IN THE SUPREME COURT OF NEW ZEALAND

SC 95/2012
[2013] NZSC 77

BETWEEN	KOVINANTIE VAHAFOLUA FUKOFUKA Appellant
AND	THE QUEEN Respondent

Hearing: 16 July 2013

Court: Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Counsel: D R F Gardiner for Appellant
D J Boldt and M J Lillico for Respondent

Judgment: 16 August 2013

JUDGMENT OF THE COURT

A The appeal is allowed and the convictions are quashed.

B A retrial is ordered.

C The appellant is remanded in custody pending such retrial but is at liberty to apply for bail at the District Court.

REASONS

(Given by William Young J)

Introduction

[1] The appellant, Kovinantie Fukofuka, was found guilty by a jury in the District Court of wounding with intent to cause grievous bodily harm and theft.[1] The charges arose out of an incident in which a number of people attacked the complainant and stole personal items from him. The case against the appellant was based solely on the complainant's identification of him as one of his attackers.

1 *R v Fukofuka* DC Manukau CRI-2011-092-6009, 30 March 2012.

[2] The appellant's subsequent appeal to the Court of Appeal was dismissed.[2]

[3] His appeal to this Court is based on the way in which the trial Judge, Judge Blackie, directed the jury as to identification.[3] As will become apparent, the Judge's directions did not comply with the requirements of s 126 of the Evidence Act 2006.

Background facts

[4] On 9 November 2010 shortly before 11 pm,[4] the complainant and two female friends were standing at a bus stop in Auckland when a group of people drove past in what seem to have been two cars. They were acting in a way which had gang connotations and one or more of them shouted "Crips", the name of an Auckland gang. The complainant and one of his friends were wearing red, a colour which has some gang associations. One of the cars stopped nearby and two men got out and walked towards the complainant. They spoke to him in Tongan. He responded by saying that he was Samoan and could not speak Tongan. He was then punched and he retaliated. At this point the two men who were attacking him were joined by four other young men. The complainant dropped to the ground and curled up in a ball. The attack continued with kicks to his head and body and he lost consciousness. His attackers then stole his shoes, bag, wallet, school books and cell phone.

[5] When the police arrived at the scene, the complainant was still unconscious but he soon regained a measure of awareness. One of the police officers, Constable Chris Williams, asked him if he knew "who did this". The complainant responded by saying that he did not know who had attacked him. He was, however, "very dazed and confused" and Constable Williams could get little from him before he was taken to hospital.

[6] A police officer took a statement from the complainant the next day. In this statement, the complainant described one of his attackers as "male, fair skinned like half Pakeha, half Tongan, short and skinny, about five foot with a gold tooth on the

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2 *Fukofuka v R* [2012] NZCA 510.
3 *Fukofuka v R* [2013] NZSC 34.
4 The police team which went to the scene of the assault was dispatched at 11 pm. The other evidence as to timing was hazy to say the least.

left side of his mouth, short hair and a grey t-shirt".[5] He did not say that he recognised this person as someone he had previously met.

[7] On 24 March 2011, Detective Constable Tane Walters produced a photo montage for the complainant. This did not include a photograph of the appellant and the complainant said that he was not able to identify anyone. Detective Constable Walters subsequently put together a second photo montage which contained the appellant's photograph. This was shown to the complainant on 7 April and he identified the appellant as one of the offenders. Evidence to this effect was all that the jury had as to the background to the 7 April identification. From evidence given in the absence of the jury, we know that on 24 March, the complainant told Detective Constable Walters that he had recognised one of his assailants as someone who had been at Te Wananga o Aotearoa on a particular course. It was this information which enabled the police to put together the second photo montage which contained a photograph of the appellant. It is surprising that this evidence was not before the jury as it was of contextual significance in relation to the reliability of the identification.[6]

[8] In terms of the description given by the complainant on 10 November 2010, the appellant is of Tongan ethnicity (although not particularly pale) and short (around five foot three or four inches, distinctly shorter than the complainant, but taller than five feet) and has a gold tooth (but on the right side of his mouth and not his left). His stature and gold tooth were not apparent from his photograph in the second photo montage.

[9] In his evidence at trial, the complainant said that he recognised one of the people in the cars as they drove past as being someone who had been at the Wananga in 2009 at a time when he (the complainant) was also there. Although they were doing different courses, the complainant sometimes saw the appellant at the school at "jamming sessions".[7] He said that this person was one of his attackers. The

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5 *Fukofuka v R*, above n 2, at [10].

