

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **TODD O'HARA**

Appellant

AND **THE QUEEN**

Respondent

Hearing 7 July 2005
Coram Blanchard J
Tipping J
Counsel C B Cato for appellant
A Markham for respondent

APPLICATION FOR LEAVE TO APPEAL

Cato May it please Your Honours I appear for Mr O'Hara.

Tipping J Yes Mr Cato.

Markham May it please the Court, Miss Markham and I appear for the respondent.

Tipping J Yes Miss Markham. Mr Cato

Cato May it please Your Honours the applicant submits contrary to the response of the Crown that the Court is not simply being asked to review a determination of the Court of Appeal in this case but that the issues central to the basis of this application involve the security or if you like admissibility of evidence obtained as a result of an identification parade where the witnesses concerned had initially denied being able to identify the person involved as the offender. Subsequently saying that they were able to do so in a very limited way and that issue in my submission is one which has recently come before Courts overseas but in this country has arisen for the first time and my

submission is a very important issue because whether or not that evidence should be admissible will raise issues of the security of the evidence and its safeness insofar as the trial process is concerned.

Tipping J I'm probably at the same point but you don't normally in a circumstantial case look at each individual strand do you, you look in the end as to whether the evidence as a whole can safely be left to the jury.

Cato I accept that Your Honour but it is my submission that where you are dealing with evidence it is essentially presented as evidence of identification, you are not really dealing with a case that's entirely circumstantial. In other words I'm saying that before one can say this is a circumstantial fact, there at least must be some integrity in the foundation or in that particular step. My submission is that evidence of this kind does not reach that threshold and that is the danger of it.

Tipping J When you say this kind what exactly do you mean?

Cato I mean evidence as opposed to evidence, actual eyewitness evidence of the circumstances as recounted by the witness, evidence where the witness has been subject to some kind of procedure such as an identification procedure or as is probably going to be more the case if this kind of procedure case is upheld, informal procedures whereby the witness is unable to positively identify but says in effect 'this particular person bears some resemblance'.

Blanchard J Well it was more than that wasn't it? One of them said I can't be 100% sure but I believe it was and the other one said well I'm 80% sure that it was.

Cato Yes. Well my submission to that is that those are not positive identifications and in order for this kind of evidence to be admitted it is my submission that the identification should be positive and unequivocal.

Blanchard J Where are you going to draw the line? If a witness comes along and says I'm 99% certain it was you would say that's not admissible. So we're only dealing with people who have the confidence to say I'm 100% certain and the moment in cross-examination counsel perhaps by persistent questioning gets a concession that may be it wasn't 100 maybe it was 99, that evidence is inadmissible.

Cato Yes, if the witness concedes as a result of the questioning that the witness is uncertain, is not able to make a positive identification, then in my submission it is extremely dangerous evidence.

Blanchard J Yes but with honest witnesses of identification, particularly those who know a little about the problems of identification, unless it was someone who was actually known to them beforehand it's highly likely

that the witness is going to make some kind of concession. I mean it's not a question of mathematical proof.

Cato No, but on the other hand Your Honour the Courts for many years now have emphasised the importance of high standards when it comes to identification and if in fact the evidence is being led, in effect as it was led in this case by the Crown as saying it's evidence of identification, then in my submission it must in order to be evidence which can be safely led, evidence of positive identification.

Tipping J So if you had five eyewitnesses to the affray, each of them said I'm 99% certain, none of them would be admitted?

Cato Yes.

Tipping J With greatest possible respect Mr Cato that is so defying common sense. Have you got any remote authority for this extraordinary argument?

Cato No Your Honour, but that's pushing the argument to the very real extreme.

Tipping J Well that's the way to test it. If the evidence as a whole isn't fit to go to the jury the case is withdrawn from the jury. If as a whole it's open to find beyond reasonable doubt that this was the man, you leave it to the jury to decide. That's been the law for donkeys' years and I can't see anything wrong with it. Evidence as a whole with the caution.

Cato Well this particular kind of issue that's in my submission has not come before the Courts because.

Tipping J I think I can understand why.

Cato Well probably because I would think few Crown Prosecutors would have advanced this kind of evidence.

Tipping J What! What! I must have sat in a hundred trials where identification was an issue. You never get people saying they're a 100% certain, or very seldom, and if you do you're a bit suspicious of them.

Cato This is a situation where a person has been invited to go into an identification parade and the witness has first of all said he was not, or in fact two of them, were not able to identify and then subsequently.

Tipping J But we know the facts, we know the facts, don't keep on rehearsing the facts. The issue is whether this point, which admittedly is one of general importance, is remotely arguable.

Cato Well it is, my submission's important.

Tipping J Of course it's important but what I want to be persuaded is how can it possibly be right.

Cato Well in my submission the danger of this kind of evidence is that the jury will read into it more than they should.

Tipping J That's why they're warned to be careful and a proper summing up will explain to the jury why there is room for difficulty and room for error and will draw attention to the fact that these people initially didn't and so on and so on. It's over to the jury. Unless as a whole they can't find guilt beyond reasonable doubt, you can't divorce identification evidence from other evidence. The balaclava just about sank your man.

Cato But without the evidence.

Tipping J Without this other evidence.

Blanchard J Anyway we're hearing a leave application and we understand the point you wish to advance. That seemed to be the only point of general or public importance. Are there others that I'm overlooking?

