COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Odesho, 2024 ONCA 9
DATE: 20240105
DOCKET: C67762

Doherty, Trotter and Sossin JJ.A.

BETWEEN

His Majesty the King

Respondent

and

David Odesho

Appellant

Megan Savard and Riaz Sayani, for the appellant

Philippe G. Cowle, for the respondent

Heard: November 21, 2023

On appeal from the conviction entered by Justice Laura A. Bird of the Superior Court of Justice, sitting with a jury, on February 15, 2017.

Sossin J.A.:

OVERVIEW

[1] This appeal arises from a conviction of the appellant, David Odesho, for the second-degree murder of Sarhad Sadiq and aggravated assault of Behget Eyup.

[2] The events occurred at Baggio's Café, an establishment in a strip mall in Vaughan, Ontario, on the evening of June 6, 2014. Mr. Sadiq and Mr. Eyup were

owners of the café, where people sometimes gathered to gamble, play poker, and smoke.

[3] The appellant spent some time in the café earlier on the day of the shooting. He met up there with his friend, Fade Dawood. The appellant and Mr. Dawood left the café and went to a nearby Tim Hortons. They were travelling in a white Mazda which Mr. Dawood had rented nine days earlier. The appellant and Mr. Dawood then returned to the café, this time with the appellant driving.

[4] At the time of the shooting, Mr. Sadiq and Mr. Eyup (and perhaps another man, Ashor Denkha) sat at a table in the kitchen of the café. The gunman, who was identified by Mr. Eyup as the appellant, a frequent patron of the café, entered the kitchen and shot Mr. Sadiq twice, killing him. Mr. Eyup then approached the gunman he identified as the appellant, and struggled with him until Mr. Eyup was shot in the neck, fell to the floor, and lost consciousness.

[5] The appellant was seen leaving the café and getting in the white Mazda with Mr. Dawood, who drove them away. Mozart Kodede, who was standing outside the café, testified to hearing shooting and seeing the appellant leave the café with what he concluded was a gun.

[6] Mr. Dawood told the police that he drove the appellant to a parking lot, where the appellant told him to get out of the car. The appellant then drove away on his own. The white Mazda was found later that night abandoned in a different parking

lot. A single particle of gunshot residue evidence was found on the gearshift of the car.

[7] Following a trial by judge and jury, the appellant was found not guilty of first degree murder, but was convicted of the second degree murder of Mr. Sadiq and the aggravated assault of Mr. Eyup.

[8] The appellant called no evidence and did not testify at trial.

ISSUES

[9] The appellant raises concerns with the trial judge's jury charge, and specifically whether the charge required (1) a stronger caution on the frailties of identification evidence; and (2) a stronger caution addressing the frailties of Mr. Sadiq's *ante-mortem* statement.

[10] The appellant also seeks to admit fresh evidence. Initially, the appellant also appealed sentence, but he has abandoned his sentence appeal.

[11] For the reasons that follow, I would dismiss the fresh evidence motion and dismiss the conviction appeal.

ANALYSIS

(1) The fresh evidence motion

[12] The appellant asked the court to admit as fresh evidence on appeal police synopses and other documents relating to three sets of criminal charges brought

against the Crown witness Mr. Dawood in the months and years following the events giving rise to the charges under appeal. The first incident occurred in January 2015. Mr. Dawood was charged with a firearms offence and other related charges. He eventually pled guilty to breach of probation and the firearms charge was stayed. The second incident occurred in July 2017. Mr. Dawood pled guilty to possession of a prohibited firearm, and possession of a firearm while prohibited from possessing firearms. He received a conditional sentence. The third incident occurred in January 2019. The appellant was charged with various firearms offences. He was acquitted when the gun he was said to have possessed was excluded from evidence.

