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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A.254/93

2127

THE QUEEN

v

B

Coram: McKay J
Thorp J
Henry J

Hearing: 11 October 1993

Counsel: Susan W Hughes for Appellant
Lowell P Goddard QC for Crown

Judgment: 23 November 1993

JUDGMENT OF THE COURT DELIVERED BY McKAY J

The appellant appeals against his conviction in respect of the aggravated robbery of a video and lotto shop in New Plymouth. The robbery occurred about 7.10 pm on Saturday, 31 October 1992. The appellant was charged jointly with one Mark Clifford Message, and the defence was based on the identity of the robbers. Both accused gave evidence and denied having taken part.

The grounds of appeal are that there was a miscarriage of justice because one of the Crown witnesses had been declared hostile by the Judge, and was allowed to be cross-examined by the Crown. It was contended that the Judge was wrong to declare the witness hostile, and that the Judge did not adequately warn the jury that the witness's previous statements were not themselves evidence.

The general principle relating to declaring a witness to be hostile is discussed in Garrow & Turkington's Criminal Law XIII.9, where it is pointed out that a hostile witness is not a witness who merely gives unfavourable evidence, but a witness who is adverse in that it appears the witness does not wish to tell the truth. The text cites the statement of the common law position in Stephen's Digest of the Law of Evidence, Art. 147, which was adopted with approval in *Prefas & A M D Price* (1988) 86 Cr App Rep 111 (CA):

"If a witness appears to the Judge to be hostile to the party calling him, that is to say, not desirous of telling the truth to the Court at the instance of the party calling him, the Judge may in his discretion permit his examination by such party to be conducted in the manner of cross-examination to the extent to which the Judge considers necessary for the purpose of doing justice. Such a witness may by the leave of the Judge be cross-examined on:

- (1) Facts in issue or relevant or deemed to be relevant to the issue;
- (2) Matters affecting his accuracy, veracity or credibility in the particular circumstances of the case; and as to
- (3) Whether he has made any former statements, oral or written relative to the subject matter of the proceeding and inconsistent with his present testimony ...

In the case of a witness who is treated as hostile, proof of a former statement, oral or written, made by him inconsistent with his present testimony may, by leave of the Judge, be given in accordance with Articles 144 and 145."

The witness in question, Ms Wilson, was a part-time employee of a dairy which adjoined the video shop and shared a common street entrance, access to the video shop being through the dairy. She was working in the dairy when the robbery took place. She saw the first robber enter with what appeared like a black hat on his head. While he was standing quite close to her he pulled it down over his face and she saw that it was a black balaclava. He then went behind the counter and she saw him pull a gun from his pocket. She realised

that this was a robbery and made for the door. A second man had entered, who also appeared to be wearing a hat, but she saw his face only for a couple of seconds before a customer came between them and she ran outside. As she turned round once she was outside the door, she saw this man turn to face the door and unlatch it in order to lock it.

In her evidence at the trial, the witness described these events much as she had in her police statement and in her depositions. When asked if she had seen the first man before, and whether she recognised him, she replied to each question "I am not sure". When asked if she recognised the second man, she again said "I am not sure", and when asked what she meant by this, said "I can't remember". The jury was then asked to retire, and the Crown applied to have the witness declared hostile. The Crown called two witnesses to the effect that Ms Wilson had told each of them separately that she had received a threatening phone call in relation to her giving evidence. The Judge asked Ms Wilson, who had remained in Court, whether their evidence was correct. She said that it was, but that she had been telling untruths to them when she said she had been threatened. She told the Judge that she wanted to give evidence and was holding nothing back.

In his ruling, the Judge said that from the moment she stepped into the witness box she was most uncomfortable and completely ill at ease, but he had been unable at that stage to conclude the true cause of her demeanour and presentation. He said he was satisfied that she was deliberately withholding from the Court material evidence in the matter. On this basis he declared her to be a hostile witness, and allowed her to be cross-examined.

