

Narrative

[2] The victim, Cui Ping Tan, was the victim of a street robbery in central Auckland on the evening of 13 May 2015. She was pushed over from behind and her assailant tried to grab her bag. Mrs Tan fought back and was knocked to the ground again. The assailant succeeded in grabbing her bag, which contained a mobile phone, a wallet with credit cards, \$1,200 in cash and a Longines watch. The robber ran to a waiting getaway car, a Nissan Primera.

[3] Mrs Tan and three other eyewitnesses described the assailant as a male. The eyewitnesses also gave inconsistent evidence as to the race of the offender. Mrs Tan stated that the offender was white, while another witness said the offender had brown skin and the third said that the offender was of Asian descent. Mrs Tan conceded that she could not reliably make a cross-cultural identification; to her, anyone who is not dark must be white. The appellant is a Māori female.

[4] At 4.12 am the following morning, a different car was stopped by police in central Auckland. The appellant was in the car, whose driver, a Ms Davis, was the registered owner of the Nissan Primera used in the robbery. Another woman in the car was wearing the stolen watch. The appellant stated that she had given the woman, her girlfriend, the watch in lieu of an engagement ring. Mrs Tan's credit card was also found in the car.

[5] On 14 May at 10.07 am, Mrs Tan underwent a formal identification procedure. She was shown a photo montage which included photographs of eight women, including the appellant. Mrs Tan is not fluent in English, and there is no evidence that the police officer who conducted the procedure, Detective Constable Lee, speaks Ms Tao's first language. So Mrs Tan's daughter translated. The officer's sworn record of the montage records that Mrs Tan identified the person in photograph number five (the appellant):

5. No indication was given to the witness as to whom (among the persons depicted in the photoboard), may or may not be, the person to be identified.
6. The witness was informed that the person to be identified may, or may not be, among the persons depicted in the photoboard.

7. The witness was requested to identify the alleged offender and picked out the defendant in photograph number (5) FIVE as the person to be identified.

[6] Attached to the montage was a statement signed by Mrs Tan and witnessed by the officer. It stated that:

I have been shown the group of photographs labelled Number 69903 and instructed to take my time and carefully look at all the photographs before I make my decision.

I have been told that this group of photographs may or may not contain a picture of the person who committed the crime now being investigated and advised to keep in mind that hair styles, beards and moustaches may easily be changed.

I have also been advised that photographs may not always depict the true complexion of a person (it may be lighter or darker than shown in the photo) and to pay no attention to any markings or numbers that may appear on the photos or to any other differences in the type or style of the photographs.

I have also been requested not to tell other witnesses that I have or have not identified anyone.

No indication has been given to me as to who amongst those persons in the photos is the person to be identified.

The form recorded her answers to the following questions:

Question # 1: Do you see anyone you recognise?

Answer: Yes.

Question # 2: (If the answer to Question 1 was "YES") identify, by number, the photo or photos you recognise.

Answer: 5

Question # 3: From where do you recognise the person(s) identified?

Answer: 5 or 8. He was staring me outside Auckland library and stole my hand bag and pushed me to the ground last night.

Question # 4: Do you have any additional comments?

Answer: 5 or 8 his eyes were very big No.5 looks more like the person.

[7] At trial on 23 November 2015, Mrs Tan said that she had identified only the person in photo number five in the identification procedure, and was sure about that identification. She said that initially she was confused but when she took a second look she recognised number five, and she maintained that she was sure at the time of the identification that she had made the correct identification. She said that she clearly saw the offender as she got into the getaway vehicle, and further that she had noticed the person who robbed her “marking” or closely observing her before the robbery.

[8] Detective Constable Lee confirmed that Mrs Tan had identified the appellant and the appellant alone when shown the photo montage. The officer said that she herself had written “5 or 8” at question three of the montage record by mistake and she had crossed it out.

[9] The other identification witnesses who saw the robbery did not give oral evidence. They had their statements admitted by consent.

Was a formal identification process undertaken?

[10] For purposes of s 45 of the Evidence Act 2006, a formal identification procedure is a procedure for obtaining visual identification evidence:

45 Admissibility of visual identification evidence

...

- (3) For the purposes of this section, a **formal procedure** is a procedure for obtaining visual identification evidence—
- (a) that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency; and
 - (b) in which the person to be identified is compared to no fewer than 7 other persons who are similar in appearance to the person to be identified; and
 - (c) in which no indication is given to the person making the identification as to who among the persons in the procedure is the person to be identified; and

- (d) in which the person making the identification is informed that the person to be identified may or may not be among the persons in the procedure; and
- (e) that is the subject of a written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
- (f) that is the subject of a pictorial record of what the witness looked at that is prepared and certified to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
- (g) that complies with any further requirements provided for in regulations made under section 201.