Cato Well the other point, or the other two points, is the quality of the directions given by the Judge and the Judge effectively invited the jury to, as did the Crown, to treat the evidence of the, evidence I should say resemblance, as identification.

Blanchard J Well that really just goes to the particular facts of the case and it comes back to your first point, was this identification evidence or was it simply resemblance evidence.

Cato Yes, yes but it is also a point in my submission that if this evidence is admissible then this Court should give some guidance as to the way in which this kind of evidence should be approached.

Blanchard J Well the Judge gave at reasonable length the standard direction.

Cato I appreciate that but he invited the jury as it were to treat the evidence as reliable evidence of identification when it couldn't be.

Blanchard J Well it was over to them it seems to me whether they considered it was an identification or not. The reservations were all there for the jury to consider.

Cato Well in my submission when the witness himself says that he can't positively identify then the jury cannot say with a degree of certainty suggested by the Judge that that is an identification, and one of the points made in **George** is that if this evidence is to go forward then it ought not be advanced in a way which suggests that it is in fact identification.

Tipping J I have grave difficulty with this distinction you're seeking to draw between resemblance evidence and identification evidence.

Cato I simply say that any evidence of a witness called as an eyewitness and that witness is not positively able to identify falls short of evidence of identification, at most it can be said to be evidence of resemblance. Perhaps in some cases a high degree of resemblance.

Tipping J Isn't that in effect evidence at least purporting to assist in the identification, I mean it is a very literalistic approach to s.344(d). If you're going to say that you only have to give the warning when it's identification evidence, ie positive then you don't have to give the warning when it's resemblance evidence.

Blanchard J And at what point does resemblance evidence shade into identification evidence?

Cato Well that's the point we go back to. I say that in order for an eyewitness evidence to be evidence of identity that it must be a positive identification.

Blanchard J Right, so it's the same point.

Cato It is the same point and that's what I stand and fall on.

Blanchard J Ok.

Cato So my second point is that the direction invited the jury effectively to do something they could not do. The third point is the security of the conviction itself. My submission is that this evidence, the evidence of the eyewitnesses was used as it were to sure up the balaclava evidence. Without that evidence there could not in my submission have been a conviction on either of the counts and so it raises also the security of the convictions and this is the third point.

Tipping J That's a substantial miscarriage of justice point, not a general importance point.

Cato Yes that's correct.

Tipping J It didn't seem to me from my recollection of the cases I've seen coming before me in the Court of Appeal to be anything very remarkable.

Cato It depends. If you have a case where, in fact the case of **Jill Dando the George** case was a classic example of it. If you have a positive identification and if you have a case which involves supporting forensic evidence that kind of thing which points to identification clearly there may well be partial identifications or whatever they like to

call them that are led without objection, but it is where, it is where you have a very narrow case like this one that the admissibility issue becomes a sharp issue.

Blanchard J Doesn't **Turnbull** itself discuss on the issue of whether certain evidence should go to the jury that you are entitled to take into account what other evidence there is to support. That surely must logically suggest that you don't have to have a threshold of absolute positive ID before the evidence can go to the jury.

Cato My submission is that **Turnbull**, all the three judgments in **Turnbull** considered in **Turnbull** were all cases where the witness identified the person concerned as the offender positively and the rationale for that, particularly in the fleeting glimpse or short opportunity situation is that an honest and mistaken witness as we all know repeatedly can be mistaken. My submission is this that we are one step removed from that situation when we are not dealing with positive identifications and it is how far we allow this to go down the slide. Sixty percent identification, 50% certainty – how do you cross-examine on that sort of thing?

Tipping J Well you would probably be wise to leave it alone and say not good enough. I've seen people being cross-examined and they firm up because they get irritated.

Cato Yes, but the problem is with great respect Your Honour when the Judges and the prosecutor say that this is evidence of identification to the jury and the Judge suggests to the jury that if they're satisfied with all the other evidence this could be regarded as a reliable identification then one has to do something about it.

Tipping J No you can't put it that way. You could simply say if the other evidence is indicative of guilt you can put all the evidence together to decide whether you are satisfied beyond reasonable doubt, anyway I think I for one certainly have your point that as you say this is a slippery slide and we should draw a halt at anywhere below 100%.

Cato Yes, yes, positive identification. And in my submission if I might just before closing because I don't intend to go on, I'm not permitted to go on, but it's this, the danger is that evidence of this kind will be used as a make-weight. If it's less than positive identification it will be used as a make-weight and in my submission this trend is seen in a number of jurisdictions in very recent years which tends to suggest because I doubt if it had been around for longer because the defence counsel would not have taken this point long before now. If this in my submission is permitted to occur widespread throughout the Courts we could be looking at my submission serious miscarriage of justice, if not this case, others. That's my submission. May it please the Court.

Blanchard J Thank you Mr Cato.

Blanchard J Yes we are in a position to give judgment immediately. We won't need to hear from you Miss Markham. The application for leave to appeal is dismissed. The primary argument which the applicant wishes to advance, namely that evidence of a qualified identification was inadmissible is in our view untenable and unsupported by authority or any cogent reasoning. The other proposed points not of any general significance, the evidence of witnesses concerning identification was only part of the case against the applicant, there was a proper basis in the evidence as a whole for the jury to have found him guilty; the jury directions were adequate; accordingly there is no appearance of any miscarriage of justice.