In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
2017: No. 28

BETWEEN:

THE QUEEN

-and-

TRENTON WILLIAMS

Date of hearing: 12th , 13th October 2017

Date of Ruling: 16th October 2017

Ms. L. Burgess for the Crown

Mr. Attridge for Mills

Before: Hon. C Greaves PJ.

JUDGMENT / RULING / REASONS FOR DECISION

Crim law-sufficiency of recognition evidence-Code D, Police and Criminal Evidence Act 2006 Sufficiency of evidence Section 31 Criminal Jurisdiction and Procedure Act 2015.

INTRODUCTION.

This is an application by the defence for a ruling to exclude certain recognition evidence to be given by two police officers in which they purport to have recognised the defendant in certain CCTV footage.

Before I turn to the substantive issue, I note that the jury has already been selected but not sworn. This is an application that should have been brought pre-trial under section 31 of the Criminal Jurisdiction and Procedure Act 2015 for a sufficiency of evidence ruling so as to avoid the wastage of precious court time at the time of the trial.

However, I accept the excuse given by counsel as reasonable in the circumstances given that this case was recently sent to the Supreme Court for arraignment on August 1st 2017 and on 19th September the trial date was quickly fixed for October 9th 2017. I accept that due to his effort to accommodate the quick trial date there was an oversight on his part until he was properly preparing the case for trial. In addition, the point he has taken might not have been appreciated until he was really in preparation mode- and there appeared to have been some issues on the part of the defence in relation to the timely viewing of the footage. IN any event it seems to be a case where we fell victim of our own speedy process in this jurisdiction.

THE FACTS.

On 8th June 2017, a fight ensued on Front Street before the Cosmopolitan Night Club among several young male persons. One of them was stabbed several times by another. A knife was recovered from the scene bearing the complainant's blood on the knife's edge. The defendant was subsequently arrested when he voluntary surrendered at the police station and charged for Wounding with Intent, pursuant to section 305(a) of the Criminal Code Act 1907. I understand no attire of his was recovered as purported to be worn on the night of the melee.

A knife-set of the same family as the knife recovered at the scene was found at his home when searched. He gave the police no statement.

On the night of the incident there was a quick response by the police to the scene.

CCTV footage was recovered from the police CCTV system which clearly showed the fight and additional footage was recovered from the nearby club.

DC Tait wrote in his statement dated 29th June 2017;

> *On Tuesday 8th June around 2:35 am …I heard broadcast of a fight taking place on Front St near the entrance of Cosmopolitan night club involving several males.*
>
> *I immediately proceeded from the Hamilton Police Station. As I reached the junction of Reid and Parliament Street, my attention was drawn to a slim Caucasian male dressed in long dark pants, dark short sleeves shirt and wearing a baseball type hat. He was crouching on the porch of the old magistrates' court building to my right; he appeared to be uneasy and this aroused*

my suspicion. However as a result of the violent nature of the fight on Front Street I continued where the fight was…

I stayed at the scene and continued to monitor my police radio. I also heard the officers stating the male who stabbed the victim was a white male. My recollection was immediately brought back to the caucasian male I earlier saw crouching on the porch of the old magistrates' court building. I returned to the Hamilton Police Station. I later went to the CCTV monitoring room and reviewed the footage. I observed several males involved in a fight and a caucasian male with what appeared to be an object in his hand swinging it towards the body of a male. It was revealed to me that the caucasian male alias was, Rabbit. I conducted inquiries which revealed that his correct name was Trenton Williams. I collected the DVD.footage…and place it in the office of DS Roberts.

I wish to say that the caucasian male that I saw on the CCTV fitted the description of the male that I saw on the porch of the old magistrates' court building at that time visibility was good.

It is accepted that the reference to who the male was is inadmissible hearsay.

Acting police inspector Trott wrote the following in his statement dated 7th July 2017:

Once the ambulance left the scene with Thomas I returned to the Police Co-Ops where I reviewed the CCTV footage captured during the disturbance. Whilst viewing the footage I saw a white male, who I believed to be Trenton Williams, involved in physical confrontation with another male during which time the white male made several stabbing motions toward the other male. The white male was then seen to run toward Parliament Street out of the view of the CCTV cameras.