6 See [19]–[20] below.

7 In his evidence, the complainant said that the appellant was taking a performing arts course at the Wananga and that they (along with others) had practised together for a concert. The interaction between the complainant and the appellant was limited mainly to saying "hi" and "bye" to each other.

complainant also said that the next thing he could recall after being knocked unconscious was waking up in hospital. He thus had no recollection of his discussion at the scene with Constable Williams. He was also not able to recall the 10 November 2010 discussion he had with a police officer but did not dispute the contents of the statement when it was put to him.

[10] The appellant gave evidence. He accepted that he had attended the Wananga in 2009 at the same time as the complainant. He also accepted that he had seen the complainant at the jamming sessions. He said, however, that there was another person present at those sessions who was also Tongan and had a gold tooth. He denied any involvement in the offending and said that he had been with his partner. She also gave evidence in support of this alibi.

The evidence as to when the complainant told the police that he had recognised one of his attackers and the absence of evidence as to the reasons for the delay

[11] Given the complainant's state of consciousness and general condition when spoken to immediately after the assault, his negative response to the question whether he knew "who did this" is probably of little moment. But of potentially more significance is that the following day, when able to give a reasonably detailed description of one of the offenders, he did not tell the police officer that he had recognised this person.

[12] Counsel for the appellant did not cross-examine the complainant as to the extent of his delay in telling the police that he had recognised one of his attackers. Nor did counsel press the complainant as to the reasons for such delay. So the jury were not told when the complainant first informed the police that he had recognised one of his attackers and the reasons for the delay, if any, were not explored in evidence.

Summing up on identification

[13] Section 126 of the Evidence Act provides as follows:

> **126 Judicial warnings about identification evidence**
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> (1) In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.
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> (2) The warning need not be in any particular words but must—
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> (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and
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> (b) alert the jury to the possibility that a mistaken witness may be convincing; and
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> (c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.

The case against the appellant depended "wholly or substantially on the correctness of" the complainant's identification of him as one of the offenders. So s 126 was plainly engaged.

[14] The Judge's summing up was relevantly in these terms:

> [22] But the essential thing is identification and I need to talk to you about identification because that is really what is going to be the issue for you to discuss. I must tell you because the law requires me to tell you that there is a special need for caution before finding an accused guilty on the basis of, what we call, visual identification evidence, that is pointing somebody out because in this case, you see, other than visual identification of the accused by the complainant, Mr Vao, there's nothing else, there's no fingerprints, there's no DNA samples, there's no evidence from somebody else that recognised him or saw him. You're being asked to rely solely on the evidence of Mr Vao and why it was that he recognised the accused.
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> [23] The law tells me that I have got to warn you to be cautious when you're relying on visual identification evidence. The reason for that is that experience has shown that it's quite possible for a perfectly honest person to be mistaken about identification. I think one of the counsel gave you an example that you might see someone in the street and you might say, "That's my aunty", and you go up but when you get there it turns out to be somebody else, so one can make mistakes about identification and, in fact, more than one person can be mistaken about identification, so bear that in mind.

It will be noted that what the Judge said fell short of what was required by s 126(2) in two respects:

(a) The Judge did not tell the jury that a mistaken identification can result in a serious miscarriage of justice (subs (2)(a)); and

(b) He did not direct the jury that a mistaken witness can be convincing (subs (2)(b)).

[15] Having given the warnings just set out, the Judge then asked the question:

> [24] When it comes to identification, what is before you here?

He answered this question not by his own analysis of the identification and its strengths and weaknesses, but rather (a) by reference to what counsel had said and (b) in a disjointed way. First he discussed, rather discursively, the points as to identification made by the prosecutor in his closing address. Having finished that summary, he paraphrased the prosecutor's comments about the evidence given by the appellant. This was followed by what is known as the tripartite direction in relation to that evidence. He then returned to the topic of identification and repeated to the jury the principal submissions made by defence counsel.

[16] When discussing the prosecutor's closing address, the Judge said this:

> [25] When he was asked immediately afterwards ... he wasn't able to identify any particular person, but he was able to give a description. He talked of somebody who was Tongan or Island with a reasonably fair complexion, somebody who was wearing a grey top, a jumper, a shirt, a t-shirt or something of that nature, but he was able to do that because he had seen the person first hand, only a short time before. Of course he obviously wasn't 100 percent sure because he'd just suffered this assault and had been unconscious, so he wasn't able to give a detailed description, he was able to estimate height, he thought about five feet and described the person as being skinny. There was also a suggestion that the person had a gold tooth.

