IN THE COURT OF APPEAL OF NEW ZEALAND

CA603/2015
[2016] NZCA 167

BETWEEN	WHETU SONNY JAMES WAIWAI Appellant
AND	THE QUEEN Respondent

Hearing:	3 March 2016
Court:	Ellen France P, Keane and Dobson JJ
Counsel:	N P Chisnall and K F Preston for Appellant K S Grau for Respondent
Judgment:	4 May 2016 at 10 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Ellen France P)

Table of contents

Introduction

[1] Whetu Waiwai was convicted after a jury trial presided over by Judge Adeane on one count of injuring with intent to cause grievous bodily harm to Malcolm White. Mr Waiwai appeals against conviction.

[2] The appeal raises three main issues. First, the appellant says the verdict was unreasonable because he had an alibi and the identification of him as the assailant was flawed. Secondly, it is argued the evidence from a hostile Crown witness Neil Munro, who had earlier pleaded guilty to participation in the assault on Mr White, was inadmissible. Finally, the appellant says the Crown impermissibly emphasised the gang context of the assault.

Background

[3] As the submissions for the Crown record, the incident that gave rise to the charge arose out of gang tensions in Wairoa. Mr Waiwai was associated with Black Power and Mr White, the victim, with the Mongrel Mob.

[4] Mr White was walking along Paul Street in Wairoa on 28 June 2014. The Crown case was that Mr Waiwai and three others saw Mr White and ran towards him yelling gang slogans. A police officer, Constable Andrew O'Sullivan, was nearby. He heard the noise and saw Mr Waiwai, whom he knew and recognised, and three other men (two of whom he also knew), attack the complainant by punching, kicking, stomping and striking him with an instrument. Constable O'Sullivan approached and told the assailants to stop three or four times. Two did so but Mr Waiwai and one of the others continued the assault. Having been told again to stop the men dispersed. The assault left Mr White with various injuries including a fractured jaw, a laceration to his shoulder, lacerations to his scalp and grazes to his cheek and jaw area.

[5] Mr Waiwai attended at the police station in the early hours of the following morning. He told police that closed-circuit television (CCTV) footage from the nearby Z Service Station would show he was at the service station at the time of the assault.

[6] Mr Waiwai was jointly charged in relation to the assault on Mr White with Adam Kelliher, Neil Munro and Tuahae Aupouri. The charge against Mr Aupouri was dismissed pre-trial on the Crown's application.[1] Messrs Kelliher and Munro pleaded guilty at the beginning of a trial that took place in May 2015. That trial, which proceeded on the charge against Mr Waiwai alone, resulted in a hung jury.

[7] The retrial took place in September 2015. The sole issue at trial was the identification of Mr Waiwai. The Crown case was that Mr Waiwai participated in the attack, ran off, then doubled back to the Z Service Station, got into a stranger's black van and asked to be dropped off near his home. Mr White had not made a statement to the police and he did not give evidence at trial. Instead, the Crown case relied on the evidence of Constable O'Sullivan who identified Mr Waiwai as one of the assailants. The jury also heard evidence from two other constables on patrol in the area that evening and from the driver of the van at the service station. The driver explained that, prior to that evening, he had never seen either Mr Waiwai or the other man who got into the van and asked for a ride. Finally, as we shall discuss, the Crown called evidence from Mr Munro.

[8] The defence case was that Mr Waiwai could not have been involved in the assault because there was insufficient time for him to have run off and then be seen on the CCTV footage at the Z Service Station getting into the van.[2]

An unreasonable verdict?

[9] A verdict will be unreasonable if, having regard to all of the evidence, the jury could not reasonably have been satisfied beyond reasonable doubt that the defendant was guilty.[3] The issue raised by the appellant's case is whether the verdict was unreasonable because Mr Waiwai's alibi was a complete answer and Constable O'Sullivan's identification of Mr Waiwai problematic.

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1 The Crown accepted there was a problem with the procedure adopted to identify Mr Aupouri.

2 It was an agreed fact that the CCTV footage showed Mr Waiwai getting into a black van at the Z Service Station on Achilles Street, Wairoa.

3 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [5] and [17]; and *Wiley v R* [2016] NZCA 28 at [10](c) and [80].

[10] The issue arises because of the timing of events. Accordingly, we need to examine the relevant evidence in more detail.

