EDITORIAL NOTE: CHANGES MADE TO THIS JUDGEMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT KAIKOHE

CRI-2017-027-001309
[2018] NZDC 5130

THE QUEEN

v

[LUKE CLAYTON]

Hearing: 13 March 2018

Appearances: B O'Connor for the Crown
W McKean for the Defendant

Judgment: 19 March 2018

RESERVED JUDGMENT OF JUDGE D J McDONALD

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[1] The defendant faces trial on two charges, that is with intent to cause grievous bodily harm to [the complainant] caused him grievous bodily harm and aggravated robbery of [the complainant]. The charges arise out of the same incident.

Application

[2] The defendant has applied under s 147(4)(c) that the defendant be discharged on both charges because as a matter of law, a properly directed jury could not reasonably convict the defendant. The application is opposed by the Crown.

[3] Section 147(4)(c) codifies the case law under s 347 Crimes Act 1961 which enables a Judge to discharge a defendant if, as a matter of law, a properly directed jury could not reasonably convict the defendant. The law developed under s 347 is

[6] Mr McKean referred me to *R v Turnbull*.[3] Although the evidence now codifies how identification evidence should be dealt with, Mr McKean submitted *R v Turnbull* was still good law, in particular at page 229:

> When, in the judgement of the trial Judge, the quality of the identifying evidence is poor, as for example that it depends solely on a fleeting glance or a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.

[7] He took me through the three appeals and the factual scenarios in relation to each. He submitted that in this case this was a fleeting glimpse of a man that [the complainant] did not know that well. Mr [Clayton] had a limp as a result of a severely sprained or broken ankle, which injury he sustained whilst in prison. He was released from prison shortly prior to the alleged incident.

[8] [The complainant] could not say what Mr [Clayton] was wearing. He could not say who the other two persons were. He was punched early on and knocked off his bike. The reported voice recognition whilst he is on the ground curled up trying to protect himself of Mr [Clayton], is just [the complainant] wrongly coming to the view that he saw Mr [Clayton] approach him and punch him, that it was Mr [Clayton]'s voice.

[9] Mr McKean submitted that the identification evidence was so poor that a properly directed jury as a matter of law could not reasonably convict the defendant.

The Crown's position

[10] Ms O'Connor submitted that the application under s 147 was premature. The Court at this point must take the Crown's case at is highest. [The complainant] knows Mr [Clayton]. He has known him for 15 to 20 years. This was not stranger identification. It can be distinguished from the Roberts appeal in *Turnbull*. It was 3.00 pm in broad daylight. He knew who had attacked him. The two were both members of [a gang].

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[3] *R v Turnbull* [1977] 1 Q.V. 224

[11] Ms O'Connor said that a properly directed jury could convict if they accept and are sure as to the identification. The trial Judge would have to give a warning in any event.

Discussion

[12] There is ample evidence that [the complainant] was badly assaulted and had his [motorcycle] stolen on the afternoon of [date deleted] 2017 while attending [a funeral] at [the Cemetery]. There were about 100 people present at the cemetery. [The complainant] was sitting on his bike. He was not wearing a helmet. He moved very slowly a very short distance down a metal road on which there were parked cars.

[13] He saw the defendant, whom he knew standing by a white car with others. At that point [the complainant] was stopped. When he saw Mr [Clayton] there were a couple of other people standing by a car with him on the side of the road. He then:

> Noticed at the last second [Luke] ([Clayton]) walking quickly towards me from my left. There were two others with him but I did not really see them at all.

[14] He then states:

> I know it was [Luke], [Luke Clayton] . I have known [Luke] for 20 plus years. There was no question it was him. I can't say what he was wearing but it was him. Without warning or saying anything [Luke] punched me right in the mouth. I can't say which hand but it was a full-on punch.

[15] [The complainant] goes on to describe being knocked off his bike, being kicked and stomped to the head. During that he said he could hear [Luke]'s voice yelling, "Get his bike," "Get his colours," "Get the bike", I know it was [Luke], I know his voice."

[16] [A [relative] of the complainant] was at the funeral. He saw [the complainant] while he was driving down [the road], away from the cemetery. [The complainant] was leaning out of a car spitting blood. [The complainant's relative] stopped, helped [the complainant] into his car and then drove him home. He describes [the complainant] as:

> Badly beaten up. He could hardly talk, some teeth had been knocked out and [he] had a black eye. I drove ([the complainant]) to [his home address] and dropped him off to his missus.

[17] The complainant's partner is at home when he is dropped off. [The complainant's partner] gives a description of her partner and the serious injuries to, particularly his face that she saw. In her statement, she says:

> I started screaming, get in the car, get in the car. [The complainant] managed to say something like, '[Luke Clayton] booted my head in. There was three of them.'"

[18] On the face of it that evidence is admissible under s 35(2) Evidence Act 2006.

Is the identification so poor that I should exercise my discretion and discharge Mr [Clayton] under s 147?

[19] In my view, it is not for the following reasons:

(a) The identification of Mr [Clayton] by [the complainant] is recognition. He had known Mr [Clayton] for 15 to 20 years. The additional information set out in the recently filed job sheet states that [the complainant] considered Mr [Clayton] to be a friend. They had spoken every now and then over the time they had known each other.

(b) It was the middle of the afternoon therefore in broad daylight. There was nothing obstructing [the complainant]'s view of Mr [Clayton] as Mr [Clayton] approached him and punched him.

(c) He saw Mr [Clayton] by the car first and then saw him as he approached then punched him. Whether he had a limp or not does not detract from the facial identification that [the complainant] made of a friend, Mr [Clayton]. It may well be he was focussing on the face of Mr [Clayton] rather than what he was wearing and whether he was limping.

(d) He recognised Mr [Clayton]'s voice when Mr [Clayton] said, "Get his bike," "Get his colours," "Get his bike." I have regard to Mr McKean's submission that the voice identification is weak if he is wrong that of the view that he thought it was Mr [Clayton] approaching him, then he would be predisposed to attribute that the voice he heard belonged to Mr [Clayton]. In my view, if his visual recognition is correct then it is likely that Mr [Clayton], who lead the attack, is saying the words that [the complainant] heard.

[20] [The complainant] and Mr [Clayton] are both members or associates of [a gang]. Therefore, they are in the same criminal group.

[21] For these reasons, I consider that there is sufficient evidence from which a properly directed jury could convict Mr [Clayton] if they could conclude that Mr [Clayton] was the person who attacked [the complainant] and took his motorcycle.

Result

[22] The application made by Mr [Clayton] under s 147 is dismissed.

D J McDonald
District Court Judge