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Criminal

Court affirms jury should not be given 'traditional caution' on exculpatory eyewitness evidence: counsel

By **Amanda Jerome**

(May 9, 2022, 2:14 PM EDT) -- The Ontario Court of Appeal has ordered a new trial for two men convicted of first-degree murder in a decision that, counsel says, affirms "where there is either a mixed or exculpatory eyewitness, the jury should not be given the traditional caution warning them to be especially careful before relying on this evidence" because "the reason for that traditional caution is that it creates a risk of wrongful conviction."

"There's no such risk when the eyewitness tends to suggest innocence, not guilt," said Paul Alexander, a sole practitioner in Toronto and counsel for appellant, Shaqwan Kawano.

Alexander also noted that "if you have a mixed witness, the trial judge needs to explain to the jury that they may see the witness' evidence as mixed."

Paul Alexander, a sole practitioner, represented appellant, Shaqwan Kawano

"The trial judge should, if possible, point to the aspects of this witness' evidence that might be exculpatory and the trial judge should make it clear that the exculpatory aspects of this witness' evidence aren't subject to that same caution. Instead, the trial judge should make it clear that they don't have to believe the exculpatory eyewitness' evidence. It simply needs to leave them with a reasonable doubt in order for them to acquit. Which, of course, is a very different standard than they would apply to relying on an eyewitness' evidence to convict," he added, noting that in this case, "the trial judge rolled the exculpatory eyewitness' evidence in with all the other eyewitnesses and gave the traditional caution warning the jury to be careful when relying on that evidence to convict."

"But what she didn't do was make it clear that the key witness gave evidence that the jury might find to be exculpatory in nature, and she didn't make it clear that the jury was to apply that standard to his exculpatory evidence. And that was an error that ultimately rendered the verdicts unsafe," he explained.

In *R. v. Grant*, 2022 ONCA 337 the court heard that the appellants, Kawano and Alton Grant, were "tried and convicted by a jury of first-degree murder" for the death of Rala Fedrick.

Fedrick was shot at 1:50 a.m. in the summer of 2014. According to court documents, Fedrick was "standing with several people on George Street, in Toronto, just south of Seaton House, a shelter for homeless men" when he died. And "[A]lthough numerous CCTV cameras populate George Street," the area where Fedrick was killed was "not covered by any camera."

Before Fedrick died, Kawano saw the deceased "grab the buttocks of Tasha Simpson while hugging her near Seaton House." At trial, the Crown "alleged that Simpson was Kawano's girlfriend."

"It was the Crown's theory that Kawano took such offence to Fedrick hugging Simpson that he enlisted his friend, Grant, in a plan to kill Fedrick and, early the following morning, Kawano shot Fedrick in retaliation for the inappropriate hug," the court explained.

Surveillance footage from the night of the shooting shows that "Kawano and Grant went together to George Street just after 7 p.m. At Seaton House, they sat near Fedrick but did not engage him. There was no apparent argument or confrontation between them."

The Crown's theory, the court noted, was that "Kawano was the person recorded by various CCTV cameras around that time wearing a scarf wrapped around his head, which led to that individual being called 'Scarfman' during the trial. It also was the Crown's position that Kawano, the Scarfman, shot Fedrick."

According to court documents, seven people testified "who were either with or in the immediate vicinity of Fedrick at the time he was shot." However, "[O]nly one of them, David Kamkin, saw the actual shooting."

Kawano and Grant, separately and together, raised several grounds of appeal: Grant argued that "the verdict against him as the aider of the offence of first-degree murder was unreasonable;" Grant submitted that the trial judge, Justice Faye McWatt of the Superior Court of Justice, "erred in dismissing his application for a stay of proceedings by reason of a violation of his rights under s. 11(b) of the Charter;" and both appellants argued that Justice McWatt "erred in instructing the jury on how to assess the exculpatory evidence of an eye-witness, Kamkin."

Justice David Brown, writing for the Court of Appeal, was not persuaded that Justice McWatt "erred in dismissing Grant's s. 11(b) application." However, he determined that her "instructions on Kamkin's exculpatory identification were tainted by legal error."

Both appellants, the court noted, submitted that Justice McWatt "misdirected the jury on the exculpatory eyewitness evidence provided by Kamkin, an error that goes to the heart of the verdict and necessitates a new trial."

According to court documents, Kamkin "could not be located for the trial so, on consent, his preliminary inquiry evidence was played for the jury."

Kamkin testified that "he was standing on the east side of George Street, south of Fedrick, who was standing on his right. He noticed a man pacing back and forth on the west side of the street." He described the man's appearance and dress.

According to court documents, Kamkin testified that he "could not see the person's face from across the street. But, the person's race was black, 'Afro background,' a person of colour; he had a dark complexion."

"The man walked across the street towards a group of people turning sharply towards Fedrick. Kamkin then heard a bang, like a powerful firecracker, saw smoke, smelled gunpowder and saw a blue light from the area of the front pockets of the shooter's hoodie, but he did not see a gun," the court explained, noting that the "shooter then turned around and jogged diagonally, across the street."

There was another person standing north of Fedrick who "left the scene jogging in the same direction as the shooter." The second person, the court noted of Kamkin's evidence, "was a person of color (although he could not see the face), not as slim as the shooter, had a light grey tracksuit on, no hoodie, and was wearing a baseball cap."

Kawano submitted that Kamkin's "description of the shooter differed in several respects from his actual appearance or from the person whom the Crown alleged was Kawano."

According to court documents, "Kawano's counsel identified some mis-statements in the charge of Kamkin's evidence, which the trial judge subsequently corrected."

"Upon completion of the charge, Kawano raised two related objections to the part of the charge dealing with identification evidence," the court added, noting that "[A]fter considering these submissions, the trial judge declined to further charge the jury as requested by Kawano."