Trenton Williams is known to me as an affiliate of the Parkside Gang and is known to me to frequent Court Street, Parsons Road, Fenton's Drive, and other locations used and frequented by Parkside gang members in North Hamilton and Pembroke Parish. I have had no direct dealings with Williams. However in my former role as a supervisor in the Armed Response Unit, the officers who served under me had. I have also personally witnessed Williams frequenting in the areas I have previously mentioned.

As a result of my belief that the white male on the CCTV footage was Trenton Williams, I spoke with the officers who were dealing with this matter and made them aware of the possibility. That was the extent of my involvement in this matter.

This officer provided no other information as to why he thought this was Trenton Williams.

A briefing meeting was convened on 8th June 2016 at 9:05 am per note of DC Williams. In attendance were DC Williams, DS Roberts, DC Simmons and DS Rock.

Roberts is the officer to whom the DVD had been given by Tait.

It is not clear if the suspected information in respect of Mr Williams in the video was somehow brought to the attention of DC Simmons.

The burden of proof that such did not occur rests upon the Crown.

Thereafter DC Courtney Simmons wrote in a statement dated June 16th 2017 the following:

> *On Thursday 8th June 2017, I was on duty. When I was informed of a complaint of assault that occurred earlier that morning on Front Street. DS Roberts handed me one disc with CCTV footage from the police cameras and asked me if I could assist in viewing the footage and compile screen shots and a running log. I was also informed there were four people in custody detained in relation to the matter.*

That same day she went to the custody area and took individual photos of the four persons (none of whom were the defendant) to assist her with her viewing of the footage. She continued:

> *That same day I began to view the CCTV footage …and started running a log…Whilst viewing the footage I was able to identify all the above individuals from the descriptive clothing and build. There was also another male I was able to identify as Trenton Williams in the footage. I can describe Trenton Williams as a white male about 6ft in height of a slim build stature at the time in the footage he was wearing a black baseball cap, black t shirt with graphics, blue jean pants and dark sneakers. I have known Williams for over five years through Police investigations.*

The officer then produced a log detailing the actions as seen in the video including those she attributed to the person she purported to recognise as Mr Williams.

SUBMISSIONS.

Mr Attridge submits for the defence, that neither the evidence of D/Inspector Trott nor that of DC Simmons should be admitted because inter alia neither gave a sufficient basis for they alleged recognition of Mr Williams and both purport to have recognised without complying with the requirements of certain aspects of Code D of the Police and Criminal Evidence Act 2006, which would require a recording at the time or at least reasonably close to the time in such circumstances how they had carried out the CCTV viewing process and a detailing of the basis upon which they said they recognised him.

He submits that the recognition portion of Trott's statement is no more than hear-say taken from information obtained from the officers of his former unit and to the extent that there is any reference to direct recognition of his own he failed to in the proper manner set out any detail explaining it.

In the case of DC Simmons , he submits that the mere blanket statement after she had viewed the footage, that she had known Mr Williams for 5 years due to police investigations was insufficient and lacked detail and form as required by the Code.

Furthermore, it being several months after their alleged recognition and failure to provide the requisite detail, it is now too late to allow either of them to do so.

Consequently their recognition evidence is unreliable and should be excluded.

Furthermore, he submits, the footage is not of a sufficient quality that a jury could look at it and clearly identify the culprit as the defendant without the purported recognition evidence of the police officers.

Thus if his submissions are accepted, there is an insufficiency of evidence tending to associate the defendant with the crime and thus he is entitled to such a ruling.

In support he relied on Code D 3.30, *R v Smith and others [2008]EWCA Crim 1342; [2008] All ER (D)343*; *R v Jake Seaton [2016] EWCA Crim 393; R v Deakin [2012] EWCA Crim 2637.*

Ms Burgess for the Crown submitted that the authorities relied upon by the defence tended to relate to occasions of formal and not informal recognition and identification in CCTV footage.

She submits that in the case of DC Simmons this was an informal recognition and despite the scarcity of details relating to how and why she was able to recognise the defendant there was no breach of the Code. However even if there was, it was not of such a substantial nature in this case that the recognition evidence should be excluded.

She submits that the footage is of a sufficiently supportive quality that a careful Turnbull direction to the jury should suffice. Thus the defence application should be refused.