[13] The appellant submits that evidence of Mr. Dawood's prior involvement with firearms lends credence to the argument that the gunshot residue found in the car that Mr. Dawood and the appellant used to leave the scene of the shooting came from, or at least may have come from, Mr. Dawood, and not the appellant. The appellant contends that it was important to the Crown's case identifying the appellant as the shooter, that the jury find that the gunshot residue in the vehicle came from the appellant, who had just shot the victim. The defence argues that the fresh evidence is sufficiently cogent on the question of the source of the gunshot residue to warrant a new trial. The respondent opposes the admission of fresh evidence, highlighting three flaws in the application to admit this evidence.

[14] First, the respondent argues that the police synopses are hearsay. Only the conviction of Mr. Dawood for the 2017 charges could be proven if there was a new trial. The synopses of the other two sets of charges could only create evidence if they were adopted by Mr. Dawood, but there is no evidence to suggest that Mr. Dawood would admit to gun possession allegations if he were asked on the stand. There is certainly no basis to suggest he would admit to any involvement in gun trafficking. Without admissions from Mr. Dawood there is no admissible evidence to prove the truth of those allegations. I note in this regard that the appellant's counsel chose not to seek an order permitting the examination of Mr. Dawood as part of the fresh evidence application.

[15] Second, the respondent contends that the passage of time and lack of connection between the events alone are sufficient to render the later incidents of criminal activity largely irrelevant.

[16] Third, the respondent argues that the appellant's attempt to use fresh evidence to point to Mr. Dawood as a potential shooter runs directly against the position taken by the defence at trial. Mr. Dawood was presented as an important exculpatory witness for the defence. Trial counsel urged the jury to rely on Mr. Dawood's evidence and described him as "a shy simple person who was afraid." The proposed fresh evidence would do little more than tarnish Mr. Dawood's character and undermine the defence advanced at trial.

[17] The criteria for the admission of fresh evidence on appeal is well-settled. In *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775, the court laid out the four requirements for the admission of fresh evidence:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief; and,
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[18] I would agree with the respondent that the proposed fresh evidence does not meet the *Palmer* threshold. Taken at its highest, the evidence is not sufficiently cogent to warrant its admission on appeal. Even if the evidence could somehow establish Mr. Dawood's involvement with firearms on other occasions, that

evidence, taken with the evidence at trial, could not reasonably be expected to have affected the result.

[19] Further, any inference available from the fresh evidence would add little to what the jury already knew about Mr. Dawood and about the frailties of the GSR evidence. The jury already knew that Mr. Dawood had a prior conviction for armed robbery and possession of an imitation firearm, that he had unsavoury associations, and that he habitually let his friends drive his car. Trial counsel for the defence used that evidence to propose Mr. Dawood as a potential source of the GSR. The trial judge also specifically instructed the jury to consider where else the GSR might have come from.

[20] In these circumstances, this evidence, taken together with the evidence adduced at trial, would not be such that, if believed, could be expected to have affected the result.

[21] Consequently, I would deny the motion to admit the proposed fresh evidence.

(2) The conviction appeal

[22] The appellant raises two grounds of appeal, both relating to the trial judge's charge to the jury: first, that the trial judge failed to provide sufficient caution in relation to the eyewitness identification evidence; and second, that the trial judge

failed to provide sufficient caution in relation to the *ante-mortem* statement of Mr. Sadiq.

[23] Appellate review of jury instructions requires a functional perspective. The instructions must be considered as a whole and in the context of the conduct of the particular trial. There is no one way to instruct a jury and there is no one way to deal with evidence in the course of a jury instruction. It is well-settled that trial judges have a broad discretion as to the manner in which they instruct a jury, as long as those instructions adequately arm the jury with the tools necessary to return a true verdict based on the application of the proper legal principles to the facts as found by the jury: *R. v. Cargioli*, 2023 ONCA 612, at para. 103; *R. v. Abdullahi*, 2023 SCC 19, 483 D.L.R. (4th) 1, at paras. 36-37, 40-46, 50, and 53-56; and *R. v. Goforth*, 2022 SCC 25, 470 D.L.R. (4th) 617, at paras. 20-22.

