

**ONTARIO COURT OF JUSTICE**

**B E T W E E N :** )  
)  
**HER MAJESTY THE QUEEN** ) **S. Kerr,**  
) **for the Crown**  
)  
**— AND —** )  
)  
**R R** ) **M. Millar, S. Montes**  
) **for the accused**  
)  
)  
) **HEARD: January 11, July 15,**  
) **September 14, 2010**  
)

2010 ONCJ 406 (CanLII)

**FELDMAN J.:**

[1] R R pled not guilty to a charge of assault with a weapon. It is alleged that while in the company of two companions in the parking lot of a fast food restaurant he responded in anger to a confrontational exchange of words initiated by him and his friends with another group by striking one of its members over the head with a beer bottle causing him injury.

[2] In support of its case the Crown called the complainant, Justin Woodgett, and four other of his friends who were with him that evening, in addition to a civilian witness and one of the investigating officers.

[3] There is no issue the complainant was assaulted with a beer bottle. The question is whether the prosecution can establish the presence of the defendant at the scene and the identity of the assailant to the requisite standard.

[4] I must weigh the evidence and the credibility of the witnesses in making my findings of fact. I am mindful of the burden of proof on the Crown.

**THE EVIDENCE**

[5] Justin Woodgett is a 20-year old student. In the late evening of May 23, 2008, he was with friends at a pub where he said he consumed a pint of beer following which his group headed out after midnight on May 24<sup>th</sup> for some food at Johnny’s Burger in Scarborough.

[6] After eating their meal they went to their car in the parking lot where the complainant heard offensive comments coming from at least one of three men sitting inside a van parked nearby and that were directed to two of his female companions. The van's front driver and passenger windows were open. Mr. Woodgett initially observed an Arabic or Middle Eastern looking man in the driver's seat, a white front passenger and a brown skinned man with longish, somewhat braided hair and well groomed facial hair sitting in the back.

[7] The complainant heard his friend, Michael Luckoo respond sarcastically to the unwanted comments after which he saw the side door of the van open exposing a case of beer on either the seat or floor and heard someone ask if there was a problem. Mr. Woodgett tried to appease the men by suggesting they all "go and pop some bottles" together.

[8] He testified that at this point the accused, who seemed agitated, got out of the van while carrying a beer bottle. At the same time he said the passenger came out as well, rushed over to his friend, Akshay Dubey, and initiated a fight. Mr. Woodgett told the court he went over to assist Mr. Luckoo by pushing off the passenger when he was blindsided by the man with the braided hair, whom he identified as the defendant, by a blow from behind across the left side of the face leaving him dazed and bloodied.

[9] The complainant said that just before being assaulted he also saw the driver getting out of the van. He testified it was this person who struck him a second time across the right side of his forehead with an empty beer bottle. When he later spoke to the police he indicated it was the accused who hit him with the bottles, not mentioning the driver. He believes the officer is mistaken in what he took down in this regard.

[10] Mr. Woodgett participated in a photo lineup in August but was unable to pick out the accused. He identified Mr. R [REDACTED] in court and said he observed him sitting with his parents on an earlier trial date in the hallway of the court house.

[11] Mr. Woodgett received 30 stitches for his wounds at the hospital. He says he is left with scars on his forehead and behind one ear.

[12] There is some qualified support in the evidence of the other Crown witnesses that identifies the accused as the back passenger assailant. Michael Luckoo confirms the harrassment of the women by the men in the van and told the court he was involved with them in an invective-laced exchange. He, too, described the front passenger as white. However, his view of the driver was blocked by the passenger and he is unsure of his description.

[13] He particularly described how the man he identified as the defendant came out of the sliding side van door angry and looking for trouble. He said he had brown skin, was of medium build, wore a ponytail and was carrying a full bottle of beer. He told the court the accused began pushing him and that when the complainant tried to separate them after first telling Mr. R [REDACTED] to "chill out", he was swiped on the left side of his face by the accused

with the beer bottle for his trouble. The witness indicated he then exchanged punches with the defendant and was face to face with him for about 20-30 seconds.