For support, she relied on *R v Alvin Moss [2011] EWCA Crim 252.*

ISSUE; Is the purported recognition evidence by the two officers so lacking in supportive detail and or constitute such a substantial breach of the principles envisioned in the Code that it should be deemed too unreliable to be admitted. And if so, is it too late for that recognition evidence to be supported by further evidence now to be supplied by the witnesses either in a voir dire or by an additional statement.

THE LAW.

Code D 3.30 which is identical to the UK Code 3.35, provides that when showing any film or photographs to potential witnesses or to police officers for the purpose of recognition and tracing suspects, to obtain identification evidence, it shall be shown on an individual basis to avoid any possibility of collusion, and as far as possible, the showing shall follow the principles for video identification pursuant to annex A, if the suspect is known or Annex E, if the suspect is not known.

3.31 provides that when it is proposed to show photographs to a witness in accordance with Annex E, it is the responsibility of the officer in charge of the investigation to confirm to the officer responsible for supervising and directing the showing, that the first description of the suspect given by that witness has been recorded. If this description had not been recorded, the procedure under annex E must be postponed.

In R v Smith page 15, *paragraphs 67-69 Moses LJ* clearly set out the danger of not adhering to the procedure and of not creating a proper record at the time. He reasoned that though police officers may not be in the same position as ordinary witnesses, since it would be expected that sometimes a police officer may not detail a description and thus assert the recognition before he had seen the video, the safeguards of the Code should still apply whether or not the Code actually applied. Such was to avoid the likely-hood or opportunity for it to be claimed that a police officer might have consciously or unconsciously asserted recognition without a objective evidence to test that assertion.

The court recognised in that case at the time that the UK officers were in the process of developing such a protocol.

It was at a time when the UK provisions in their Code were only similar to those in the Bermuda Code D.

In *R v Deakin* the issue arose again as to whether a police officer should be allowed to give purported recognition evidence after viewing CCTV footage. By then post *Smith*, the UK Code D 3.35 had been amended to extend the protocol per 3.36, (a)-(k). For the sake of brevity I shall not refer to (a) to (j) which in my opinion were mostly complied with in the log created by DC Simmons in the instant case and is at present irrelevant to the decision.

More importantly is (k) which provides;

> *Whether or not on this occasion, the person claims to recognise any image shown, or individual seen, as being someone known to them, and if they do;*
>
> *(1) The reason*
>
> *(11) The words of recognition*
>
> *(111) any expression of doubt*
>
> *(1v) what features of the image or the individual triggered the recognition.*

3.37 requires that record under 3.36 be made by the officer who view the image or sees the individual and makes the recognition or officer in charge of showing the images to the person or in charge of the conditions under which the person sees the individual.

I am of the opinion that despite the absence of these latter provisions in the Bermuda Code D, effect of our 3.30 as it presently is, is the same. The letter and spirit of the Code is to achieve the same effect and as illustrated by the *Smith case,* the latter procedure is the correct one to follow.

The problem in the present case is twofold. Firstly DC Simmons viewed the video alone without any supervision at the time and secondly though she recorded what she saw in the video as she saw it she in addition asserted recognition of the defendant and only asserted that she recognised him as she knew him for five years through police investigations. She offered no details of this basis for her recognition. It may have been for example that through those investigations, she had had previous direct contact

with him, she may have said how many times, where, in what circumstances, about what and so on. But she did not.

It is understandable why she might not have wished to include such in her statement or record at the time as such would likely be challenged in a trial for prejudice. But there would have been available solutions for that, including for example an agreement between the parties that she did know him previously and thus an exclusion of that evidence as not to be in dispute. It might be that she may have known him from previous photographic evidence seen in police investigations. It is well known that police intelligence keep a good record of photos of local gang associates, but she did not say or detail that. In any event it's unlikely that that would have been helpful since from my viewing of the video I could not find that there was a sufficient facial exposure of the defendant that any one could say he was the same or even similar as in a photo.

In short this court is left with no record of any proper basis upon which DC Simmons could back up her alleged recognition.

It may be in some cases where the video is of a sufficient quality that a facial recognition or identification can be made by an objective observer such as a jury but after viewing the video, I cannot say that is the case in this case.