(3) The trial judge did not err in her charge on identification evidence

[24] The appellant argues that the eyewitness identification instruction was insufficient in three respects: (1) the overall instruction was too weak, (2) the judge failed to instruct the jury about photo and in-dock identification, and (3) the judge failed to instruct the jury about collusion.

[25] I note that none of the concerns raised on appeal were made before the trial judge. At trial, defence counsel was content with the charge as delivered.

[26] I will address each of the appellant’s arguments in turn.

(i) The trial judge did not err in providing cautions on the eyewitness evidence

[27] The appellant argues that the identification evidence in this case revealed a number of “red flags” that called out for a strong caution about the frailties of the eyewitness evidence and careful scrutiny of the limited confirmatory evidence, and that the trial judge failed to provide such a caution in the jury charge.

[28] The appellant emphasizes that Mr. Eyup’s and Mr. Kodede’s identifications of the appellant were based on fleeting identifications in situations of high stress: Mr. Eyup only observed the gunman for a few seconds, while Mr. Kodede had less than 20 seconds and was 10-15 feet away. Both witnesses provided physical descriptions of the gunman that conflicted with each other and with the appellant’s appearance on the day of the shooting. Further, Mr. Eyup admitted he was in no condition to observe who was in the kitchen that day, and that his memory was impaired going forward.

[29] Moreover, according to the appellant, the fact that Mr. Eyup had been discussing the appellant’s conflict with Mr. Sadiq immediately before the shooting created a risk that he could have subconsciously assumed the subject of the conflict was the person who attacked them.

[30] The respondent submits that the eyewitness identification instruction was clear and effective. The respondent argues the instruction included a strong, clear

warning that drew heavily on David Watt's *Watt's Manual of Criminal Jury Instructions*, 3rd ed. (Toronto: Thompson Reuters, 2023) (Watt's "*Manual*"), and that the relevant evidence was reviewed within the framework proposed in Watt's *Manual*. According to the respondent, the trial judge repeatedly used strong, appropriate language to bolster her guidance to the jury, and the warnings in the eyewitness instruction were amplified by other warnings that were given to the jury elsewhere in the charge, and by counsel in their submissions.

[31] The respondent notes that the trial judge provided multiple cautions concerning the eyewitness evidence. The strength of the initial caution about this evidence bears repeating:

> You must be very cautious about relying on eyewitness testimony to find Mr. Odesho guilty of any criminal offence. In [the] past, there have been miscarriages of justice, innocent persons have been wrongly convicted, because eyewitnesses have made honest mistakes in identifying people or the person whom they saw committing a crime. Eyewitness identification may seem more reliable than it actually is because it can be given by a credible and convincing witness who honestly, but perhaps mistakenly, believes that the accused is the person whom he or she saw committing the offence. In this case, the defence challenges both the credibility and the reliability of the testimony of Mr. Eyup and Mr. Kodede.

[32] Following this caution, the trial judge elaborated on credibility and reliability and the distinction between them.

[33] I would not accept that the trial judge failed to caution the jury on the challenges with eyewitness evidence sufficiently or failed to advert to challenges with the specific evidence in this case. Her cautions in the charge, such as the one above, provided the tools needed for the jury to address the frailties of the eyewitness evidence.

[34] The appellant further argues that the trial judge's charge with respect to the eyewitness evidence was too general and simply exhorted the jury to consider the evidence without adequately equipping them to understand the frailties of the eyewitness evidence in the record. According to the appellant, the trial judge told the jury that only one frailty raised real concerns about the reliability of Mr. Eyup's evidence, which was the absence of espresso cups when Mr. Eyup had testified to recalling espresso cups being in the kitchen at the time of the shooting.

[35] However, the jury charge reveals numerous occasions where specific cautions were provided, particularly in relation to evidence provided by another friend of Mr. Eyup and patron of the café, Mr. Denkha, whose testimony often was at odds with the evidence given by Mr. Eyup.

