55/10; [2010] VSC 560

SUPREME COURT OF VICTORIA

R v TRAN

Hollingworth J

16-17, 19 August, 8 December 2010

CRIMINAL LAW – EVIDENCE – IDENTIFICATION – PHOTOBOARD IDENTIFICATION – WHETHER POSITIVE IDENTIFICATION – SIMILARITY EVIDENCE – WHETHER EVIDENCE SHOULD BE EXCLUDED: *EVIDENCE ACT* 2008, SS135 AND 137.

In a murder trial against T., defence counsel objected to the admissibility of certain evidence proposed to be given by two witnesses. The evidence related to photoboards shown to those witnesses which included a photograph of T. Defence counsel also submitted that the evidence ought to have been excluded under ss135 or 137 of the *Evidence Act* 2008.

HELD: The Crown permitted to lead the evidence.

1. Even if one of the witnesses had not made a positive identification, his evidence would have been admissible as part of the Crown's circumstantial case. Evidence to the effect that an accused person is similar to, or resembles, the offender has been held to be admissible as part of the circumstantial evidence in cases involving issues of identification. Although such evidence is not sufficient in itself to sustain a conviction, it may nevertheless form part of a circumstantial case pointing to the accused as the offender.

***Murphy v R* [1994] SASC 4674; (1994) 62 SASR 121; and**

***Pitkin v R* [1995] HCA 30; (1995) 80 A Crim R 302; (1995) 69 ALJR 612; (1995) 80 A Crim R 302; (1995) 11 Leg Rep C7, applied.**

2. Evidence is not unfairly prejudicial to an accused merely because it makes it more likely that the accused will be convicted. In order to be excluded, there must be a real risk of some unfairness in the way that the jury might use the evidence, for example, by leading them to adopt an illegitimate form of reasoning or to give the evidence undue weight.

3. The law recognises that there are various risks inherent in any identification evidence, in particular with photoboard identification. That is why comprehensive directions are required to be given to juries, to warn them of such risks. Any risks or limitations in the evidence of the witnesses would be capable of being explained to and understood by the jury. Accordingly, the probative value of the evidence was not outweighed (substantially or at all) by the danger of unfair prejudice to the accused T.

HOLLINGWORTH J:

Introduction

1. The accused, Phillip Tran, was charged with the murder of Aaron Nidea at Melbourne on 22 December 2008.

2. Prior to the commencement of the trial, defence counsel objected to the admissibility of certain evidence proposed to be given by two witnesses, Bruce Smith and Luke Morgan. The evidence related to photoboards shown to those witnesses, which included a photograph of the accused.

3. Defence counsel argued that the evidence was not admissible at all, as it was not positive identification evidence. Alternatively, defence counsel sought to have it excluded under ss135 or 137 of the *Evidence Act* 2008.

4. At the commencement of the trial, I ruled that I would allow the Crown to lead the evidence, for reasons which would be published later; these are those reasons.

Background

5. There was no dispute that in the early afternoon of 20 December 2008, Smith and Morgan

went with Smith's friend, Robert Tasevski, to an abandoned Telstra building in Footscray (generally referred to by witnesses as "the squat"), in order to use heroin. The three men entered the squat by climbing through a hole in the fence, and then through a window. When they entered, there were two men already in the squat, one was using heroin and the other was swinging a baseball bat.

6. The statements of Smith, Morgan and Tasevski differed in some respects as to the precise events which transpired in the squat, and the manner in which they left the building. But they all agreed that by the time all three of them had left, the only people still in the squat were the man with the baseball bat and his companion.

7. A short time later, the deceased was found in a semi-unconscious state in the squat, suffering from head injuries. He died two days later, on 22 December 2008, from those injuries.

8. There was no dispute that the man seen by Smith, Morgan and Tasevski with the baseball bat was the deceased. The Crown case was that the other man in the squat was the accused.

9. The Crown case against the accused was a circumstantial one, based in particular on:

> (a) Phone calls between the mobile phones of the accused and the deceased on 20 December, the duration and location of which the Crown said demonstrated that the two men were arranging to meet up, and did eventually do so at the squat;
>
> (b) Admissions alleged to have been made by the accused to three witnesses; and
>
> (c) The evidence of Smith, Morgan and Tasevski, including their respective identifications of the accused as the person, or as resembling the person, who was in the squat with the deceased.

Photoboard identifications — Tasevski

10. Tasevski positively identified the accused and the deceased as the two men in the squat, and there was no challenge to his photoboard identifications.

Morgan

11. Morgan made four statements to the police, two of which were made on 25 March 2009, when he undertook two photoboard identification exercises.

12. First, he looked at photoboard 676-2009. His statement said he viewed each image and identified photograph number 6 by pointing and saying "this guy was the one holding the bat in the squat". Photograph number 6 was a photograph of the deceased.

13. Shortly thereafter, he was shown photoboard 675-2009-A. From this second photoboard, Morgan identified number 11. His statement said:

> I indicated to Photo Number 11 by pointing and saying:
> 1. They all look similar 11 could be it.
> 2. I remember that he was taller than average Asian, slender looks young (maybe 18).
> 3. Remember his lips – Asian lips normally thin whereas white people's lips are usually fuller and this bloke had fuller lips.
> 4. Definitely not number 8, I reckon its number 11.
>
> Question – "Where have you seen number 11 before?"
> Reply – "In the Telstra building the day the guy was bashed. It was the other guy that I have looked at earlier that had the bat when I saw them."

The man in photograph number 11 was the accused.

14. At the committal hearing on 16 December 2009, Morgan was cross-examined by counsel for the accused. In particular, Morgan was taken to the parts of his statement in which he said "they all look similar 11 could be it", and " I reckon its number 11".