[14] At the same time, he saw the passenger go after Akshay and begin fighting with him. When all three men retreated to their vehicle and attempted to leave, they were briefly held up by a security guard who took down their license plate number.

[15] Although he previously observed him in the hallway of the courthouse and identified him at trial, Mr. Luckoo was, as well, unable to pick his photo out of a lineup a few months after the incident.

[16] Adnan Ismail is a 21-year old student and friend of the complainant. He was the designated driver that evening and consumed no alcohol. He, too, identified the accused as the person who came out of the back of the van and strike the complainant in the face with a beer bottle. He said he was standing next to Mr. R [REDACTED] during the assault and similarly described him as having long hair he believed to be braided, slightly darker skin than the driver and a larger build. He did not recall his having facial hair. Mr. Ismail was unable to pick the defendant out of a photo lineup, citing facial dimension in the pictures tending to mislead the observer. He identified him in court, having earlier recognized him in the hallway sitting with his parents.

[17] Mr. Ismail, in addition, supported the thrust of the prosecution evidence. He described the front passenger as a tall Caucasian and the driver as having light brown skin and appearing Iranian or Mideastern in hue and appearance. He said the passenger took swings at Akshay, punching him in the face. He recalled Michael and the defendant fighting in front of their car. He also said the accused tried to stab Michael with a piece of the broken bottle, but failed to mention this to the police.

[18] Mr. Ismail testified that he saw the driver open his trunk, take out a bottle and hit the complainant with it on his left forehead. He said his being in shock at the hospital after these events caused him to mistakenly identify the second perpetrator as the passenger.

[19] Akshay Dubey is a 21-year old investment banker who had nothing to drink that evening. He confirmed it was the first person from the van to break a beer bottle over the head of the complainant that wore a ponytail and came from the back of the van. He recalls this person getting into the driver's seat, with the other two climbing into the back of the van, when they fled the scene. He described this assailant as possibly Tamil, with brown skin, but not muscular or chubby. He did not participate in a photo lineup, but identified this person in court as the accused.

[20] Mr. Dubey also confirmed that the Caucasian passenger became physically engaged with him and that the driver grabbed a second beer bottle from the back of the van and struck Justin on his head with it.

[21] Branavaa Devasenathipathy is a 21-year old business school graduate. He described the person who first hit the complainant with bottle as someone with long hair who came yelling out of the back of the van. He recalled the white front passenger punching

Akshay in the face. He was unable to identify the accused from a photo lineup. Another friend of the complainant, Milia Georgi, also described a man who looked Guyenese, with a ponytail and who was a bit chubby as the one who “bottled” Justin in the head. He is not sure the assailant came from the back seat of the van but says this individual and the white passenger were involved in the fighting.

[22] I found the Crown witnesses to be straightforward, sincere and believable witnesses. There was no embellishment in their evidence, although there were inconsistencies as between them, some confusion about the facts surrounding these fast-moving and undoubtedly traumatic events and at times uncertainty, all of which raise reliability concerns heightened by their application to the principle that acknowledges the particular frailties in eye witness identification, particularly in light of the prosecution reliance here on “dock” identification.

[23] The Crown called additional evidence that he says circumstantially links the defendant to these events and enhances the identification evidence. Stephanie Mann, formerly employed as a security guard, now a corrections officer, was present at the time and was working with her partner who stepped in front of the van that was attempting to leave the scene. Ms Mann wrote down the license plate number as related to her by her partner but is unable to recall if she observed it herself. She cannot attest to its accuracy. Her evidence is rank hearsay.

[24] Det. Scott Whittemore conducted a CIPIC license search and reported, again on a hearsay basis, that the accused’s father owns a van with that plate number. No documentation or other evidence was presented. As a result of the officer’s call to the R [REDACTED] home, the defendant attended the police station and was arrested.