Justice Brown explained that the Court of Appeal has noted "the need for special care concerning eyewitness identification evidence arises because of the danger of a wrongful conviction."

"That danger does not exist where the eyewitness evidence tends to exculpate the accused," he added, noting that "[C]onsequently, where the eyewitness evidence tends to exculpate the accused, the traditional instruction regarding eyewitness identification evidence should be avoided as it could leave the jury with an erroneous impression about the quality of evidence that could leave them with a reasonable doubt."

Justice Brown also noted that the Court of Appeal has provided "guidance on how a trial judge should instruct a jury on eyewitness identification evidence that tends to exculpate an accused" in three decisions: *R. v. Wristen* [1999] O.J. No. 4589, *R. v. Vassel*, 2018 ONCA 721, and *R. v. Sheriffe*, 2015 ONCA 880.

Justice Brown accepted Kawano's submission that Justice McWatt "misdirected the jury on the exculpatory eyewitness evidence provided by Kamkin."

"Notwithstanding the exculpatory tendency of several aspects of Kamkin's evidence, the trial judge included his evidence in her traditional charge on eyewitness identification evidence. That was an error for several reasons," he wrote.

"First," he explained, Justice McWatt's "instruction on eyewitness identification evidence did not acknowledge that some of Kamkin's evidence tended to be exculpatory in nature."

"That was a material omission, given the otherwise circumstantial nature of the evidence against Kawano and the centrality of Kamkin's evidence to Kawano's defence," he added.

"Second," Justice Brown found "the charge did not offer the jury any assistance about how to distinguish exculpatory from inculpatory evidence and assess the exculpatory evidence. Instead, it treated Kamkin's evidence as a single whole."

He explained that "where some of the eyewitness evidence is exculpatory the issue on appeal is whether the charge as a whole, in the context of the particular case, clearly informed the jury that they must determine whether the exculpatory evidence alone, or in combination with other evidence, left them with a reasonable doubt about the accused's guilt."

"Third," he added, "given the exculpatory tendency of aspects of Kamkin's evidence, by including his evidence in the traditional instruction for eyewitness identification evidence the trial judge ignored the directions of this court in *Wristen*, at para. 46 — later repeated, albeit after the trial, in *Vassel*, at para. 192 — that the traditional instruction should not be used for exculpatory evidence, which does not give rise to the danger of a wrongful conviction."

Regarding the issue of whether "the verdict against Grant for first-degree murder unreasonable," the court noted that the Crown's "theory identified Kawano as the principal who killed Fedrick, with Grant liable as a party to that offence pursuant to s. 21(1) of the *Criminal Code*."

Grant submitted on appeal that "the evidence, taken cumulatively, is incapable of proving beyond a reasonable doubt that he aided Kawano in murdering Fedrick. As a result, the verdict that Grant was guilty of first-degree murder is not one that a properly instructed jury, acting judicially, could have rendered. Therefore, the verdict should be set aside on the ground that it is unreasonable or cannot

be supported by the evidence and an acquittal entered."

"Applying the principles governing the review of a jury's verdict under s. 686(1)(a)(i) to the record as a whole," Justice Brown was "not satisfied that a properly instructed jury acting judicially could not reasonably have rendered the verdict of first-degree murder against Grant."

"A properly instructed jury may conclude, despite the frailties of eyewitness identification evidence, that the eyewitnesses' testimony is reliable and may enter a conviction on that basis, although a jury may not convict on the basis of such evidence alone where that testimony, even if believed, would necessarily leave a reasonable doubt in the mind of a reasonable juror," explained Justice Brown, not giving effect to this ground of appeal.

Justice Brown, with Justices Alexandra Hoy and Steve Coroza in agreement, concluded that Justice McWatt "erred in her instruction to the jury regarding eyewitness identification evidence and the curative proviso cannot apply in the circumstances."

"As that error affects the verdicts against both appellants, I would set aside those verdicts and order a new trial," Justice Brown determined in a decision released May 2.

Alexander told *The Lawyer's Daily* that "if there is an eyewitness whose evidence is either mixed or exculpatory counsel should be careful to ask the trial judge not to apply the traditional caution to that witness' evidence and to make it clear to the jury there's exculpatory value in that witness' evidence and that it only need raise a reasonable doubt in order to lead them to acquit."

"I think it's a good restatement of the principles that the court articulated in the earlier cases of *Wristen* and *Vassel,*" he added, noting that in this decision, and in *Vassel*, "the court made it clear that it's not necessarily an error to tell the jury to be careful about certain kinds of evidence even if it's defence evidence."

Anil Kapoor, Kapoor Barristers

"But in *Vassel*, the court also seemed to suggest that the jury should never be given a generalized caution about eyewitness ID evidence being typically frail when that evidence tends to suggest innocence. Instead, the jury should only be warned about the frailties of eyewitness ID evidence if there are specific frailties on the evidence in that case. And that's something that came out in *Vassel*, which didn't arise in this decision. So, I think to get a full picture of the law on what to tell the jury about an exculpatory eyewitness, I would recommend that practitioners read this case along with *Vassel* because that will give the full picture of what the jury ought to be told," he explained.

Anil Kapoor, of Kapoor Barristers and counsel for Grant with Dana Achtemichuk, said "this case, once again, reminds us that it is very important for a trial judge to turn their mind to whether identification evidence, in whole or part, is exculpatory and, if so, to charge the jury accordingly; that is, to avoid the standard caution on eyewitness identification as that unfairly undermines the defence position."

"It is also important to direct a jury to the exculpatory portions of the eyewitness evidence," he added.

The Ministry of the Attorney General, on behalf of Crown counsel, declined to comment on the decision.

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