

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CACR012/2013

IND 85/12

C#0449/2012

BETWEEN: JUSTIN D'ANGELO RAMOON

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

Before:

The Honorable Mr. Justice Mottley, Justice of Appeal

The Right Honorable Sir Anthony Campbell, Justice of Appeal

The Honorable Mr. Justice Martin, Justice of Appeal

Appearances: Ms Fiona Robertson & Mr. Ben Tonner of Samson & McGrath for the Appellant
Mr. Greg Walcolm Crown Counsel for the Director of Public Prosecutions

Hearing: 3 and 16 April 2014 Judgment reserved.

Judgment delivered: 22 August 2014

Mottley J.A.

1. On 17 July 2013, following a trial before Mr. Justice Swift and a jury, the Appellant was convicted of wounding Andrew Lopez on 25 August 2012, with intent, contrary to section 203 of the Penal Code. He was sentenced to 7 years and 9 months' imprisonment.

2. On 25 August 2012, Mr. Lopez was having a drink with his cousin who was leaving the Island. Having had two beers he left shortly after midnight; Mr. Lopez went to Archie's Bar along Shedden Road to talk with a friend and observe a game of dominoes which was being played. He was leaning on the side of his car facing the men who were playing dominoes; his back towards the Sea Inn. Suddenly, he felt a stab on his left side towards the rear. After receiving this stab, he looked over his left shoulder in the direction of the Sea Inn. When asked in/ evidence-in chief if he saw anyone, he replied that it was the Appellant, Justin Ramoon, whom he knew as Potts. On turning around, he stated that the Appellant was right in front of him. He said that he was not even given a chance to turn around properly before he received a second stab. Mr. Lopez said the Appellant said "Pussy where all your mouth is now". He indicated that he and the Appellant had an argument the week before the incident. Mr. Lopez was trying to get away from the Appellant while he was being stabbed but he slipped when his foot came out of the slippers which he was wearing. Mr. Lopez received four stabs, two in his back, one over his heart and one in his stomach. He said that he never fought back. Mr. Lopez stated that there was nothing obstructing his view of the Appellant.
3. In cross examination, Mr. Lopez repeated that when he felt the first stab, he turned over his left shoulder and saw the Appellant who said something to him and continued to stab him.
4. The following sequence occurred in cross examination by Mr. Tonner:

"Q The suggestion I'm making to you is your attacker was behind you throughout, that's why you received the cuts to your back.

A I wouldn't say he was behind me. He came up from behind me sir.

But he was mostly like on the side. When I turned, he was right there. This is behind me. This is right there. You understand?

Q If you were facing him, you'd have received cuts to your front, but you didn't.

A Sir, that why the side of me stabbed up right now because he was right here. He wasn't behind me, He came up from behind.

Q The attacker was wearing a cap as well, wasn't he?

A Yes, sir.

Q You've told us about the attacker then running away. Nobody came to help you, did they?

A No, sir.

Q Nobody helped you when you were on the floor, no?

A No, sir.

Q Nobody pulled the attacker off you?

A No, sir.

Q He just stopped, yes.

A Yes, sir."

5. Mr. Lopez agreed with a suggestion from Mr. Tonner that "*the whole thing from beginning to end have happened very quickly*". He agreed that while at the hospital there was an argument between him and the officers. He denied the suggestion that he was drunk.

6. Mr. Lopez, who was aged nineteen at the time of his evidence, said he knew the Appellant from the time he was about 14 or 15 years. As regards the lighting in the area, Mr. Lopez agreed that there were some street lights on. He disagreed with the suggestion that there was no other source of light. He indicated that there was light coming from the area where dominoes were being played.
7. The main issue in this case was the identity of the person who attacked and stabbed Mr. Lopez. Put another way, did the prosecution prove beyond a reasonable doubt that it was the Appellant who stabbed Mr. Lopez. The judge was required to deal with the law as laid down in *R v Turnbull* [1977] Q.B. 224.
8. At page 229 the Lord Chief Justice said :

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.

9. Mr. Justice Swift in his summation reminded the jury of what Mr. Lopez said in his evidence:

“He said he described the defendant later to a police woman by his skin colour, hairstyle and height. But there is no record of that. At first he could not recall the defendant’s correct name, but immediately told the police it was “Pott”, the name by which he knew him, who was the culprit.

Let me say something now about his recognition of the defendant. When you are considering the identification evidence of Mr. Lopez, who says he recognised his attacker as someone he knew, you need to exercise special caution. The reason for this is that experience tells us that honest and impressive witnesses genuinely convinced of the correctness of their identification, even those who say they recognize someone, have in the past made mistakes, even a number of witnesses making the same identification.