## THE AUTHORITIES

[25] It is a fundamental principle that a trier of fact must be cautious in relying on eyewitness identification because of its inherent frailties that arise from the unreliability of human observation and recollection: *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.); *R. v. Mezzo* (1986), 27 C.C.C. (3d) 97 (S.C.C.); *R. v. Turnbull*, [1976] 2 All. E.R. 549, 63 Cr. App. R. 132 (C.A.).

[26] It is a caution that is taken from the wisdom of various studies and commissions of inquiry reminding us that mistaken identification has been responsible for miscarriages of justice by reason of the wrongful conviction of persons who have been mistakenly identified by one or more honest witnesses.

[27] It is the risk of error that is inherent in eyewitness testimony that is, in effect, mere opinion evidence based on a host of psychological and physiological factors: *Miaponoose*, at p. 451. In light of this reality, the court must be mindful of the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case: *R. v. Baltovich*, [2004] O.J. No. 4880 (Ont. C.A.).

[28] In the weighing analysis certain factors are important, including a witness's opportunity to observe, the fact that one's retention of an impression held over a significant period of time, as in this case, can deteriorate and that there is no correlation between a witness's confidence and the accuracy of his or her identification evidence: *R. v. Spatola*, [1970] 4 C.C.C. 241 (Ont. C.A.) at p. 249.

[29] Material inconsistencies on the part of witnesses or significant discrepancies with the accused's appearance may reflect an inadequate opportunity to observe or inability to accurately observe the suspect tending to undermine the worth of eyewitness testimony: *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.); *Chartier v. Que. A.G.* (1979), 48 C.C.C. (2d) 34 (S.C.C.).

[30] Importantly, "in-dock" identification is considered in the authorities to be undesirable and unsatisfactory and to attract little weight: *R. v. Izzard* (1990), 54 C.C.C. (3d) 252 (Ont. C.A.); *R. v. F.A.* (2004), 183 C.C.C. (3d) 518 (Ont. C.A.). In *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.), the court said the danger of this type of evidence, if taken as direct identification of the perpetrator, is that it is "deceptively credible", so that in its view, in-dock identification has an "almost total absence of value as reliable positive identification".

#### **APPLICATION TO THIS CASE**

[31] As noted earlier, I found the prosecution witnesses to be sincere and believable. They were not seriously challenged on the fact that the person who got out of the back of the van and perpetrated the initial vicious assault was probably the accused. Michael Luckoo was face to face with this assailant during his own conflict with him. Adnan Ismail was present when Justin was first struck with the beer bottle.

[32] But I must apply caution when considering the Crown's onus in identification cases where there are reliability concerns in the prosecution evidence referred to earlier in these reasons. None of the witnesses were able to pick out the defendant during a photo lineup that occurred at a time much closer to the incident, a result that serves to further minimize any weight accorded the in-dock identification presented here. Inconsistencies in the evidence of the witnesses concerning the suspect's physical description, including, for example, whether he had facial hair or the nature of his build add to these concerns.

[33] The identification evidence would, in my view, have been significantly enhanced were the defendant to have been at least circumstantially linked to the subject van. This, the Crown has failed to do in not adducing the best available evidence for this purpose, but rather relying on inadmissible hearsay evidence for that end. I have made reference to this fact in the earlier review of the evidence. Ms. Mann is unable to say she confirmed the accuracy of what she wrote down, although that is probably the case. Det Whittemore reported what he read in a document regarding ownership of the van, without producing it. The owner could have been called. It would be in significant part speculative on this hearsay evidence to infer the defendant's linkage to the van by his attendance at the police station.

[34] The person who initially attacked the complainant leaving him with permanent damage committed a savage and cowardly act deserving of a significant sanction. However, proof of his identity requires careful consideration by this court mindful of the caution reflected in the authorities concerning the frailties in eyewitness testimony. I am mindful that the Crown must prove this fact to a near certainty: *R. v. Starr*, 2000 SCC 40. On this evidence, I am not satisfied that the identity of the assailant has been proven beyond a reasonable doubt. In the result the charge is dismissed.

**Released: September 14, 2010**

Signed: “Justice L. Feldman”