

30-11-d

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 3 of 2001
(Summary Court Appeal No. 90 of 1999)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent



- and -

JAMES AUSTIN PIERCY

Appellant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice I. Rowe, Justice of Appeal
The Honourable Mr. Justice M. Taylor, Justice of Appeal

H. Delroy Murray instructed by Samson Murray Jackson for the Appellant.
Audrey Clarke for the Respondent Crown.

Heard: November 27th 2001

Reasons released: November 30th 2001

REASONS FOR DECISION

TAYLOR, J.A.

The appellant was convicted in the Summary Court on a charge of reckless driving contrary to section 68 of the Traffic Law and his appeal from that conviction was dismissed by the Grand Court; his appeal to this court is on the ground that there was no satisfactory identification evidence before the Magistrate.

At the conclusion of the hearing we allowed the appeal and said we would later provide written reasons for our decision.

The witnesses for the Crown, a mother and her 15-year-old daughter, are neighbours of the appellant and know him. They testified to a “near-collision” which happened very close to their home when a truck came around the corner towards them on their side of the road, forcing the mother to swerve violently to the left in order to avoid it. The truck continued without stopping and they were unable to get its licence number.

The mother, Jennifer King, said the truck was being driven 20 to 25 miles per hour and identified it as a vehicle which she had previously seen driven by the appellant. She saw a “fair-skinned, dark-haired, big stocky man” in the driver’s seat, leading her to believe that the driver was the appellant, although she does not say she saw his face.

The issue of identification thus turned in the end on the evidence of the daughter. Stephanie King was 15 at the time of trial in October 1999, and would have been 12 or 13 at the time of the events in question more than two years earlier. She testified that her mother was driving at about 20 miles an hour, and the truck coming towards them at 20 to 25 miles an hour. She testified that when she first saw it the truck was only 8 to 10 feet away, and her mother swerved onto the shoulder to avoid it. She said she saw the driver’s face, and was positive that the driver was the appellant. In cross-examination she said the truck “took a few seconds to pass”.

She agreed that she had never given a statement to the police and that she had not come to court on previous occasions when the case was expected to be tried. We were told by counsel that

neither Crown nor defence had expected her to testify, although no objection was taken on behalf of the accused to the trial proceeding without a statement from her being taken.

The appellant denied having driven a vehicle at the relevant time and place.

The learned Magistrate very properly instructed herself with respect to the need in these circumstances for caution in dealing with the identification evidence. She said:

The circumstances under which this alleged identification took place were as follows: an incident which on the evidence took place very quickly and which was obviously fraught with panic and stress. The identification also took place while the driver of the car was taking emergency evasive action.

The person being identified was not a stranger to Stephanie King but caution has to be taken when one considers how frequently it happens that persons make mistakes when they think that they see a person they are well acquainted with. Such mistakes can have often been made by honest witnesses whether it be in relation to a stranger or a person they are familiar with. Consequently, I have to bear this in mind especially when the evidence of Stephanie King could be based on the fact that she is used to seeing the defendant driving a vehicle such as the one involved, around her neighbourhood.

The Magistrate reminded herself also of the significance of the fact that Stephanie King had not given any statement prior to the time of trial.

The Magistrate accepted the evidence of Mrs. King and her daughter that the incident involved a truck such as that they had previously seen driven by the appellant, and found as a fact that Stephanie King saw that the appellant was driving it.

In dismissing the appeal to the Grand Court Mr. Justice Sanderson observed that the identification issue turned on credibility, and that the court would overturn a finding of fact based on credibility of witnesses “only where the finding of fact reached was such that no reasonable person could have come to that conclusion”.

Before us counsel for the appellant focussed on the “fleeting” nature of the view which Stephanie King had of the oncoming vehicle and its driver. This was such, counsel said, that there could not have been any opportunity for a person in her position to make any identification of the driver on which a court could safely rely. If the vehicles were closing at a combined speed of 40 to 45 miles per hour, as she testified, and if, as she testified, she first saw the truck 8 to 10 feet before it passed, she could not have had “a few seconds” in which to view the other vehicle and its driver, but only one-quarter or at most one-third of a second. Particularly in circumstances of a sudden emergency it would be impossible in so brief a moment, counsel contended, to make a reliable identification of the other driver.

The Magistrate’s finding that Stephanie King was entirely honest in her evidence is unassailable. As the Magistrate noted, however, and the authorities emphasize, honest witnesses can be mistaken in identifying persons, even those known to them, on the basis of a fleeting glance. It is obvious that the witness was mistaken in believing that she had several seconds in which to see the driver if the vehicle was as close as she said when she first saw it. But this point was not explored in the evidence, and the Magistrate did not deal with it. In such circumstances the possibility of honest but mistaken identification to which the Magistrate correctly referred cannot, in our view, be excluded.

As the Magistrate observed, Stephanie King's evidence had the further unusual feature that her account was not recorded at or close to the time when the incident occurred, but first disclosed to the Crown more than two years later, on the day of trial. An honest but mistaken identification which may have originally been of a more tentative nature can, of course, crystallize in the mind of a witness over such a period of time.

In accordance with the authorities cited by my colleague Mr. Justice Rowe, in the concurrently released decision of this court in *R. v. Richards* (CICA No.18 of 2000) at pp 10 – 11, it was necessary that the Magistrate disclose how she reached her conclusion in light of the conflict in the evidence of Stephanie King as to the length of time that the other vehicle and its driver were in view. Without resolution of that conflict the case was one in which the opportunity for identification may well have been so fleeting that the case would, in a jury trial, have had to be taken from the jury: *R. v. Turnbull* [1977] 1 Q.B. 224 (C.A.).

We were of the view that the frailty of the identification evidence rendered the conviction of the accused unsafe. We accordingly allowed the appeal and directed that the conviction be set aside and a verdict of acquittal entered.

Zacca, P.

Rowe, J.A.

Taylor, J.A.