You cannot convict the defendant unless you are sure that Mr. Lopez's identification was accurate, and in making that judgment, you need to look carefully at the circumstances in which it was made and look for any other evidence in the case which may support it. Let's consider the circumstances in which the identification was made, took place and first of all the opportunity that Mr. Lopez had for observing the person he says was the defendant.

How long did he have the defendant under observation? Well, from turning around on receiving the first stab until all the stabs had been delivered, he had his assailant in view. Then when he slipped and was halfway down on the ground resting on one arm, he says he saw the assailant fleeing. Although this was obviously a fast moving incident you may think that he had enough time to see his attacker as the stab wounds were being delivered. But it is a matter entirely for you.

How far were they away from each other? Well, stabbing distance. He was right in front of me, said Mr. Lopez. After he turned around, they were face to face until he slipped and fell part way to the ground and looked up and saw him leave.

What about the lighting? There were a couple of street lights, as are described in the admissions and you have seen them in the photograph. There was also lighting on the outside of the wall of Archie's bar. And more significantly perhaps, matter for you, there was light from the domino tent. That light was shining directly at Mr. Lopez and thus directly at the face of the assailant, who was coming from behind.

Was there anything to impede his view? Well, the defendant was wearing a cap, I suppose, but other than that there was nothing. He was asked whether he put his arms up to protect his head when he was attacked and he said he didn't. So he wasn't obscuring his view by his own arms.

Mr. Lopez also told you that he recognised the defendant as soon as he saw him as someone he'd seen three or four times a week since he was about 14 or 15 years of age. He said he was now 19. But certainly over a number of years he'd seen this person, the defendant. They would occasionally say hello in passing on the street.

He said Pott would ride up and down on his dirt bike, and Mr. Lopez gave him a ride on his dirt bike once when he was 17. He knew that Pott lived behind his workplace. That's Mr. Lopez's workplace. And he had at least

four cousins who he named, Charlie, Terrence and Donald, who were involved in the scooter theft and Ramario who was with Pott at Jah-T's the previous Saturday when the incident occurred which is said to have been the catalyst for the stabbing.

Ramario was the person who had said those words that I have read out to you, and I won't repeat them again. It was on that occasion that Mr. Lopez says Pott was close enough to him for him to see him trying to hitch up his trousers and he thought draw a weapon although he didn't see a weapon. So he's saying that he recognised the defendant as someone he knew very well indeed and had seen at close quarters the previous week in quite lengthy circumstances. Anyway, what Mr. Lopez is saying is that he recognizes the defendant as someone he knew well.

It is more difficult perhaps for a witness to take in the features of a complete stranger than it is for him to recognize the features of a person he knows already. However, you need to bear in mind that even people well known to one another make mistakes in recognition. Something which you may have experienced in your own lives. But Mr. Lopez said in the end, 'It was Pott who attacked me. It was not just a fleeting glimpse. I have not made no mistake.'

It was suggested to Mr. Lopez on the defendant's behalf that he was mistaken in his recognition of the defendant. Mr. Lopez was adamant that he had the right man. It was suggested that he was heavily intoxicated and

so may more easily have made a mistake of recognition. But he said he'd only had two beers at his cousin's house that evening and had hardly begun to drink the Guinness he just obtained from the domino tent before the attack took place.

He said that he'd been behaving loudly at the hospital later, and so the police officers there might have thought he was the worse for drink but he wasn't. He was just annoyed. And you should consider carefully whether there is any room for mistake.

What the police did later was to ask Mr. Lopez to identify the assailant from a number of photographs. He picked out the same person he said he had recognised. But you might expect that in any event if the recognition was right or whether it was wrong. If he had made a mistake in the first place, you would expect him to pick that person out from the photographs. So maybe that evidence takes you really no further. The only purpose it serves is to link the person he describes to the defendant as being one and the same individual.

The real question for you is whether his recognition is correct taking all the circumstances into account and you are sure about it. When you are making that judgment you should have regard also to any other evidence which might tend to support Mr. Lopez's identification if there is any.

First let me tell you of evidence which you should not regard as support for Mr. Lopez's recognition. His own account of the previous incident in

Jah-Ts is not supporting evidence, nor is his description of the history of his relationship with the defendant supporting evidence because it comes from him. It doesn't come from an independent source. His own account of the circumstances in which he knew the defendant equally, as I say, is not supporting evidence because it doesn't come from separate independent source.

