

CHILDRENS COURT OF QUEENSLAND

CITATION: *R v YZ* [2020] QChC 14

PARTIES: **R**
V
YZ
(defendant)

FILE NO/S: 3/2020

DIVISION: Criminal

PROCEEDING: Trial by Judge alone

ORIGINATING COURT: Childrens Court of Queensland

DELIVERED ON: 22 June 2020

DELIVERED AT: Bundaberg

HEARING DATE: 19 June 2020

JUDGE: Clare SC DCJ

VERDICT: **GUILTY**

CATCHWORDS: TRIAL BY JUDGE ALONE – VERDICT & REASONS – one count of armed robbery in company – where the sole issue was identification.

IDENTIFICATION – purported recognition of a person the witness had never met.

COUNSEL: E Kelly for the Crown
N Larter for the defendant

SOLICITORS: Office of the Director of Public Prosecutions for the Crown
Legal Aid Queensland for the defendant

- [1] On 18 December 2019, the complainant child, Bob¹, was held up and robbed of his BMX bicycle. The robbery was not contentious. Bob had gone for a morning ride taking the footpath. At about 6.30 am, as he rounded the corner from Walker St into Banyan St, he was confronted by 2 people. It was over in less than a minute. The male stopped the bike, stood in front of Bob, pointed a knife close to his chest and demanded the bike. The girl had stood behind Bob. When the male took the bike, she sat on the handle bars and they rode off together. Bob never saw his bike again.

¹ Not his real name.

- [2] There was no dispute that the couple had acted together to commit the robbery. There was no dispute that the male was armed with a weapon. The prosecution case was that the defendant child, YZ, was that person. He was indicted for armed robbery in company. He elected to be tried by a judge without a jury.

The trial

- [3] The sole issue was identification. There were only 2 witnesses: Bob and the investigating officer. YZ did not offer any evidence, as was his right. He was presumed innocent. His silence was not evidence. No adverse inference could be drawn from it. The burden was on the prosecution to produce sufficient evidence to prove the case against him. The standard of proof was satisfaction beyond reasonable doubt. The court is confined to the evidence at trial. All of that evidence had to be assessed to weigh those parts that were credible and reliable. YZ was entitled to an acquittal unless that whole body of evidence excluded any reasonable possibility that he was innocent.
- [4] It took police 2 months to locate YZ. He was found in Wynnum. Neither flight nor alibi was raised.
- [5] The entire case hinged on Bob. His honesty was not challenged, but his reliability was. Squarely in issue was his capacity to accurately identify YZ, a person he had never met. Bob was only 15 years old. There were inconsistencies in his recollection of the direction of the robber's escape and the description of the knife. Defence counsel, Mr Larter, argued those matters reinforced Bob's general unreliability. The crown prosecutor, Ms Kelly, relied upon Bob's prior knowledge of YZ. The defence contended that prior information only compromised the identification.

Identification of YZ

- [6] Without a positive and reliable identification from Bob the case had to fail.
- [7] The witness's evidence was that he recognised the robber immediately. Within the hour, he was making his statement to the police. He named YZ and his girlfriend, M. (The defence did not dispute that YZ had a close association with M.) Bob described the robber as having ginger hair and freckles. Police compiled a photo board of 12 youths, including YZ, and another board for teenage girls including M. Bob was shown the photo boards just 2 ½ hours after the robbery. He picked YZ's photograph. He did not recognise any of the girls.
- [8] The photo board process was recorded. Bob looked at the male photo board for a short time, before saying "*nah, neither of them*", while continuing to look. Seconds later he said "*oh actually, number 5*". Number 5 was YZ's photograph. The officer asked Bob what made him believe it was number 5. Bob replied: "*the freckles on the face and the ginger hair*". He was not asked about his level of confidence. There was simply this exchange:

SC MACRAE: *okay you were pretty certain that's the one out of all of those.*

C: *Yeah.*

- [9] Mr Larter argued that the initial failure to recognise YZ and the term "*pretty certain*" conveyed doubt.

- [10] Identification through a photo board can be problematic. A selection of small, one dimensional head shots, usually in sub optimal lighting, is put before the witness. It can pose particular difficulties for the identification of a complete stranger. No complaint was made about the selection of photos offered to Bob.
- [11] “*Pretty certain*” was the investigator’s term. She used it without emphasis. She may not have even intended the qualification. Indeed, the absence of any direct question, suggests an imprecise figure of speech, rather than something deliberate. In any event, it seems to me unlikely that the child witness appreciated the qualification. During his examination at trial, he showed a tendency to sometimes answer, without appreciating the full import of the question. It is unfortunate that at the time of selecting the photograph, Bob was not invited to explain his level of confidence in his own words. It is also unfortunate that at trial he was not given the opportunity to directly explain what he had meant. The obvious deficiencies in this part of the evidence did not favour the crown case, but nor did they go as far as demonstrating Bob was uncertain about whether number 5 was the robber. The first comment, “*nah, neither of them*”, did not seem to be a dismissal of the whole board but more thinking aloud in respect of a part of the board. The comment was made only 17 seconds after Bob had started looking at the board. He had 12 photographs in front of him. He used the term “*neither*”, which usually denotes two. Moreover, he did not give any indication he had finished looking. He kept examining the board without interruption. 4 seconds later he nominated number 5. He acted assertively and without hesitation. He did not seek to qualify that selection. At the trial, he testified that he had realised it was YZ the moment he saw him on the footpath.
- [12] That was evidence of the witness’s positive recognition of YZ. It was consistent with his prompt report against YZ. It was not contradicted by his reaction to the photo board. Most of the trial examination was restrictive, but when the witness was invited to explain why he believed the robber was YZ, his response seemed spontaneous and genuine.