[11] Constable O'Sullivan said that on the evening of 28 June 2014 at about 10.40 pm he saw a group of males by the Wairoa panel repair shop near the intersection of Paul Street, Achilles Street and Lucknow Street. He identified Messrs Waiwai and Kelliher as part of this group. Both had a Black Power tattoo (a fist) on their cheek. He said Mr Waiwai was wearing a grey-coloured top and shoes with an "orangey coloured stripe". Constable O'Sullivan stated that he continued his patrol and when he drove by the panel repair shop shortly afterwards at around 11.10 pm he saw Mr Waiwai again talking to Constable Hamish Anderson and Constable Paul Bailey who were also on patrol that night. At that point Constable O'Sullivan also saw Mr Munro. Constable Bailey confirmed he and Constable Anderson were talking to Mr Waiwai when Constable O'Sullivan went by.

[12] As Constable O'Sullivan continued his patrol he saw Mr White. He was wearing a Mongrel Mob patch.

[13] Constable O'Sullivan said when he next passed the panel repair shop Mr Waiwai was no longer there. While stationary at the intersection, the officer heard a noise. He said he could see four males running across Paul Street. He heard Black Power gang slogans being yelled out. He saw Mr White being hit and falling to the ground. He pulled out from the intersection and came to a stop before the group of men with his car lights on full pointing in the direction of the incident. Constable O'Sullivan subsequently measured the distance from the car to the group and said it was just over 10 metres. The officer got out of his car. He described seeing four men, Messrs Waiwai, Kelliher, Munro and another, assaulting Mr White. The officer described the Black Power facial tattoos he could see on Messrs Waiwai and Kelliher. Constable O'Sullivan could not pinpoint the time at which the assault occurred.

[14] The group dispersed with two men running off down Paul Street towards Queen Street, in the opposite direction from the Z Service Station. Mr Waiwai was one of these two men. Mr Kelliher started to walk towards the officer's vehicle

before he "sidled along the fence" and disappeared. Constable O'Sullivan called for assistance from his car radio to the other two officers, Constables Anderson and Bailey. He told them that they should arrest Mr Kelliher for assault with a weapon. Constable O'Sullivan said inquiries made indicated the time of the call recorded on the police communications disc was 11.18 pm.

[15] Constable O'Sullivan checked on Mr White. There was some dispute at trial as to whether he did so before or after making the radio call. Mr White was not interested in receiving any assistance. The officer then ran forward "a bit" to the information centre on Paul Street to make sure that Mr Waiwai had not just stopped around the corner. Constable Bailey then appeared. By then he had Mr Kelliher in custody. Constable O'Sullivan went off to look for the other assailants. After about 15 or 20 minutes he went back to the police station.

[16] The jury saw the CCTV footage taken from the Z Service Station. The CCTV footage has a clock running alongside the images. Constable O'Sullivan's evidence was that, three days after the assault, he checked the time on the CCTV clock against the time on the police communications clock. At that point, he said, the CCTV clock was around four minutes and 32 seconds slow. Mr Waiwai first appears in the CCTV footage on the forecourt having come from the left-hand side as the viewer looks at the screen. He is shown bent over at the concrete island on the forecourt at 11.17.36 pm (11.22.08 pm on the Crown case). A police car enters the video driving from right to left at 11.18.33 pm (11.23.05 pm on the Crown case). It is agreed this car is the car driven by Constables Anderson and Bailey on their way to arrest Mr Kelliher. At this point, Mr Waiwai is inside the black van on the forecourt. The door of the van is still open.[4] Shortly after the van drives away.

Our assessment

[17] The high point for the appellant's case is that the time the police car enters the CCTV footage indicates the CCTV clock cannot have been four minutes and 32 seconds slow on the night in question. If that is so, the appellant contends there

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[4] The appellant's submissions state the door to the van was closed. At counsels' suggestion we viewed the CCTV footage. We noted the door was still open at this time.

was no opportunity for Mr Waiwai to have assaulted Mr White and then appeared on the CCTV footage. The following matters are emphasised: the evidence indicated the radio call for assistance was made at 11.18 pm; Constables Anderson and Bailey said they were close by when they received the radio call; and the arrest of Mr Kelliher happened very quickly. By 11.18.33 pm, when the police car enters the CCTV footage, Mr Waiwai was in the van. Mr Chisnall also emphasises that Mr Waiwai appeared on the forecourt having come from the left-hand side whereas the implication from Constable O'Sullivan's evidence as to the direction in which Mr Waiwai ran off after the assault was that he would likely have appeared from the right-hand side of the forecourt.

[18] If the jury accepted the evidence from Constable O'Sullivan as to the inaccuracy of the CCTV clock, that certainly allowed sufficient time for Mr Waiwai to get to the forecourt and into the van having run off after the assault. However, even if we assume for these purposes the CCTV clock was accurate or close to accurate on the night in question the alibi does not necessarily provide a complete answer. That is because there were a number of uncertainties as to timing at various points any one of which would expand the window of opportunity.