There is in this case, I direct you, no independent supporting evidence for the accuracy of this recognition. You must decide whether you are sure that Mr. Lopez is accurate and that his recognition is correct.

10. The judge was required to direct the jury on these issues concerning the correctness of the identification. He was required to warn them of the need for special caution before they could convict. The judge was required to tell the jury the reason why it was necessary to proceed with caution. He had to point out to the jury that a mistaken witness can be a convincing witness. The judge was also required to direct the jury that they had to examine closely the circumstances in which the identification was made.
11. The judge told the jury that they could not convict the Appellant unless they were sure that the identification of Mr. Lopez was accurate. He pointed out to the jury that in making that determination they needed to look carefully at the circumstances under which it was made and to look for any other evidence which may support the identification. The judge did not at this stage indicate to the jury that there was no evidence which supported the identification.

12. The judge did remind the jury that when Mr. Lopez slipped, he was halfway down onto the ground and he was resting on one arm. At this stage, Mr. Lopez saw the person who had stabbed him, fleeing. While the judge pointed out to the jury that although this was a fast moving incident, he nonetheless suggested to the jury that they may think that Mr. Lopez had enough time to see his attacker while the stabs were being delivered. Even though this was an unfortunate remark for the judge to have made in the circumstance of the case, the judge, however, reminded the jury that the decision was for them. While the judge did remind the jury that they needed to look carefully at the circumstances in which the identification was made, the judge did not remind the jury that the identification of the Appellant was made in difficult circumstances as this was an essential factor in deciding whether Mr. Lopez correctly identified his attacker, which the jury ought to take into consideration. The judge ought to have reminded the jury of the circumstances which made the identification of the Appellant difficult. At the time of the attack the Appellant was standing by his car shortly before midnight, when he received the first stab; this caused him to look over his left shoulder. In turning around, Mr. Lopez would have been in the course of defending himself from being stabbed further while at the same time he was trying to get away from his assailant. In trying to get away, his feet slipped out of his slippers and he tripped and was trying to prevent himself from falling on the ground. It was at this time that he received a further stab. The judge ought to have pointed out that the attack was sudden and unexpected and the attacker was wearing a cap. Mr Lopez would have been concerned for his own safety. In addition, the judge ought to have reminded the jury that after the attack while at the hospital, the police officers stated that Mr Lopez appeared to be highly intoxicated.

13. Later in his summation, the judge reminded the jury that Mr. Lopez was asked by the police to look at a number of photographs to see if he could identify his assailant. Having looked at the photographs, he picked out the Appellant as the man who had attacked him. The judge observed to the jury that “maybe that evidence takes you really no further. The only purpose it serves is to link the person he described to the defendant as being one and the same person”. Immediately after the judge made this observation, he told the jury:

“The real question for you is whether his recognition is correct taking all the circumstances into account and you are sure about it. When you are making the judgment, you should have regard also to any other evidence which might tend to support Mr. Lopez’s identification if there is any”

The direction that “maybe the evidence” relating to the picking out the Appellant from the photograph “takes you no further”; and that such evidence had a limited purpose was not in our view, strong enough in the circumstances of this case.

The judge ought to have told the jury in no uncertain terms that there was no evidence which supported the evidence of identification of the Appellant by Mr. Lopez.

14. It is true that the judge directed the jury that there was “no independent supporting evidence for the accuracy of this recognition.” The use of the term “independent supporting evidence” was unfortunate in the context of this case. By the use of the words “independent supporting evidence” the jury may well have concluded that the directions related to evidence independent of Mr. Lopez but did not relate to evidence from Mr. Lopez himself such as the evidence relating to identification of the Appellant by the use of the photograph.

15. A clear and unequivocal statement was required from the judge. The judge ought to have made it clear to the jury that there was no evidence which was capable of supporting the identification of the Appellant by Mr. Lopez.

16. In our opinion, the judge did not give the jury the necessary assistance in determining the quality of the evidence of identification. As indicated above, the judge ought to have reminded the jury that this was an identification made under difficult circumstances. In addition, the judge failed to direct the jury in clear terms that there was no evidence which supported the evidence of Mr. Lopez.

17. In our opinion, the quality of the identification evidence was not good as it was made under difficult circumstances and there was no evidence capable of supporting the identification evidence of Mr. Lopez. In the circumstances, we are satisfied that the verdict was unsafe and unsatisfactory.

Mottley JA

Campbell JA

Martin JA