15. It was put to him that he could not be 100% sure in relation to number 11. Morgan replied

> "No, I am sure that this is the bloke." He explained that his statement recorded the process by which he had taken his time to study all the faces, thinking out loud, to make sure he picked the right one. It was put to him that what he was really saying was that number 11 looked the closest to the person he could recall seeing in the building; he replied "No, I'm certain that that is the bloke I saw in the building."

16. He was asked by the magistrate whether he had used the actual words "I reckon it's number 11" at the time he made his statement; he replied "No, no, I pointed and said that it was number 11." He said he knew the faces of the two men "without a doubt".

Smith

17. Smith's third statement to police, dated 23 March 2009, dealt with his examination of two photoboards.

18. The first photoboard displayed twelve images of Islander men, and from this photoboard Smith identified number 5 as being the person he had seen holding the baseball bat when they went into the squat. Number 5 was the deceased.

19. In relation to the second photoboard, 675-2009-B, Smith's statement said:

> I couldn't be sure that any of the images were of the same person, but what I can say is that images number 1 and 9 have the facial features of the second male in the squat on the day of 20th December 2008. The guy in the squat had some growth on his face but did have the same features of 1 and 9.

20. Photograph number 1 was the accused.

Admissibility

21. Defence counsel argued that Morgan did not make a positive identification of the accused, and the evidence was therefore inadmissible. I rejected both of those submissions, for the following reasons.

22. Had Morgan's proposed evidence gone no further than his witness statement, there might have been some room for argument about whether or not he had positively identified the accused, or merely said something to the effect of "I think it is him" or "he is similar to the man I saw". But, when regard is had to his evidence at the committal, it is clear that he positively identified number 11, the accused, as the other man present at the squat at the relevant time.

23. Even if he had not made a positive identification, Morgan's evidence would have been admissible as part of the Crown's circumstantial case. Evidence to the effect that an accused person is similar to, or resembles, the offender has been held to be admissible as part of the circumstantial evidence in cases involving issues of identification.[1] Although such evidence is not sufficient in itself to sustain a conviction[2], it may nevertheless form part of a circumstantial case pointing to the accused as the offender.

24. As far as Smith was concerned, the Crown accepted that he did not make a positive identification of the accused. However, his evidence was admissible as part of the Crown's circumstantial case, on the authorities just mentioned.

Probative value versus prejudicial effect

25. Even if the evidence of Smith and Morgan was otherwise admissible, defence counsel argued that it should be excluded because its probative value was weak and was substantially outweighed by its possible prejudicial effect. Although defence counsel's submissions only referred to discretionary exclusion under s135 of the Act, I have also had regard to whether there should be mandatory exclusion under s137.

26. Section 135 provides that:

> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) cause or result in undue waste of time.

27. Section 137 provides that:

> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

28. Defence counsel argued that the evidence did not have any probative value, because it was not a positive identification by either witness. I reject that argument. Morgan's evidence does amount to a positive identification. In any event, similarity or resemblance evidence may have probative value as part of the circumstantial case.

29. Defence counsel referred to certain parts of the witnesses' statements to establish that the circumstances of their observations of the second man meant that their evidence had little probative value. For example, Smith's first statement said that he "did not pay too much attention to the one that was squatting down having a shot." And Morgan's first statement said that he "never really got a good look" at the second Asian man. But those sentences should not be read in isolation from the rest of their evidence, in which they gave descriptions of the two men and further information about the circumstances of their observations. Ultimately, the assessment of the weight and strength of their evidence was a matter for the jury, assisted by any appropriate directions from the trial judge concerning the risks and limitations of such evidence.

30. Evidence is not unfairly prejudicial to an accused merely because it makes it more likely that the accused will be convicted.[3] In order to be excluded, there must be a real risk of some unfairness in the way that the jury might use the evidence, for example, by leading them to adopt an illegitimate form of reasoning or to give the evidence undue weight.

31. The real problem here was that defence counsel was unable to point to any potential unfair prejudice to the defendant. On several occasions, defence counsel made submissions to the following general effect:

> What we are saying, Your Honour, is that you have what is potentially – not potentially, but what is a weak identification, at best, and the danger, Your Honour, we say, that eventuates from admitting it, is that the Crown would then be asking the jury to draw an inference, based on what is not a positive identification and to lend weight to their case, in an impermissible way.[4]

32. Defence counsel never actually explained what would be impermissible in the jury relying on the evidence of Smith and Morgan.

33. The law recognises that there are various risks inherent in any identification evidence, in particular with photoboard identification. That is why comprehensive directions are required to be given to juries, to warn them of such risks. Any risks or limitations in the evidence of Smith and Morgan would be capable of being explained to and understood by the jury.

34. I was not persuaded that the probative value of the evidence was outweighed (substantially or at all) by the danger of unfair prejudice to the accused.

35. For these reasons, I ruled that the evidence was admissible.

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[1] *Murphy v R* [1994] SASC 4674; (1994) 62 SASR 121; *Festa v R* [2001] HCA 72; (2001) 208 CLR 593; (2001) 185 ALR 394; (2001) 76 ALJR 291; (2002) 23 Leg Rep C3.
[2] *Pitkin* [1995] HCA 30; (1995) 69 ALJR 612; (1995) 80 A Crim R 302; (1995) 11 Leg Rep C7.
[3] *Festa v R, op cit* per Gleeson CJ at [221], McHugh J at [51].
[4] T107.

APPEARANCES: For the Crown: Mr G Horgan SC, counsel. Solicitor for Public Prosecutions. For the Accused Tran: Ms C Randazzo SC, counsel. C Marshall & Associates, solicitors.