[19] First, it was not clear when the assault took place. That allowed of the possibility Mr Waiwai, having run off, had returned at some earlier point prior to appearing on the forecourt. Secondly, it was unclear where Mr Waiwai went after he left the scene. Although Constable O'Sullivan went up the street "a bit" to check, the jury heard that Mr Waiwai was not seen at that point. Thirdly, it does not appear from the evidence that the time of the radio call shown on the police communications disc was necessarily accurate. The evidence was unclear as to when the officer made the call, particularly, whether he checked Mr White's condition before or after calling for assistance. Finally, there was some uncertainty about exactly where Constables Anderson and Bailey were when they received the radio call. The effect of these matters is that it was open to the jury to reject Mr Waiwai's alibi.

[20] It is also relevant that these matters were all before the jury. For example, the point now relied upon by the appellant as to the timing of the police car entering the

footage was a matter the defence closing highlighted. Judge Adeane also noted this point in his summary of the defence case.

[21] Further, the jury was entitled to consider the identification evidence from Constable O'Sullivan. While Mr Chisnall for the appellant takes issue with Constable O'Sullivan's assertion he was "100%" confident in his identification, this was not a case of a fleeting sighting by someone unfamiliar with Mr Waiwai.

[22] Constable O'Sullivan had been a police officer in the Wairoa area for five and a half years. He had lived and worked there prior to his employment as a police officer. He described numerous dealings with Mr Waiwai. He had seen him before he became a police officer and then dealt with him as a police officer on several occasions. The officer gave as a recent example a vehicle stop on 12 January 2014. Mr Waiwai had no driver's licence and Constable O'Sullivan impounded his vehicle so the two men spent about 45 minutes together waiting for the vehicle to be towed away. There had been an earlier vehicle stop in late September 2012 when again the two had spent time together. On an earlier occasion, involving an accident in which a child was run over, the officer had also dealt with Mr Waiwai.

[23] Constable O'Sullivan also told the jury that at that time there were four Māori men of similar age, including Messrs Waiwai and Kelliher, in the Wairoa area with the same Black Power facial tattoo. The officer knew them all and had dealings the night before with one of the other two men, that is, neither Mr Waiwai nor Mr Kelliher. He said the other two men were of a different build than Mr Waiwai. Constable O'Sullivan had dealt with all four men over the years.

[24] Further, there was no challenge to the identification of Mr Waiwai by Constable O'Sullivan when Mr Waiwai was in the company of the Messrs Kelliher and Munro shortly before the assault. Accordingly, on the defence case, another man with the same facial tattoo as Mr Waiwai took part in the assault after which he was not seen again. Mr Waiwai meanwhile immediately reappeared in the vicinity getting into a stranger's vehicle wearing what appeared to be the same clothes as he had been seen wearing earlier in the evening and during the assault.

[25] Finally, the jury was appropriately directed on the dangers of identification evidence.

[26] When the matter is looked at overall, we are satisfied there was sufficient evidence before the jury on which they could convict Mr Waiwai. The verdict was not unreasonable.

The calling of Mr Munro as a witness

[27] Mr Munro had been sentenced by the time of Mr Waiwai's second trial. He made an eight-page notebook statement to Detective Senior Sergeant Mark James on 30 June 2014 and signed or initialled it on all pages apart from the second page. That page recorded the following exchange:

> Discussion with Munro prior to interview
>
> Munro states
>
> -Malcolm [Mr White] tried to punch me it was self defence.
>
> HS I punched him and ran off
>
> -I went to sleep in the school
>
> Q Where did it happen?
>
> HS In the Firestone
>
> Q Who was with you?
>
> HS Adam, Whetu, ~~Tuhoe~~[5]
>
> Don't put there [sic] names.
>
> …

[28] Mr Munro was not called to give evidence at the first trial. The Crown decided to call him on the retrial. On 27 July 2015, some time prior to the retrial, Ms Epati, who was acting for Mr Waiwai, wrote to the Crown about Mr Munro's evidence. She said Mr Munro appeared to be "clearly hostile" and the defence did not know what his evidence would be. She suggested that the Crown was calling Mr Munro just to have his statement to the police admitted. She said a pre-trial

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5 Possibly, Tuahae (Mr Aupouri).

application to determine admissibility should be filed. Ms Epati also filed submissions on admissibility.