The nature of identification evidence

- [13] Any identification evidence is potentially unreliable. A witness may honestly believe his evidence is accurate even when he is mistaken. A mistaken witness may be very convincing and innocent people have previously been wrongly convicted on the strength of such mistaken evidence. For that reason, the court must exercise caution in deciding whether the evidence should be accepted, and if so, the weight it should be given.
- [14] My firm impression of Bob was that he was doing his best to tell the truth. His recognition of YZ was dependent upon his observation of the robber, his familiarity with YZ and the accuracy of his recognition. The crown case must fail unless the evidence excluded any reasonable possibility of error at any of those 3 points.
- [15] Specific factors that may impair the reliability of the evidence must be carefully considered. Here they were the fast and stressful circumstances in which the offender was observed, plus the fact that Bob’s claim to prior knowledge of YZ was very limited and the evidence of it was bare.

Familiarity with YZ

- [16] YZ and Bob had no personal contact prior to the robbery. Inferentially, Bob had not even heard YZ speak. Bob's evidence was that he knew of YZ by reputation only. He knew his name. He was told YZ had done something bad to his friend. There was a personal sighting. It happened only once, it did not last long, but it was a deliberate observation. A friend pointed out someone in a food court. Bob was told that was YZ. Bob watched the person from behind and about 20 metres away, for about 2 minutes. He then walked in front of the person and saw his face, for perhaps 15 seconds. That may have been a couple of months before the robbery. The passage of time was a further risk factor for an unreliable recollection. In between the personal sighting and the robbery, Bob had viewed a photo on Facebook. It showed the same person with a girl. Someone had tagged the photo with the names YZ and M.
- [17] Bob's statement did not specifically mention the Facebook photo. Cross examination suggested it went no further than asserting Bob had seen YZ before. In re-examination Bob was asked why he did not specifically refer to the Facebook photo in his statement. His initial answer was that he saw the photo after the robbery. Then he corrected himself. I believe him. The inconsistency came at the conclusion of his evidence in a moment of confusion. There is no doubt that even when Bob was reporting the robbery, he knew the name of M and her connection to YZ, as well as having some impression of her appearance. Bob said he only knew those things because of the Facebook photo. There was no suggestion that he had learned of them through any other means.
- [18] There was no direct evidence to confirm that either the person in the food court, or the person on Facebook, was YZ. The photo was not produced. Bob's friend who had named YZ in the food court was not called. Bob's belief about the name of the person he had seen previously was based on hearsay.
- [19] Nonetheless, the circumstantial evidence was compelling.
- i. The male pointed out in the food court as YZ, looked to Bob to be the same person in the Facebook photo tagged as YZ.
 - ii. The male in the Facebook photo was with a girl tagged with the same unusual name as YZ's close friend, M.
 - iii. The photograph Bob purported to recognise on the photo board as the robber and the person he understood to be named YZ, was in fact YZ.
- [20] Those matters go beyond mere coincidence. The only reasonable conclusion was that the person Bob previously understood to be YZ was in fact YZ. Further he demonstrated sufficient memory of YZ to at least be able to recognise his photograph.
- [21] The photo board comprised 12 headshots of what looked like teenage boys of normal build with short hair. The quality of the images is inconclusive as to freckled skin, but making allowance for poor lighting, at least 9 could pass for ginger haired. The hair is brushed to one side for 8 of them.

- [22] A description given by an eye witness before he was asked to identify someone would obviously carry more weight than any description offered at trial. It may be in this case that police did not seek a description because they had a name. In any event, the prosecution did not ask the witnesses about any identifying details initially given to the police. Indeed, the fact that Bob had named the robber only became clear during cross examination. He did refer to ginger hair and freckles in the course of the photo board selection. That was Bob's response when the officer asked what made him believe number 5 was the robber. Logically, ginger hair and freckles could not be the only reason, because there were others on the board who would similarly qualify. Again, while the notable feature of ginger hair and freckles was relevant, it necessarily had less weight than it may have had if raised at the outset.
- [23] At the trial, Bob was invited to describe the robber. There was no mention of age, but he recalled someone slightly taller than himself, with a bit of weight but not fat. (Bob offered that assessment as someone of lanky build). His description seemed consistent with YZ's presentation now. The defence did not argue otherwise. In addition, Bob again referred to the freckles and ginger hair. He recalled the hair brushed to one side. The evidence is that that is how YZ wore his hair at about the time of the robbery. It was also YZ's hair style depicted in the photo board. Bob could not see YZ in the dock when he gave his evidence because he testified from a remote room. Nonetheless the additional description was of more limited value because it was belated.