[36] For example, the trial judge told the jury that the evidence of Mr. Eyup and Mr. Denkha was "irreconcilable" and "completely inconsistent" with respect to Mr. Denkha's presence in the kitchen at the time of the shooting. The trial judge emphasized the evidence supporting Mr. Denkha's account, such as the absence

of espresso cups in the kitchen. The trial judge told the jury that the absence of the espresso cups in the kitchen supported Mr. Denkha's account and "raises real concerns about the reliability of Mr. Eyup's evidence." The trial judge told the jury that both men could not be correct and that this "must be considered" in assessing Mr. Eyup's reliability.

[37] Similarly, the trial judge told the jury that they must consider Mr. Eyup's ability to recollect the incident at the café in light of his subsequent acknowledgment that he was in no condition to remember who was there. She also highlighted for the jury that the clothing Mr. Kodede described as being worn by the appellant differed from the description of the appellant's clothing given by others. In addition, the trial judge instructed the jury on Mr. Kodede's inconsistent evidence about "locking eyes" with the appellant. She added: "You should take into account this statement to the police when assessing Mr. Kodede's evidence at trial that he locked eyes with Mr. Odesho as he was leaving the café. Consider what impact it has on the reliability of Mr. Kodede's testimony and on his ability to accurately identify the person he says he saw leaving the café."

[38] Read as a whole, the trial judge equipped the jury to understand both the general and specific legal and evidentiary issues surrounding the eyewitness identification of the appellant. I see no error in the trial judge's instructions on eyewitness evidence.

[39] Moreover, the cases relied on by the appellant where more detailed cautions were viewed as necessary involved the identification of strangers or near-strangers: see, for example, *R. v. Mills*, 2019 ONCA 940, 151 O.R. (3d) 138, at paras. 181, 195, and 222; *R. v. Virgo*, 2016 ONCA 792, 134 W.C.B. (2d) 317, at para. 17; *R. v. Baltovich* (2004), 73 O.R. (3d) 481 (C.A.), at para. 81; and *R. v. McFarlane*, 2020 ONCA 548, 393 C.C.C. (3d) 253, at para. 79.

[40] By contrast, in this case, there was significant evidence that the appellant was known by Mr. Eyup, including the nickname by which the appellant was known, Penguin. That Mr. Eyup knew the appellant did not appear to be in dispute (though the extent of his association with the appellant was a point of contested evidence). In this setting, I do not accept that the additional, tailored, and specific caution sought by the appellant was necessary.

(ii) The trial judge did not err in relation to the photo and in-dock identification

[41] The appellant characterizes the photo identification process employed by the police as a “badge of unreliability,” which could have reinforced or even replaced Mr. Eyup’s uncertain memory of the gunman with a memory of the appellant. Mr. Eyup’s photo identification of the appellant occurred in the hospital, hours after the shooting, and consisted of an officer showing Mr. Eyup mugshots

of the appellant and Mr. Dawood on a cell phone. The appellant reiterates that no proper photo lineup ever took place.

[42] The appellant argues that the trial judge failed to provide the jury with direction about the significance of the photo and in-dock identifications. According to the appellant, the jury needed to be told that these were entitled to little weight. The appellant contends that a strong *Hibbert*-style instruction was needed here.

[43] A *Hibbert* instruction warns the jury about the shortcomings of eyewitness identification, especially when the testimony of the witness is delivered in court and involves identifying the accused as the perpetrator in front of the jury. In *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, the Supreme Court emphasized "the danger associated with eyewitness in-court identification, in that it is deceptively credible, largely because it is honest and sincere. Further, the 'dramatic impact' of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it": at para. 50.

[44] In this case, the appellant argued that a *Hibbert*-style caution should have linked the dangers of the in-dock identification with the improper photo identification, and the potential for mugshot commitment and contamination.