[29] There the matter seems to have rested until 21 September 2015, the first day of the trial. At that point, the prosecutor asked the Judge whether a voir dire should be held. Judge Adeane took the view it was preferable to wait and see if Mr Munro was uncooperative and then deal with the matter. Ms Epati agreed with that course on the basis that it would not be known how matters would pan out until that point in the trial was reached. Ms Epati referred to the earlier submissions she had filed but accepted they were dependent on how Mr Munro gave his evidence. The Crown agreed not to refer to Mr Munro's statement to the police in opening.

[30] Mr Munro was duly called to give evidence. When asked how many people assaulted Mr White he said it was just him and that no-one else was present. The Crown then made an application to have Mr Munro declared a hostile witness under s 94 of the Evidence Act 2006. Defence counsel did not seek to be heard on that application. Judge Adeane ruled Mr Munro was hostile.[6] Ms Epati did, however, want a voir dire to be held on the admissibility of Mr Munro's statement. After hearing evidence on a voir dire from Detective James, who took the written statement from Mr Munro, the Judge ruled the Crown could call and examine Mr Munro on the written statement.[7] Judge Adeane said he did not have concerns about the "integrity" of the interview arising out of the officer's evidence.[8]

[31] When Mr Munro was recalled to continue giving his evidence, he confirmed he attacked Mr White on his own. He was asked to comment on the evidence from Constable O'Sullivan that there were four assailants. Mr Munro said the officer was lying. He was then asked about his statement to police. He accepted he gave the officer some names including that of "Whetu" and by that he meant Mr Waiwai. Mr Munro denied he knew what the police officer's question was about and said he meant the other men were with him before the attack. He said he did not sign the second page of the statement.

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6 *R v Waiwai* [2015] NZDC 24311.
7 *R v Waiwai* [2015] NZDC 24343.
8 At [2].

The appellant's case

[32] Mr Chisnall says that the evidence of Mr Munro was inadmissible. The submission is that the evidence, particularly his statement to the police, was not reliable. Mr Chisnall also says the process followed by the trial Judge in determining that the evidence was admissible meant reliability was not tested prior to admission and admission resulted in unfair prejudice. Finally, it is said there was a breach of cl 5 of the *Practice Note – Police Questioning* such that the statement was improperly obtained in terms of s 30(5)(c) of the Evidence Act.[9]

Analysis

[33] The argument that the statement is unreliable rests on the proposition the jury could not be sure Mr Munro named his co-offenders. However, there is no dispute Mr Munro said what the statement records him as saying. Rather, the issue is as to what he meant. That issue does not make the statement unreliable.

[34] As to possible unfairness, the Supreme Court in *Morgan v R* made the point trial Judges should be "particularly vigilant in the case of a hostile witness to ensure that the evidence of the witness does not require exclusion under s 8" of the Evidence Act 2006, that is where the unfair prejudice outweighs any probative value.[10] The Court continued by noting that the:[11]

> … ultimate question will always be whether the evidence is unfairly prejudicial in all the particular circumstances of the case, of which opportunity for realistic cross-examination will always be important.

[35] In the present case there was no issue about the ability to cross-examine on the statement. Mr Munro was not refusing to answer questions and nor did he rely on an inability to recall matters. Mr Munro gave his explanation. Further, defence counsel clarified with Mr Munro that he meant Mr Waiwai was with him earlier in

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9 *Practice note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297. Clause 5 relevantly states that where such a statement is not recorded by video, the person making the statement must be given the opportunity to review the written statement or have it read over and be given an opportunity to correct any errors or make additions. The person must also be asked if he or she wants to confirm the record as correct by signing it.

10 *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [40].

11 At [41].

the evening. (We interpolate here that this explanation cannot have applied to Mr Kelliher given he pleaded guilty to the assault.) In cross-examination Mr Munro also confirmed that he was not shown the second page of the statement and that he was careful to correct any incorrect matters in the other parts of the written statement.

[36] Mr Chisnall was critical of the Judge's intervention in the cross-examination of the officer on the point of whether Mr Munro had been shown the second page. The Judge asked whether the deletion was as a result of some indication Mr Munro gave concerning the contents of that page. The officer replied:

> At the point when he says to me, "Don't put their names" I have then gone back to cancel that name out but then realised, he's not saying to me, cross their names out. I've already written it out so I've left it in my notebook.