It maybe that a person who well knows another may without a clear facial feature in a video be able to recognise that person and that may very well be the case in this case. But even though DC Simmons recorded a description of the person she purported to recognise in the video, that description could easily have come from her observations in the video and not from otherwise. It is not clear at all from her statement and log that the former did not occur.

The prosecutor argued however that this was not a case in which DC Simmons was given the video to see if she could recognise anyone in it and thus attracted the Code. This was a case in which she was given the footage to record what she had seen in it. She had access to and photos of the four suspects in custody. It was whilst doing so that she came to recognise the defendant similar to as occurred in the *Moss case.* It is therefore within the judges' discretion to admit the evidence and to follow it with the requisite Turnbull directions to the jury.

In the *Moss case,* the officer was passing by when he happened to glance at a screen upon which the defendant's photo was exposed and he immediately said that is Alvin Moss. He made no note at the time but he immediately reported his recognition to his supervisor and made a note a week later. The evidence was allowed.

On appeal the court considered the guidance in the S*mith case* and the subsequent amendment to the UK Code D *but* it reasoned that in such informal excises such evidence could in the discretion of the judge be admissible.

I think the *Moss case* is distinguishable from the instant.

In this case DC Simmons attended the briefing that morning with officers including D/Sgt Roberts on whose desk the DVD had already been placed.

It is arguable that DC Simmons may have learned at that meeting of the likelihood of the defendant in that video. This was a point of dispute in the hearing. The prosecution asserts that her information was that the content of the video was not mentioned at the meeting. Defence counsel asserts that such an assertion would be expected. No notes were produced detailing what occurred at the meeting. The burden of proof is on the prosecution. I cannot say it has been discharged.

Unlike in *Moss*, this officer, Simmons did not just pass by and assert. She spent much time viewing the video over and over; she had evidence of who the other or some of the other suspects in the video were. By process of elimination it was perhaps only the man she purported to recognise as the defendant left to be Identified, yet all she could say is I recognised him by knowing him for five years through police investigations; proceeded to describe him as he appeared in the video and provided no further record detailing her reasons for the recognition.

Furthermore, even if she is correct, from my viewing of the video, I see no facial image of any sufficient quality to assist her. I think this is a case that begged for further detail. One would have expected her supervisor to immediately demand such.

The further question I must consider is whether the recognition evidence could be remedied at this time, perhaps through the provision of further detail. The defence argues it is too late. The prosecution argues such may be done for example by voir dire.

I find merit in the defence argument. It has been many months since the purported recognition. It has been many months since the statements were made.

The defence argues that it would be expected that the evidence to be now provided by the officer or officers would only serve to bolster their previous lacuna. The prosecution could hardly differ from that.

In the *Seaton case*, the officer upon the demand of his superiors gave a further statement some 6 months after his initial statement purporting to have recognised the defendant. That statement was found to be an attempt to shore up the deficiencies in his previous statement.

It was held to be in breach of the spirit and intent of the Code.

I would hold likewise in this case.

I think even in the absence of the Code, on ordinary principles of fairness, I would have held both DC Simmons and Inspector Trott's recognition to be inadmissible. I would have held them to be unreliable and I would not have allowed a further statement to be produced at this time, to avoid the risk of a possible shoring up of evidence which the officers could have given at the proper time unless supported by physical evidence such as recordings or photos for example showing the witnesses and the defendant in communication or association.

I would hold that the additional evidence, even if available, in the case of both Trott and Simmons would be too late to afford the defendant a fair trial in such a case as this when the only evidence against him is the alleged recognition by the police officers.

I would have done so based on the principle of the defendant's entitlement to know the case against him before the day of his trial and that he should at least have a reasonable sufficiency of time for challenge if he desires to. In short the additional disclosure on such a crucial issue would have been too late.

Furthermore, on the evidence as it presently stands, I cannot see how a full Turnbull direction would assist the prosecution because there is hardly any evidence that would at present meet the indicia in that direction.

In conclusion, I will treat the application as if it was a section 31 application and allow it.

In the circumstances it is conceded that there is not sufficient other evidence against the defendant for a trial to proceed and I so rule. Consequently pursuant to section 31(2) of the Criminal Jurisdiction and Procedure Act I quash the indictment.

16th October 2017

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Justice Carlisle Greaves, PJ