[45] Appellate courts have held that the police practice of showing the witness an isolated photo is prejudicial and "contaminates the identification process" by contributing to mugshot commitment – the risk that after the person has seen the

face in the photograph it will be stamped on their memory, rather than the face they saw on the occasion of the crime: *R. v. Mills*, 2019 ONCA 940, 151 O.R. (3d) 138, at para. 191.

[46] However, the importance of a photo lineup and the risk of mugshot commitment or contamination is diminished in settings, as here, where a witness already has identified the subject as the gunman before the photo identification was made.

[47] Trial counsel did not request an instruction about photo or in-dock identifications, nor did trial counsel suggest that Mr. Eyup's identification of the appellant was tainted by the picture that was shown to him. Mr. Eyup identified the appellant as the shooter before he was shown the photograph by police and long before trial.

[48] The judge summarized the evidence on that point by telling the jury that there was no dispute on the evidence that Mr. Eyup knew the appellant and that the appellant had been to the café many times. Moreover, as stated above, trial counsel raised no objection to the charge. While not determinative, the absence of an objection to this aspect of the charge, given the centrality of the identification evidence to the theory of the defence, is telling.

[49] Taken together, I am not persuaded that the trial judge erred in her treatment of the photo and in-dock identifications.

(iii) The trial judge did not err in failing to address collusion in the charge

[50] Finally, the appellant also argues that the trial judge erred by providing the jury with no direction about collusion in relation to the identification evidence. In fact, the appellant asserts that the charge implicitly invited the jury to use identification evidence from Mr. Kodede, which was potentially the product of collusion with Mr. Eyup, to enhance the reliability of Mr. Eyup's identification. Both counsel referenced this issue in their closing submissions. In particular, the Crown told the jury that Mr. Eyup's evidence could corroborate Mr. Kodede's claim of hearing two shots and a pause.

[51] The appellant argues that the jury was never told to consider whether Mr. Eyup and Mr. Kodede's identifications, if not the product of deliberate collusion, were tainted by 'innocent contamination.'

[52] The respondent contends that there was no evidence in the trial record suggesting the Mr. Eyup's identification could have been tainted by collusion with Mr. Kodede, or anyone else. Emergency services arrived at the scene of the shooting minutes after the 9-1-1 call. Mr. Eyup was taken to hospital, and he identified the appellant as the shooter from his hospital bed within hours of being shot. There was no suggestion that anyone told Mr. Eyup that the appellant was responsible.

[53] The respondent also argues that, with respect to Mr. Kodede, the jury was instructed to consider the possibility of collusion. The trial judge instructed the jury to ask themselves whether Mr. Kodede's identification evidence was based on his own recollection of his observations or "something put together from information received from a number of other sources?" The trial judge further instructed the jury to ask whether Mr. Kodede was aware of the accounts or descriptions given by others, and if so, whether his description of the appellant changed after becoming aware of the description of others.

[54] Again, I see no error in this aspect of the trial judge's charge. I note, once again, that counsel for the appellant did not request at trial the caution he now argues was necessary on appeal.

[55] For these reasons, I would not accept that the trial judge erred in the portions of the jury charge relating to identification evidence.

[56] I turn now to the second ground of appeal.

(4) The trial judge did not err in her charge to the jury on the *ante-mortem* statement

[57] The trial judge permitted the Crown to tender statements made by the deceased in a conversation he had with Mr. Eyup immediately before he was fatally shot. While the two men were in the kitchen of the café, Mr. Sadiq told Mr. Eyup about his encounter with the appellant earlier in the day. According to

Mr. Eyup, Mr. Sadiq said that he had banned the appellant from the café because the appellant had brought a gun into the café some days earlier.

[58] The trial judge admitted the portion of the statement that the appellant had been banned from the café. She found no evidence that Mr. Eyup had any reason to falsely implicate the appellant in the shooting, or to make up utterances by Mr. Sadiq in an attempt to bolster his identification of the appellant as the shooter.

[59] The trial judge did not permit any reference to the appellant having a gun, as she found insufficient foundation for this claim.

[60] The appellant has not appealed the trial judge's decision on the admissibility of Mr. Sadiq's *ante-mortem* statement at the *voir dire* prior to the trial. Rather, the appellant argues that the trial judge should have revisited her ruling on the admissibility of the *ante-mortem* statement given the way Mr. Eyup's and other witnesses' evidence emerged at trial.

[61] The appellant contends that the trial judge should have either instructed the jury that the *ante-mortem* statement was inadmissible and should be disregarded, or, in the alternative, provided a *Vetrovec*-style instruction that linked the reliability of the *ante-mortem* statement to both Mr. Eyup's unsavoury character and propensity to lie and Mr. Sadiq's unsavoury character and his propensity to lie.

[62] The appellant's argument for a *Vetrovec* instruction in relation to the deceased on appeal appears to contradict the position taken by trial counsel that

such warnings were not sought for any witness apart from Mr. Eyup. This was clearly a tactical decision. If trial counsel had asked for a *Vetrovec* warning in relation to Mr. Sadiq, the judge would also need to provide a similar warning in relation to Mr. Dawood as a matter of fairness, which could have undercut the importance the appellant placed on Mr. Dawood's testimony at trial.

[63] The trial judge provided both an extensive review of the evidence surrounding the *ante-mortem* statement, and a clear caution in the following terms:

> You should be cautious when you determine how much or little you will rely upon this evidence of what you find Mr. Sadiq said to Mr. Eyup to decide this case. It may be less reliable than other evidence that has been given. Mr. Sadiq was not under oath or affirmation when he was speaking to Mr. Eyup and their conversation was not recorded. You did not see or hear Mr. Sadiq testify about the conversation with Penguin earlier on June 6th. He could not be cross-examined here like the other witnesses who testified before you to test the credibility or reliability of his account of that conversation.

[64] In *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at p. 831, the Supreme Court held that trial judges may − and in some cases must − include in their charges "a clear and sharp warning" drawing to the attention of the jury the risks of adopting, without more, the evidence of an unsavoury witness. In *R. v. Armstrong* (2003), 179 C.C.C. (3d) 37 (Ont. C.A.), this court stated that a *Vetrovec* warning is not required for all such witnesses and that a trial judge has discretion whether or not to give a warning, though in some cases the circumstances are such that the judge has no discretion and failure to provide a warning is an error

of law: at para. 14. Whether such a warning is mandatory depends on the witness's credibility and the importance of the witness's testimony to the Crown's case.

[65] In this case, trial counsel did not request a *Vetrovec* warning with respect to Mr. Sadiq, though he did seek such a warning in relation to Mr. Eyup (which was given). The appellant has not shown that the *Vetrovec* instruction in relation to Mr. Sadiq was mandatory in the circumstances (notwithstanding that it was not sought). Given the considerable discretion afforded trial judges in charging juries on unsavoury witnesses (*R. v. Ranglin*, 2018 ONCA 1050, 370 C.C.C. (3d) 477, at para. 32), I am not persuaded that a *Vetrovec* caution in relation to the *ante-mortem* statement was required in this case.

[66] Instead of a *Vetrovec* instruction, the trial judge's instruction on *ante-mortem* statements homes in on the specific weaknesses inherent in those statements. By doing so, the trial judge effectively provided a caution tailored to the evidence to which the caution was directed.

[67] The jury thus was well-instructed on its task in relation to the *ante-mortem* statement, and the jury charge reveals no error on the part of the trial judge. As a result, this ground of appeal also fails.

DISPOSITION

[68] For the reasons above, I would deny the motion to admit fresh evidence and dismiss the conviction appeal. The sentence appeal is dismissed as abandoned.

Released: January 5, 2024 “D.D.”

“L. Sossin J.A.”
“I agree. Doherty J.A.”
“I agree. Gary Trotter J.A.”