[37] The Judge then queried whether that would suggest that Mr Munro "had some oversight of the contents of page 2" to which the officer replied "Oh, absolutely, absolutely." We do not see this intervention as one outside the proper role of the Judge. It was appropriate to clarify the point.[12]

[38] In terms of the process followed to determine admissibility, Ms Epati on the voir dire asked Detective James whether it was possible he had not shown Mr Munro the second page of the statement. The officer said Mr Munro was shown every page. Detective James explained he understood the risk Mr Munro faced to his status in Black Power as a result of what he told the police. He said that was his focus at the time. In light of the question put to the officer, it would have been preferable for the Judge to have heard from Mr Munro on the voir dire at least on this aspect.[13]

[39] That said, the problematic part of Mr Munro's evidence, and the part that may not have been anticipated, was his evidence he acted alone. Mr Munro told the jury this prior to the determination he was a hostile witness. As we have noted, it was accepted by both parties that the appropriate course was to wait and see how his evidence emerged before a voir dire was held. While indications were it was likely

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12 We do not need to resolve the issue about compliance with cl 5 but this exchange shows the difficulties with the appellant's argument on this point.

13 *Morgan v R,* above n 10, at [42].

Mr Munro would be hostile, it was appropriate to approach the matter on the basis it was not possible to be sure about that until he was called and commenced giving evidence. As matters transpired, any damage was done before any issue as to the proper process in determining admissibility arose.

[40] Finally, in assessing the impact of this evidence it is relevant, first, that the evidence about the statement did not feature in closing submissions of either counsel. Secondly, Judge Adeane directed the jury to be careful in relying on Mr Munro's statement. The Judge told the jury they would need to be sure that was his statement. The Judge also directed the jury they had to decide whether Detective James' evidence was accurate on this point. Further, Judge Adeane said the jury needed to bear in mind what Mr Munro said in his evidence about the reference to Mr Waiwai and the absence of his signature on the second page. The Judge explained that these were matters that might impact on the jury's assessment of the reliability of the evidence. In these circumstances, the statement was unlikely to have featured as significant.

Reference to the gang context

[41] It is accepted for Mr Waiwai that his gang association was relevant at trial. However, Mr Chisnall submits the evidence in re-examination of Constable O'Sullivan went too far. The submission is that the result was the risk the jury would infer that gang members in general and Mr Waiwai in particular were under close observation because of a propensity to offend.

The relevant evidence

[42] In re-examination of Constable O'Sullivan the prosecutor noted that the officer had been questioned about gang members or gang affiliates not giving statements to the police. The prosecutor went on to ask:

> In terms of policing in Wairoa, an incident involving a gang member or gang members (plural) is that a common feature?

Constable O'Sullivan's response was "Yes, yes. Day to day policing."

[43] The officer was then asked whether this extended "beyond gang members to members of the public even" to which he said "Yes". The prosecutor's next question was whether this was a reality of policing in Wairoa and, again, Constable O'Sullivan said it was.

[44] Later on in re-examination, the prosecutor asked whether photographs of known gang members were circulated amongst police officers in Wairoa. The officer replied that they were. Constable O'Sullivan explained that this was:

> … to know who's in the area, who's a gang member, who's patched, who's prospecting. It's part of our job in the Wairoa area – well it was part of my job in the Wairoa area to know who was there and who had moved on and gone elsewhere.

[45] The following exchange then took place:

> Q. And to what extent if any, did that assist you in relation to the matter now before the Court?
>
> A. His photographs are on the wall continuously so you're always looking at them.
>
> **THE COURT**
>
> Q. Whose photo?
>
> A. All the photographs Your Honour, of all the gang members, it was in the briefing room.
>
> **RE-EXAMINATION CONTINUES**
>
> Q. Did that include Mr Waiwai?
>
> A. Yes it did.

Conclusions

[46] We do not consider this evidence was irrelevant or unfairly prejudicial. The first point we make is that the questions arose out of cross-examination of Constable O'Sullivan. Two aspects of the gang context were pursued in cross-examination. The officer was asked first about the absence of a statement from Mr White. In particular, Ms Epati put to him the proposition that, "people who are affiliated to gangs don't tend to give police statements". He accepted that proposition. Defence counsel also pursued the gang aspect in the context of

questioning the correctness of Constable O'Sullivan's identification of Mr Waiwai. The officer was asked about the fact there were four men in the same area with the same facial tattoo as Mr Waiwai all of whom were Māori and of similar age. The Crown was entitled to develop the line of questioning undertaken in re-examination as a response. The approach adopted was suitably restrained.

[47] Secondly, the fact there was a gang problem in the area is not likely to have been unknown to the jury.

[48] Finally, the Judge directed the jury that feelings of prejudice or sympathy had no place in the jury room, "in particular this issue of gang membership". Judge Adeane said this should not predispose the jury against Mr Waiwai in any way and that it was "quite irrelevant". He directed the jury to "[p]ut it to one side, except where it has relevance in the narrative".

[49] In the circumstances, the references were relevant and their admission not unfairly prejudicial.

Result

[50] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent