
CANADA / JUDGMENT

R. v. Crossley

2005 BCSC 985

COURT

Supreme Court of British Columbia

DECIDED

8 June 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Crossley,

2005 BCSC 985

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Registry: Vancouver

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v.

Curtis James Crossley

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648(1) CCC no longer in effect as of June 24, 2005

Before: The Honourable Mr. Justice Davies

Voir Dire #1

Ruling on Crown Application to Adduce Videotaped

Identification Evidence of Proposed Witness

June 8, 2005

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Place of Trial:

Vancouver, B.C.

- [1] THE COURT: The accused is charged with one count of second degree murder and two counts of aggravated assault arising out of events that occurred at a "crack house" in Burnaby, British Columbia on March 15, 2004.
- [2] This is a ruling made mid-trial after a voir dire concerning the Crown's application to adduce the evidence of a proposed witness's participation in a "photopack" line-up that was videotaped by the police following new photographic line-up procedures initiated by the R.C.M.P. to overcome problems with procedures in place prior to the "Sophonow" Inquiry.
- [3] The background to this voir dire was that at the preliminary inquiry the proposed witness was able to recall what she had been able to tell the police during the videotaped photopack line-up process. She was, however, unable to positively identify the accused or anyone else as having been at the house or involved in the events of March 15, 2004 that gave rise to the charges before the court.
- [4] It is the position of the Crown that the videotaped evidence of the proposed witness is admissible before the jury as some evidence of her identification of the accused and that any difficulties she had in positively identifying him in relation to the events in issue go to weight rather than to admissibility. The Crown also submits that the videotape is the best evidence of the extent of the proposed witness's prior identification.
- [5] The defence position is that the videotape offers no admissible evidence of any identification of the accused and as such is irrelevant and if admitted could only lead to impermissible speculation by the jury.
- [6] In support of its application the Crown relies principally upon the decision of the Court of Appeal in *R. v. Perrier*, 2003 BCCA 578 [Perrier] which considered the situation where the witness did not identify the accused at trial but had previously been able to make some identification of him because he "thought" it was the accused who had pushed him but could not be "100% sure". He did, however, mark a ballot selecting the accused.
- [7] I am satisfied that the Crown's application must be dismissed for three reasons.
- [8] Firstly, in *Perrier* at ¶ 14, Mr. Justice Hall considered the existing state of the law on the question of the admissibility of prior identification by a witness and stated:

The case of Tat contains a very helpful exposition of the admissibility of prior evidence of identification that exists aside from the testimony of the witness at trial. It should be noted that Doherty J.A. who gave the judgment of the Court made some observations about the correctness of the judgment of this Court in *R. v. Letourneau* (1994), 87 C.C.C. (3d) 481, a case where admissibility of prior identification evidence was an issue but I do not consider that this case requires us to decide whether those observations are well founded or not. Doherty J.A. held in Tat that out of court statements made by a witness concerning the identification by that witness of a person involved in criminal activity may be admitted when the witness identifies the accused at trial in order to allow the trier of fact to have the full picture about the identification and thus be able to properly assess the weight of the identification evidence. A second situation in which such previous statements may be admitted is in circumstances where the witness is unable to pick the accused out at the time of trial but can testify that he or she earlier made an accurate identification of the individual involved. The witness in this case was not asked to pick out the appellant at trial.

[9] This case is significantly different from *Perrier* in that while the witness in *Perrier* was not asked to identify the accused at trial, the witness did make a positive out-of-court identification by marking the ballot even though he was not "100% sure".

[10] Secondly, in *R. v. Tat* (1997), 117 C.C.C. (3d) 481 which was considered by Hall J.A. in *Perrier*, Mr. Justice Doherty said at ¶ 49:

As I read *Swanston*, the error in *McGuire* lay not in the exclusion of the prior identification evidence where the witness testified that the accused was not the perpetrator, but in the assertion that evidence of prior identification must always be excluded if the witness cannot identify the accused at trial. The *Swanston* court recognized that the witness' inability to identify the accused at trial did not foreclose evidence of prior identification where the witness was able to testify that he or she had previously made an accurate identification.

[11] In this case, the proposed witness cannot testify that she had ever made an earlier accurate identification.

[12] In my view it would be wrong to admit the videotape of a process which purports to show "some identification" of the accused when the witness did not make a positive identification and also cannot testify that she had made a previous accurate identification.

[13] Thirdly, I am satisfied that this application must be dismissed because although, by the photopack process, the police attempted to overcome the dangers identified by the *Sophonow Inquiry* in the use of a "one page" photo line-up, the officer in charge of the line-up in this case allowed the witness to handle the photographs.

- [14] The R.C.M.P. are to be commended for having attempted to institute the newly recommended process in this case. However, by allowing the witness to linger over some photographs and compare the photographs, the process actually employed allowed the continuation of many of the eye witness identification problems impugned by the Sophonow Inquiry.
- [15] While such imperfection in the identification process would, in most cases, likely be an issue of weight rather than admissibility, I am satisfied that in this case it would be dangerous to allow any evidence of purported identification to go before the jury in the absence of positive identification of the accused by the proposed witness.
- [16] I am also satisfied that to allow the jury to consider the videotaped evidence of the process engaged in this case would be highly prejudicial to the accused especially when there is virtually no probative value to the proposed witness's identification evidence.
- [17] For those reasons, the Crown's application to admit the videotaped evidence of the proposed witness's participation in the photopack line-up as evidence of some identification of the accused is dismissed.
- [18] I must, however observe, as I said during submissions, that if I had been satisfied that the threshold test to admissibility of prior identification as enunciated in Perrier had been met in this case I would have allowed the videotape of the witness's participation in the photopack process to go before the jury not only as the best evidence of the process employed by the police but also of the involvement of the witness in that process.

"B.M. Davies, J."

The Honourable Mr. Justice B.M. Davies

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