Circumstances of the observation

- [24] The robbery must have been unnerving for Bob. It happened unexpectedly and was over quickly. He saw both knife and robber. No doubt he was concerned to avoid the knife. His swore that his focus was on the male robber. It does seem reasonable that a robbery victim would closely watch the offender for warning signs, while still having awareness of the knife. The robber was very close. There was nothing impeding Bob's view of him. The light was not a problem. It was 6.30 am in summer. It was clear and light, but not bright.
- [25] Bob had named M, but could not identify her photo. That is unsurprising, given his view of the female must have been fleeting. She had stood behind him. The failure to select M's photo does not advance an argument that Bob was identifying what he had seen on Facebook, rather than the robbers.
- [26] Bob became confused about the size and colour of the knife and blade. He was inconsistent in terms of the direction in which the robbers rode off. His inconsistency on those matters does not necessarily mean that his powers of observation and his ability to recall the face of the robber were defective. It happened 6 months ago. Memories of peripheral matters fade more quickly. Bob presented as someone of normal intelligence. His concentration for some questions was less than optimum, but there was no hint of mental impairment. He knew what YZ looked like. He had taken a particular interest in him within months of the robbery. He had also had strong reason and significant opportunity to focus on the robber. He had named YZ as the robber and selected his photo within 2 ½ hours of the offence.

Subconscious bias?

- [27] Mr Larter submitted that rather than aid the identification, Bob's awareness of YZ may have prejudiced his ability to accurately identify the robber.
- [28] This was not a case of a witness subconsciously pointing out a familiar face after the event. The point of recognition was at the time of the offence, before the photo board was constructed. There was no suggestion that Bob had deliberately misled police by intentionally incriminating the wrong person. Even putting aside Bob's general credibility, in the absence of further evidence, it would be improbable. The robber had taken Bob's bike. Bob had a vested interest in its return, and therefore in the apprehension of the true offender.
- [29] Bob did regard his knowledge of YZ as relevant. In his statement Bob explained that he had never spoken to YZ, but "*I know him from his reputation around Bundaberg and I've seen him before*". During his testimony, Bob again referred to YZ's reputation. He was asked to clarify the reason he thought the person he had been told was YZ was the same person who had robbed him. He said:
--Yeah, because I knew him by reputation around the time and I'd seen a photograph of him before on Facebook and when I've seen him in person at Hinkler, I knew who it was, but – and then on – when the robbery happened, I knew who it was.
- Then a little later he asked again and said:
Because from when I'd seen him in the shopping centre, and then I'd seen ... a photo of him. And then when he ... robbed me, I knew who it was."
- [30] What Bob had heard about YZ was not disclosed. The defence had objected to its disclosure as inadmissible and unfairly prejudicial. The prosecution did not seek to adduce it for any reason other than to explain why Bob had previously taken notice of YZ. There was no suggestion of similar facts. The defence had not sought to rely on the specifics of the so-called reputation or hearsay.
- [31] Clearly the court could not use the gossip, or whatever YZ may have allegedly done in the past, against him. Nor could the court speculate about the nature of those things. Obviously it was not flattering, but in the absence of evidence, it is impossible to say whether it involved violence or property or poor character, or whether it was a school boy drama or something much more serious.
- [32] A belief that someone is a bad person raises a natural bias. Firstly, it may colour a witness's interpretation of further conduct by that person. In the present case, the conduct of the person with the knife was unequivocal. Misinterpretation was not an issue. Secondly, bias may cause a witness to suspect, or even assume, that the person he knows has a bad reputation is responsible when the offender is otherwise unknown. The same level of risk however does not attach to a witness who is face to face with the offender during the offence. Even in the unlikely event that YZ was the only person about whom Bob had heard bad things, it is difficult to accept that could be enough to induce Bob to wrongly assume YZ was the person robbing him at knife point on the street. The evidence established that Bob did know what YZ looked like. He also knew what the robber looked like. He was looking directly at the robber's face at close range. He had the opportunity to study it for a short, but not insignificant, time. Notwithstanding the stress of the incident, in the absence of further evidence, it is improbable that the witness would in those circumstances conflate the face of a person he had never actually met with the face of the person

who was actually standing before him, in full view, robbing him of his bike, just because of a poor reputation.

Conclusion

- [33] All of the elements and the circumstances of aggravation have been proved beyond doubt in respect of the male with the knife. On the evidence, I am left with no doubt that YZ was that person. I find Bob's evidence that he recognised the robber at the time he was being robbed as being the person previously identified to him as YZ to be both truthful and reliable. Bob's prior connection to YZ had been only from a distance and brief, but it was recent. He had taken particular interest in observing YZ. He had a reason to remember him. I am satisfied that he had such actual and sufficient prior knowledge of YZ to be capable of recognising YZ in person. I am satisfied that in the circumstances of the robbery he had adequate opportunity to observe the robber and that he correctly recognised him. It is beyond reasonable doubt.
- [34] Accordingly, I find YZ guilty of robbery, whilst armed and in company.