[11] In this case it is clear that most of these requirements were observed. Attention before us focused on subs (3)(d). The question was whether the Court could be satisfied that Mrs Tan had been told the person to be identified may or may not be among the persons in the procedure. There is evidence that the officer explained this, in English, but Mrs Tan is not an English speaker and the translator, her daughter, did not give evidence. Thus the question is whether an inference could be drawn that Mrs Tan was told that the offender might not be in the montage.

[12] We accept that s 45 sets up a series of formal process requirements that must be satisfied before the resulting identification is admissible under s 45(1). Further, s 45(3)(d) is important; the objective is that the witness should know the offender or other person whom she saw may or may not be part of the formal procedure. If not told, the witness might assume that the offender must be one of those in the procedure.

[13] However, it does not follow that proof of the telling requires that an interpreter relied on to convey this information to the witness should be called to confirm what was said. That is not a formal requirement of s 45 and, that being so, the translation can be proved like any other fact, meaning that inferences can be drawn from the available evidence. We observe that it would be prudent for police officers to explain the importance of the identification process and ask the translator to confirm that he or she is willing and able to translate faithfully.

[14] In this case the officer was able to depose that she explained this was a formal process and asked that Mrs Tan's daughter translate what she said, that she instructed the daughter to explain that the offender might not be in the montage, and that the daughter then spoke to Mrs Tan. In our opinion, these facts justify the inference that, absent something, such as something about the circumstances, that might displace it, the officer's explanation was faithfully translated. There was nothing to displace the inference here.

Has the appellant shown that the formal identification process was unreliable?

[15] The evidence is accordingly admissible under s 45(1) unless the appellant proved on the balance of probabilities that the evidence was unreliable. Attention here focused on the apparent identification of two people. Mr Brickell submitted that the identification does not qualify as visual identification evidence at all, because the witness did not assert that a single person was the offender.¹

[16] On the evidence, however, Mrs Tan did identify the appellant as the offender. Both she and the officer gave evidence to that effect. The identification is recorded on the form, in answer to question two. The answers to questions three and four suggest uncertainty, but Mrs Tan explained that is because she was initially unsure. That being so, we do not need to address the question whether an identification that nominates more than one person qualifies as visual identification evidence or, if not, is otherwise admissible.

[17] There is in other respects no reason to suppose that the evidence was unreliable. We are accordingly satisfied that the visual identification evidence of Mrs Tan was admissible.

Was the verdict unreasonable?

[18] Mr Brickell acknowledged that if the visual identification evidence was admissible the challenge to the jury verdict for unreasonableness would not likely succeed. The concession was realistic. It is true that there was reason to doubt the identification evidence of the other witnesses, all of whom were confused as to

¹ *Meaker v R* [2016] NZCA 236.

gender and two of whom were confused as to race. But that is understandable on our examination of the photo montage. More importantly, there was powerful circumstantial evidence linking the appellant to the offence, and there was also her own admission that she had given Mrs Tan's watch to her girlfriend. This ground of appeal fails.

The reference to fingerprints

[19] The last ground of appeal was a makeweight argument that the trial miscarried because the officer referred in evidence to fingerprints that had been taken from the Nissan Primera, suggesting that the appellant had indeed been in that car.

[20] During cross-examination, the officer was challenged at some length as to the adequacy of her investigation and her professionalism. The following evidence was given:

- Q. Do you not think you should have spoken to him [a third party]?
- A. I haven't spoken to him.
- Q. No enquiries whatsoever?
- A. No I haven't made enquiry with him.
- Q. Well you were looking for a male weren't you? Those were the descriptions given to you?
- A. I thought I had a reasonable sufficient evidence to charge the defendant after I got the photo ID identified by the victim and the fingerprints found in the car and stolen watch that was found, her partner and yes I thought, at the point I thought I had sufficient evidence.
- Q. That's what it's about isn't it. It's the photo board that pretty much sealed it for you isn't it?
- A. Photo board and the fingerprints and the stolen watch that was in possession of her partner.

Before trial it had been agreed that no fingerprint evidence would be led.

[21] We doubt that the jury would have inferred in the absence of further evidence that the appellant's fingerprints were found in the car, but any such risk was addressed by the Judge's directions. He instructed the jury that:

... the officer in charge, Detective Constable Lee mentioned there was fingerprint evidence implicating the defendant. There is no fingerprint evidence before you so you must ignore that comment by the detective constable.

[22] There is no reason to think the jury would have failed to follow this direction. This ground of appeal fails.

Decision

[23] The appeal is dismissed.

Solicitors:
Public Defence Service, Auckland for Appellant
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