Resuming her evidence, Ms Wilson continued to maintain that she did not remember what the first man looked like. She knew a person who was a

regular customer of the dairy known to her by the nickname Shoddy, but said she did not remember whether the man with the gun was Shoddy. Crown counsel then put to her her signed police statement. She acknowledged that she had there said she was "quite sure" she had seen the person before, and that he was a customer who came into the shop. She maintained, however, that she could not remember saying that to the police. She said she did not know what she had said at that time. She similarly had put to her her sworn deposition in which she said she knew the first robber, who was a regular in the shop all the time, coming in perhaps three times a week. She knew his name was Shoddy. She remembered being asked at the preliminary hearing to look around the Court and see if she could see the man she knew as Shoddy, and that she had identified him. When asked to again identify the man she knew as Shoddy, she said "I am not sure, I can't be a 100% sure that it is him". When asked to point to the man she had identified in the previous occasion, she identified the appellant and said "I think that is Shoddy over there, but I honestly don't know". She identified the co-accused, Message, whom she had known since being at school with him, but said she could not be 100% sure whether he was the second man. She thought she had identified him as the second robber at the preliminary hearing but did not remember.

For the appellant Miss Hughes made three submissions:

1. At no time did Ms Wilson unequivocally adopt her previous statement.
2. The Judge's direction to the jury did not contain the usual warning that her previous statements were not evidence.
3. Her motivation and purpose seemed at variance with the explanation given at the trial.

In his summing up the Judge dealt with these matters in the following passage:

"You will have to look with great care at what Ms Wilson eventually said before you. It is true (as both counsel for the accused have been at pains to underline) that she did not make positive identifications here in the Court. You heard and saw her. As I apprehend the evidence she never suggested that what she had previously said was wrong. Rather she said that she could now not be sure. You have heard all her evidence. As I apprehend her inability to be sure it was mainly because of the length of time which had slipped by (over six months) since it happened. Well what she said out of Court on other occasions to the police officer and in the District Court is evidence of the fact that that was what she was saying on other occasions. Now what she says is I cannot be 100% sure - I cannot be absolutely positive. She does not deny that.

You are entitled to have regard to the fact that on previous occasions nearer the time she apparently was able to make identifications and was apparently quite positive."

He went on to warn the jury not to speculate as to why she had lost her memory, if that is what had occurred, and not to assume that it was the result of anything done by either of the accused. He said that apart from one matter she accepted that she had previously said what was recorded in her statement and deposition, but now said she could not be sure.

There was also evidence from a police officer that Ms Wilson had been shown over 1000 photographs later the same night as the robbery and had picked out that of the appellant as being the first robber. She knew that the appellant had lost his right arm, and had an artificial arm with a hook attachment. The officer said that after picking out the photograph she said "I didn't see the hook, but I'm absolutely positive it's him". Asked in cross-examination about her selection of the photograph, Ms Wilson acknowledged that she had selected a photograph with the name "B" written at the foot, but said she did not know "who I thought it

was". The Judge referred to this in a further passage in the summing up in which he said:

"Then there is Ms Wilson. What you have there is the evidence that she picked out a photograph that night and that it was a photograph of the accused Mr B sitting here in Court. She has given evidence in the past in which she was adamant as to who the person was. She now says that she cannot be sure. Well that is the evidence that you have about identification from the Crown's point of view. It is a matter for you to weigh it calmly and sensibly."

Finally, the Judge again referred to Ms Wilson's evidence when he summarised the evidence of identification. He said:

"I do suggest to you whenever you are considering the evidence of Ms Wilson you come back to the question of how she presented to you. It is a question of fact. But you might have gained an impression that she seemed to be at great pains to avoid anything which suggested connection at all. It is a matter for you. Was it just that she couldn't remember now because it was a long time ago or was she trying to distance herself in some way from the situation? She certainly said she could not now be 100% sure. What do you make out of that as against what she previously has said and what has been said?"

The general rule that a prior statement the truth of which is not admitted by the maker can only be used to impeach the credibility of the maker and cannot be employed as proof of the truth of its contents is well settled: *R v Carrington* [1969] NZLR 790; *R v Allen* (1989) 5 CRNZ 316; *Archbold* (1993) 1/1351-2 para.8-87 and cases there cited. See also Sopinka Lederman & Bryant's Law of Evidence in Canada (1992) 847.

Although the question is normally one for the jury (*R v Piri* [1987] 1 NZLR 66), Miss Goddard accepted that in the present case Ms Wilson did not at trial unequivocally confirm any relevant part of her previous statements.

The effect of the passages of the summing-up we have quoted we think were well capable of being interpreted by the jury as an invitation to choose between Ms Wilson's previous statement and evidence and her evidence at trial. A similar invitation was held to be a misdirection by the Court of Criminal Appeal in *Alfred White* (1922) 17 Cr.App.R. 60. Nowhere did the Judge here direct the jury that the previous statements were not evidence unless Ms Wilson confirmed or adopted them at trial. We are therefore unable to accept the submission that the directions given to the jury adequately gave effect to the general principle enunciated above.

Miss Goddard accepted, as was clearly appropriate, that if the effect of the summing-up was to invite the jury to treat the police statement and deposition as evidence, and if this was wrong in law, then she could not contend that there was no miscarriage of justice. The whole issue in the case was identity, and Ms Wilson's earlier identification was of key importance. It could not be suggested that without that identification the jury must have reached the same verdict. She further submitted however in an elaboration of her written submissions that an exception to the general rule was recognised in respect of identification evidence; and she referred to a number of authorities to support this proposition. As will be seen later in this judgment, they are directly concerned not with this issue but with the separate issue relating to what could be termed secondary or indirect evidence, namely evidence from a source other than the identifier. Miss Goddard was unable to refer us to any authority directly in point which suggests there is such an exception to the general rule. Having regard to the now statutorily recognised dangers inherent in identification evidence, we can see no justification for a departure in that area from the well established rule. The observation of Lord Normand in *Teper v R* (1952) AC 480, 488 in relation to the admission of words spoken which are part of the *res gestae* is pertinent:

"The special danger of allowing hearsay evidence for the purpose of identification requires that it should only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstances."

as also is that of Lord Morris in *Sparks v R* (1964) AC 964, 981 :

"There is no rule which permits the giving of hearsay evidence merely because it relates to identity."

Ms Wilson's statement to the police and her deposition are therefore unable to be used as evidence of the truth of their contents in particular as to the identity of the robbers unless unequivocally adopted or confirmed by her in the course of evidence at trial - which here they were not.

The arguments of counsel were directed almost entirely to the status of Ms Wilson's previous statements, but they incidentally embraced matters of relevance to a separate issue, namely the admissibility of evidence as to the fact of her having made identifications prior to the High Court trial. It is desirable that we express our views on that evidence as it relates to the present case.

In *R v Collings* [1976] 2 NZLR 104 this Court held to be admissible the evidence of a police officer as to what the complainant had said as part of her prior out of Court identification of the accused, she having given somewhat general evidence at the trial of having made those identifications. In delivering the judgment of the Court, McCarthy J said at 114:

"The leading case concerning evidence of the identification by a complainant is *R v Christie* [1914] AC 545. It is an extremely difficult case, because their Lordships differed somewhat in the points they considered and even more so in the conclusions at which they arrived. But the case is, we think, certainly good authority for the proposition that evidence of identification, other than identification in the witness box, is admissible when the identifier is able to give evidence at the trial of the previous identification. In

R v Osbourne [1973] QB 678; [1973] 1 All ER 649 the Court of Appeal in England took the view that the principle to be seen in *R v Christie* could be applied even when the identifier is unable to speak of her identification. We would, if necessary, follow *R v Osbourne*. In the present case, however, the fact that the complainant had identified the various accused previously was not in dispute, indeed the complainant herself gave evidence albeit in somewhat general terms of having made those identifications. So all that is in dispute here is whether and to what extent evidence may be given of what she said in the course of those identifications.

Approaching the question as one of principle we think that when evidence of a prior identification out of court is admissible, then the circumstance of that identification and what was then said and done by the identifier may be relevant, and indeed important, in determining the value of that identification. A prior identification is certainly not corroboration of any of the identifier's evidence, including that covering her identification; and here the judge so told the jury. We accept that the only use to which such evidence can be put is to prove the identification and how certain the identifier was. Therefore, anything said by her at the time which indicates hesitation or doubt in making the identification should be admissible. So, too, we think, should be the evidence of some dramatic or revealing reaction by her; Mr Larsen gave the example of a complainant fainting on identifying a man. But at the same time the need to confine the evidence strictly to these purposes must be obvious, otherwise the dangers which worried their Lordships in *R v Christie* as being inherent in allowing secondary evidence of matters which should be provable only by primary evidence when that is obtainable - a procedure so contrary to the spirit of the English rules of evidence - will be present: [1914] AC 545, 551 (Viscount Haldane LFC), 558 (Lord Moulton, 563 et seq (Lord Reading))."

R v Osbourne was strongly criticised by D F Libling in [1977] Crim LR 268. The author classifies the possible fact situations as falling into four categories. The first is where a witness identifies the accused in Court. In such a case, he accepts that another witness may give evidence that the identifying witness had identified the accused prior to trial. This evidence is not admitted to prove the truth of the previous identification, but of the fact that it took place. It is therefore primary and not secondary evidence, and its relevance is that it strengthens the probative value of the in court identification. The fact that the previous statement

was made points towards consistency and away from the possibility that the identification in Court was an afterthought or mistake. This analysis appears to accord with the judgments in *R v Christie* [1914] AC 545, for example that of Lord Haldane LC at 551. The second category is where the witness cannot identify the accused in Court. The learned author submits he may still give evidence that he made an identification on an earlier occasion, and believes it was correct. In such a case an eye witness to the earlier identification should be able to give direct evidence of what he saw or heard, as strengthening the probative value of the evidence of the identifier. The eye witness can give evidence of the identification which was made, but not as evidence of its truth, as this is dependent on the evidence of the identifier.

The third case is where the identifier gives evidence that he made an earlier identification, which he believes was correct, but no longer remembers whom it was that he identified. In such a situation, a police officer who was present could give evidence as to who was the person who was identified, because it is the identifying witness alone who is asserting the truth of his identification. The author cites as an example *Burke and Kelly* (1847) 2 Cox CC 295 in which the witness remembered previously identifying a man as one of his attackers and testified that when he made that identification he was sure it was correct, but 'would not say that the prisoner was the man whom he had identified'.

In the fourth case, where the identifier is not available to give evidence, does not recollect making or no longer supports the correctness of a previous identification, the author submits that secondary evidence should not be admissible. This is subject to such apparent exceptions as where the previous identification was made at the time of the offence and is part of the *res gestae*, or where it was made in the presence of the accused whose reaction to it amounted to an admission of guilt.

Alexander v R (1981) 34 ALR 289 was a case within the second of Libling's four categories. The witness gave evidence that he had previously identified the person concerned as being the person in one of a number of photographs which had been shown to him, but could no longer do so. A police officer gave evidence as to the photograph he had chosen, and the admission of the officer's evidence was upheld by the High Court.

The question came again before this Court in *R v Ngahooro* [1982] 2 NZLR 203. Ngahooro was charged with robbery, and had been identified as being one of the robbers by a witness who saw him the following day and pointed him out to a Detective Sergeant. At trial the witness gave evidence of having made the identification of a robber but could not remember whom he had identified. The case appears to be another example of Libling's second category. The Court followed the approach taken in *R v Collings* and *Alexander v R*, and ruled that the evidence of the Detective Sergeant was properly admitted.

In *R v Howard* [1987] 1 NZLR 347 the identifier gave evidence of having made an identification at an identification parade, and as to the person he had then identified. This Court ruled admissible the evidence of a police officer present at the parade, who said the witness was mistaken in his recollection and had in fact identified someone else. This is consistent with the other authorities. Only the identifier can say that a person he identified on a particular occasion was in fact the robber or other offender. But once that evidence is before the Court, a witness present at the time the identification was made can prove who it was that he had identified.

The present case falls into Libling's fourth category, the identifier not having given any relevant evidence at trial. She acknowledged that she had

apparently said what was in her police statement, but claimed not to remember having said it, nor to remember what she had said in her deposition. She acknowledged having identified the appellant at the preliminary hearing, but would not affirm that she believed at the time that was a correct identification: rather, she declared that she could no longer recall making an identification.

We accept the basic correctness of Libling's analysis. Where secondary evidence has been admitted, there has always been primary evidence from the identifier to prove the fact that an identification was made, and to affirm its truth. We use the term "secondary evidence" to mean evidence from one person that he has witnessed an identification being made by another person. The secondary evidence has either assisted the assessment of the probative value of the identifier's evidence, or has been admitted as direct evidence as to which person or which photograph was chosen by the identifier. It is not admitted as evidence of the truth of the identification, because only the identifier is in a position to provide evidence of that. It follows that where, as here, the identifier fails to affirm the truth of the earlier identification, hearsay evidence of that fact is not admissible.

This view was adopted by Barker J in *R v Roberts* (1989) 4 CRNZ 490, where for medical reasons the identifier was unable to give evidence. The Crown sought to call evidence that she had picked out from some 150 photographs a photograph of the accused, as being the person she saw firing the gun at the time of the incident with which the accused was charged. After referring to the authorities discussed above, Barker J ruled the evidence inadmissible.

There is a dictum which suggests otherwise in *R v Osbourne*, to the effect that the principle to be seen in *R v Christie* could be applied even where the identifier is unable to speak of the identification. That situation did not fall to be considered in *R v Osbourne*, and we would respectfully disagree with the view

expressed, as being wrong in principle. The Court appeared to regard evidence given by one witness of a previous identification by another as being original evidence on the issue of identity, but as pointed out by Weinberg in 12 Melbourne University Law Review (Dec. '80) 543, 555, this is "manifestly incorrect". Archbold (1993) 1/1672 para 14-50 submits that the decision conflicts with the speeches of their Lordships in *R v Christie* and should not be followed. In the passage cited above from *R v Collings*, the Court said (obiter) that it would if necessary follow *R v Osbourne* in allowing such evidence even where the identifier was unable to speak of the identification, but the question did not arise. The second paragraph of the passage cited above from *R v Collings* makes it clear that the secondary evidence is not corroboration of the identifier's evidence, and so does not prove its truth as distinct from what it was and its reliability.

In *R v Swanston* (1982) 65 CCC 2d 453 a five Judge bench of the British Columbia Court of Appeal held secondary evidence of an identification to be admissible, the identifier being unable to recognise the accused at trial due to his changed appearance, but giving evidence that he had made a positive identification at a police line up and at the preliminary hearing. The witness was again able to give direct evidence that he had on two occasions identified the man who robbed him, and "secondary" evidence could prove directly who it was he had identified on these occasions. The latter fact would be inadmissible if the identifier had not testified to the truth of his earlier identification, whatever it was.

It would be anomalous to allow identification to be proved by the secondary evidence, which is only hearsay evidence of the fact of identification, when the danger of even primary evidence being honest but mistaken has been increasingly recognised. The Court is now required by section 344D of the Crimes Act 1961 to warn the jury of the special need for caution before finding the accused guilty in

reliance on the correctness of visual identification. If secondary evidence were to be admissible as evidence on so crucial an issue as identification, other than for the more limited purposes discussed in Libling's article, then it would be illogical to exclude it in respect of other relevant matters contained in a witness's police statement or depositions. To allow relevant facts to be proved by such second-hand evidence would be contrary to authority and to the spirit of the rules of evidence.

For these reasons, we conclude that evidence such as from a witness to say he saw Ms Wilson pick out one of a number of photographs and heard her say it was the robber, or to say he saw and heard her identify the appellant in Court as being the robber is not admissible unless a proper foundation is laid by her own evidence.

If she herself gives evidence that the photograph she picked out was of a man she believed to be the robber, then the question whose photograph it was that she picked would become relevant. Any person who was present when she picked it could give direct evidence as to which photograph she picked, and evidence could be given as to whose photograph it was. Likewise if she said in evidence that she pointed in Court at the preliminary hearing to a person she believed to be the robber, then the question who it was she pointed to becomes relevant and can be proved by any witness who was present and can give direct evidence as to whom she pointed to. In the absence of any evidence from her that she had recognised the robber as being the person in the photograph or the person to whom she pointed, the identity of that person is irrelevant and evidence of it is inadmissible.

This is sufficient to dispose of the present appeal. It may be appropriate, however, to add some brief comments on the Judge's decision to treat Ms Wilson

as a hostile witness. In this case the Judge said he was satisfied that Ms Wilson was deliberately withholding from the Court material evidence in the matter. That was clearly sufficient to justify declaring her hostile. Such a decision is in any event essentially one for the trial Judge, and the exercise of his discretion will rarely be interfered with by an appellate Court: see *McLellan v Bowyer* (1961) 106 CLR 95; *R v Manning* [1968] Crim LR 675 (CA); *R v Singe* (CA 27/73, judgment 7 May 1973).

In reaching that conclusion he was influenced by the evidence which he heard in the absence of the jury, by her admission that she had told the two witnesses that she had been threatened in respect of her giving evidence at the trial, and by her claim that she had been telling them untruths. It is unusual for evidence to be heard in the absence of the jury for the purpose of determining whether a witness is hostile, as the attitude of the witness will normally be apparent from his or her demeanour and the answers given to questions properly put in the presence of the jury, and it may assist the jury to hear the examination of the witness at this stage: *R v Darby* [1989] Crim LR 817 (CA). It is, however, essentially a matter for the trial Judge. Where the Crown has evidence on which it seeks to rely in support of its claim that the witness is hostile, being evidence as here which is not directly relevant to the issues in the trial itself and could not be introduced as evidence in the trial, then that evidence cannot be led in the presence of the jury. It must be open to the Judge to allow such evidence to be called in the absence of the jury, for such assistance as it may give him in deciding whether or not the witness is hostile.

This practice has been adopted in the rare case where such a situation has arisen. In *The People (Attorney-General) v Hannigan* [1941] IR 252 one of the material circumstances relied on was a prior statement inconsistent with the witness's evidence. The Judge was concerned that the jury should not be made

aware of the statement until he had decided that the witness was adverse. He heard evidence as to the statement in the absence of the jury and this was objected to on appeal. The Court of Criminal Appeal held the objection was unsustainable. In *R v Hunter* [1956] VLR 31 the Full Court of Victoria held that if a prior inconsistent statement is to be used to establish hostility the inquiry should be made on a *voir dire* or in such manner that the jury does not know of the contents of the document until the trial Judge has ruled on the question of the adversity of the witness. *Hannigan's* case was relied upon. *R v Hunter* was in turn applied in *Price v Bevan* (1974) 8 SASR 81, an appeal to the Supreme Court of South Australia (In Banco) from the court of summary jurisdiction. The Court held that if the prior inconsistent statement was admitted by the witness, it could be looked at in deciding whether the witness was hostile, but if not admitted it would have to be proved, and in a jury trial this should be in the absence of the jury. Bray J said:

"In a jury trial the rebutting witness may well have to give his evidence twice, once on the *voir dire* in the absence of the jury for the purpose of getting a finding of hostility, and again in their presence after the finding to destroy the credit of the witness; cf. *Hunter's Case*, at p.797."

Walters J said:

"If the case is being tried by a jury, evidence relevant to the issue of hostility should be taken on a *voir dire* in the absence of the jury"
...

"In the absence of a signed statement, and where a prior verbal utterance is relied upon, a *voir dire* examination should be held (and on a jury trial, in the absence of the jury (*R v Hunter*, at p.34)) in order to determine whether the verbal statement was in fact made, and whether the examination sufficiently proves the inconsistency between the previous statement and the present testimony of the witness. It will thereupon fall to the judge to decide whether in all the circumstances he should exercise a discretion to declare the witness hostile."

The Judge was accordingly entitled to hear the evidence as to the threats to the witness in the absence of the jury.

For the reasons given earlier in this judgment the appeal must be allowed. The conviction is accordingly set aside, and there is an order for a new trial.

A handwritten signature in dark ink, appearing to read 'Whitaker', followed by a small mark resembling an exclamation point or a comma.

Solicitors

Crown Law Office, Wellington, for Crown