she also identified and why.

The Application

23. This is an application by counsel for the defendant Trott to exclude certain recognition evidence sought to be given on the part of the prosecution to be given by Officer PC Hart who viewed some CCTV footage of the events in this case and purported to recognise the defendant.
24. Defence counsel submitted that that recognition was obtained in breach of the PACE Code in respect of the unfair manner in which it was obtained and therefore it should be rendered unreliable.
25. He argued that the events in this case occurred on 14th May 2017. The next day the defendant was arrested and his co-defendant likewise a few days after. This was a well-publicised matter. The CCTV footage was acquired by the police by the day after the event.

26. It was not until two months later, namely, 19th or 20th July 2017 that the officer was purportedly invited to and did view the CCTV under supervision of D/Sgt Roberts and purported to recognise the defendant Trott whilst one of the investigating officers, DC Donawa who interviewed the virtual complainant within hours of the event, and knew the complainant identified the defendant as the person who attempted to kill him sat in the same room with the witness DC Hart whilst she was reviewing the CCTV.
27. He argued there is no video of the process. Though there is a form prepared by the supervisor of what the witness said during the interview there are some differences between that, the note taken by DC Donawa and the witness statement.
28. In short the essence of his submission is that a reasonable observer would consider this process too open to suspicion to be regarded to be of a sufficient degree of reliability that the video recognition evidence should be admitted.
29. He relied upon *The Queen v Trenton Williams* 2017/18, a decision recently delivered by this court and the authorities cited therein.
30. Furthermore he argued, the recognition evidence is unreliable for lack of a sufficient basis for it. The witness purporting only to have met the defendant six month previously through his sister, seeing him from time to time since, asserting mainly that it looks like him in the CCTV and purporting to be able to recognise him by his facial hair and facial structure, a task difficult to establish given the quality of the video and attire of the witness.
31. Prosecuting counsel responded by distinguishing this case from the *Trenton Williams* case and submitted that unlike in that case where the only evidence against the defendant was the recognition evidence of the officer which clearly gave insufficient basis for the recognition, in this case there is strong evidence tending to support the fairness and accuracy of the recognition.
32. He produced several enlarged still photographs from the footage showing whom he purports to be the defendant in dress similar to that found in photographs retrieved from a cell phone found at his home at the time of his arrest and allegedly belonging to his girlfriend. These photos show a similar dress and particularly shoes.
33. The prosecution relied for support upon a trio of cases; *Shane Chaney v The Queen* [2009]EWCA Crim21; *R v DS*[2014]EWCA Crim 933; *R v Ian Tucker* [2016]EWCA Crim 13.
34. In the *Chaney* case the only issue was whether the appellant was correctly identified as the thief. He had been accused of a theft on October 28th. The recognition officer

interviewed him for an unrelated matter for several hours on the 24th October and he was photographed in respect of that matter on the 31st.

35. November 19th another officer sent CCTV stills to the recognition officer by email referring to the appellant by name as a suspect in his 28th Oct case and asking for comments. The recognition officer replied he could identify him and would furnish a statement. Recognition evidence of that officer was allowed. He testified that he previously knew the defendant as above and recognised him in CCTV stills wearing clothing, a jacket and shoes similar to those he previously saw him wear and by his facial structure and hair. In that case there was other supporting evidence tending to connect the appellant to the crime.
36. Paragraphs 22 to 24 are instructive. The court considered the possible complaint that the sending officer might have influenced the recognition officer to identify the appellant but reasoned that in that case the jury had the evidence of the emails, and it had the photographs from the previous encounter to compare to the CCTV stills as the court itself was able to do and could form the view that the recognition was accurate.
37. I think it is likewise in the instant case. The stills clearly show an interesting goatee beard on the man alleged to be the defendant, certain staining on his trousers and shoes very similar to those taken from the seized cell phone.
38. In the instant case there is a complaint that the presence of DC Donawa at the viewing constitutes the type of suspicion that the Code was designed to avoid.
39. There is some merit in that argument. There are some instances when an investigating officer, possessing the knowledge DC Donawa did, maybe present at a recognition exercise. Such instances may include a street or station confrontation but I think it is unfortunate that she was present at an exercise such as this given the identification information she had identifying both Trott and Burgess when she interviewed the complainant. Had this been a traditional ID parade or a modern promat ID parade it is highly unlikely such an officer would be let near the parade.
40. I think in the future we should expect likewise in an exercise such as this. However although I find her presence to be a significant error I do not find it to be fatal in the circumstances of this case.
41. I think given the detail with which Ms Hart was able to establish her recognition, together with the information to be otherwise put before the jury a jury properly directed should be able to fairly discern the accuracy and validity of the Hart recognition evidence and may either accept or reject it. No doubt the presence of DC Donowa would have to be made known to the jury, with a strong caution direction so that the jury may properly come to its own judgment.

42. In the *Chaney* case the court reasoned that the jury could compare the CCTV stills with the police photos like the court did and determine for itself if the man in the photos was the man in the stills-there being evidence which seem to clearly implicate him.
43. In this case there is no suggestion that PC Hart saw the photos which show certain distinct features in comparison. The jury would be entitled to reject PC Hart's evidence if they were in doubt about its cogency and continue to consider the other evidence in their determination of the true identity.
44. For example it is for the jury to decide if the CCTV is of such a quality that DC Hart could truly see the facial structure and hair of the man she identified to accurately say he was Mr Trott or not and to further compare the features of his attire with that in the photo from the seized phone. In addition they would be entitled to consider the other recognition evidence given in this trial. They would be entitled to accept or reject all or some.
45. The delay issue was of sufficient length to raise a reasonable concern. No proper explanation has been given up to this point as to why so much time had passed before DC Trott was invited to the viewing. Nor was any offered as to why she was chosen.
46. It is worth the argument on the part of the defence that this was a later attempt by the police to shore up their evidence knowing that their main witness was likely to suffer a credibility assault by the defence that may weaken their case due to his questionable character. And that their perceived weakness might not have improved even with the later appearance of a second on the scene recognition witness, since he too has character issues.
47. On the other hand I think on the basis of the statements I have examined, it may be understandable why the investigators might have sought the assistance of DC Hart to see if she could be of assistance.
48. Her statements show that she was a regular patrol officer of that area. In those circumstances one may expect that she may have been able to recognise some of the characters who frequent that street. The evidence so far of the complainant and the other eye witness is that the two defendants were daily frequenters of those streets.
49. In the circumstances I think it would be reasonable for investigating officers armed with CCTV of the quality possessed in this case to seek to discover from their patrolling colleagues whether any maybe of assistance to recognise the assailants.
50. It was unfortunate that it took so long to come to mind and manifestation but I think not to do so at all would have been a failure in investigative duty.

51. In the circumstances I would rule there not to be any breach of the Code so significant that the application should be allowed.
52. In short I would allow the evidence to be admitted.

C Greaves, J.

23rd February 2018