9/2 NZLR

IN THE HIGH COURT OF NEW ZEALAND Ap.220/88
AUCKLAND REGISTRY

BETWEEN E

Appellant

NOT RECOMMENDED

AND THE POLICE

Respondent

Hearing: 12 December 1988

Counsel: Mr Le'au'anae for the Appellant
Mr T Foley for the Respondent

Judgment: ~~December 1988~~ 15th February 1989

JUDGMENT OF ROBERTSON J

This appeal involves a short point. It is a matter obviously of great principle for the appellant who was fined $150 and ordered to pay Court costs of $65. It is perhaps an illustration of the ability to pursue principle when there is no personal cost involved because of the availability of legal aid. Notwithstanding there is never any question that a person is entitled to vindicate name and reputation.

On 24 April last L Ma was driving a vehicle on the Great South Road through Otahuhu with her

husband as a passenger. The car struck a pedestrian. Very properly Mr and Mrs Ma turned to the scene of the accident where they were confronted by a number of people. There were general discussions and at some stage Mr Ma , while standing next to his wife, was punched in the face. The allegation was that it was the appellant who delivered the single blow. The appellant consistently denied that he was the person responsible. He admitted he was there, but when interviewed by Constable Bostock that evening denied the allegation and in evidence before the Learned District Court Judge was equally adamant.

The Judge heard evidence from Mr and Mrs Ma n, from the Police Constable and from the appellant. Mr Martin, the complainant, was unable to identify the person who delivered the blow. He simply said he could not be sure whether that person was in Court. He said that he pointed out to Constable Bostock the person who had punched him.

Mrs Ma in her evidence in chief identified the appellant. When she was subject to cross-examination she agreed she could be mistaken as to the person who had hit her husband. The Learned District Court Judge reviewed that evidence. She noted the importance for vigilance in respect of identification and concluded in respect of the evidence

from the Ma , "if that were the only evidence then I would be left in a doubt as to the identity of the defendant".

The Learned District Court Judge went on to consider the evidence of Constable Bostock. Constable Bostock was not present at the time of the assault, but she was able to depose that when she arrived at the scene a relatively short time later, she had spoken to Mr and Mrs Ma and as a result had approached the defendant. Her evidence was that the person who was pointed out to her by the Ma 's, who had a full beard, was the same person who was present as the defendant in Court.

The Learned Judge concluded that having heard the witnesses, "I am satisfied that this defendant is properly identified as the person who was there on that night. I find the fact that Mrs Ma appeared to be confused during her evidence today as only adding further weight to her obvious sincerity and forthrightness in giving her evidence."

Perhaps one can assume that the Learned Judge was therefore rejecting the evidence given by the appellant, although she does not say so.

It is not objectionable for a constable to give evidence that the person identified by a complainant at the scene is the same person who is present at a Court hearing. It is evidence however only of that fact and nothing more.

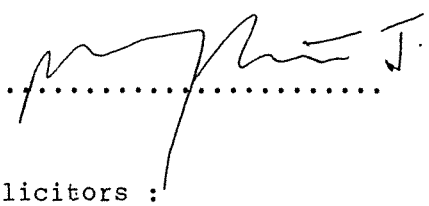
The appellant complains that the Learned Judge failed to warn herself pursuant to Section 67A of the Summary Proceedings Act of the difficulties inherent in identification in situations such as this.

That submission is difficult to assess inasmuch as the Judge recognised "the identification evidence which is crucial to this matter" and later "identification is a major issue in this matter", but I have concluded that it does have force. There was undoubtedly a number of people about. There was never any issue but that the appellant was there. What the Judge was doing was relying on the hearsay statement made out of Court not for the truth of the fact that it was made but for the very truth of its content. In circumstances such as this where identification was critical and where for the very reasons that Section 67A was enacted, mistakes could be so easily made it would be dangerous to allow this conviction to stand.

As I say the Learned Judge did not comment at all on the evidence given of denial. She did not

comment on the fact that the man had been confronted virtually in the heat of the moment and denied his involvement, when one adds those two factors to the inability of either the complainant or his wife to identify the assailant and leave proof of identification beyond reasonable doubt to the fact that a constable was able to tell the Court that the defendant before it was the person who had been pointed out as an assailant at the time, the totality is unsatisfactory. I may well have taken a different view but for the firm finding of the Judge that without the constable's evidence she would not have been satisfied. That finding in my view permitted Mr E to submit that this conviction resulted from an acceptance of the constable's evidence of a comment which was hearsay.

The appeal will accordingly be allowed and the conviction quashed.



.....J.

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