In this respect, the Judge seems to have conflated the discussion which the complainant had with Constable Williams at the scene (that is "immediately afterwards" and when "he'd just suffered this assault and had been unconscious") with what was said the next day when the complainant gave the police a description that was later said to match (broadly anyway) the appellant.

[17] There was a similar conflation when the Judge was dealing with defence counsel's submissions:

> [34] Basically he's saying, yes well look, surely if the accused with the gold tooth was at the college and was known to the complainant, why didn't he say that in the first place when he was first being interviewed, why didn't he say, "Look, I recognise the guy, I saw him at college, he was the guy with the gold tooth, quite clearly I recognise him, that's him", instead of giving just a description? Mr Gardiner is correct, he didn't give any identification at the time of the incident; he gave a description at the time, the identification came later.

[18] The Judge gave the jury a question trail in respect of each count. These addressed only the burden and standard of proof and the elements of the offences. Thus they were not capable of remedying any deficiencies in the summing up as to identification.

A jury question

[19] During their deliberations, the jury asked the following question of the Judge:

> ... at what point did the complainant go to the police and say that he recognised one of his assailants as a person he had seen at the Te Wananga o Aotearoa?

The Judge responded in this way:

> [2] Well we of course have the evidence that you heard, we all heard the same evidence and I have spoken to the lawyers, and there is no evidence before us to tell us that the complainant went to the police to say that one of the assailants was a person he knew at Te Wananga o Aotearoa. There is simply the photo board evidence that he spoke about on the 7th of April. So far as that specific question is concerned, we are unable to help you further. You've got the evidence as it's – well obviously you've been through it quite carefully. You've got the evidence as it's been recorded and that's the evidence we have to work with, but to that specific question, we can't give you a specific answer because there isn't one. ...

[20] This response was accurate but it highlights an unsatisfactory aspect of the trial which we have already noted, namely the absence of evidence as to when the complainant first told the police that he recognised one of his assailants – which

appears to have been on 24 March 2011 and after he was presented with the first photo montage.[8]

The approach of the Court of Appeal

[21] The Court of Appeal accepted that there had been a breach of s 126(2)(a)[9] but considered that s 126(2)(b) had been complied with at least in substance:[10]

> The Judge's warning regarding the possibility that a mistaken witness may be convincing was not exactly in terms of s 126(2)(b). The introduction to subs (2) notes that the warning need not be in any particular words. We are satisfied that considered overall the Judge's remarks at [22] and [23] would have conveyed the clear impression to the jury that a mistaken witness may be convincing.

[22] After reviewing the summing up as a whole and a number of Court of Appeal authorities in relation to the significance of non-compliance with s 126, the Court concluded that the appeal should be dismissed:

> [42] In this case, as in *Hohepa*, we are satisfied that no substantial miscarriage of justice occurred as a result of the Judge's failure to give the appropriate warning under s 126(2)(a). We say that for these reasons. First, the Judge's summing up on identification was comprehensive, other than the failure to mention the s 126(2)(a) point. The Judge gave a full direction on the law and on all of the relevant circumstances of Mr Vao's identification, both from the Crown and defence perspective. He also linked the need to establish Mr Fukofuka's identity beyond reasonable doubt to the tripartite test.
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> [43] Secondly, Mr Vao's identification of Mr Fukofuka was based in part on his recognition of Mr Fukofuka. Mr Vao at the March interview with the Constable was able to tell the officer that he believed his attacker was someone he knew from the tertiary institute. Mr Vao explained that he and the other young man had attended the institute and had played at music sessions together. While they did not know each other well, they had exchanged greetings from time to time. Mr Fukofuka in his evidence acknowledged the correctness of Mr Vao's description of how they knew each other.
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> [44] Thirdly, Mr Vao's description of one of his attackers given the day after the assault was broadly similar to Mr Fukofuka's appearance. Mr Vao said he believed his attacker was part Tongan, part European with lighter skin, about five foot high and with a gold tooth on the upper left of his mouth. Mr Fukofuka accepted in evidence that he had such a gold tooth and that the general description of him was accurate.

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8 See [7] above.

9 *Fukofuka v R*, above n 2, at [33].

10 At [36].

Discussion

A preliminary point – reliance on the proviso

[23] The appellant argued in the Court of Appeal that there had been misdirections as to identification which warranted the appeal being allowed. In dismissing the appeal, the Court of Appeal concluded that there had been no substantial miscarriage of justice, an indication that it decided the case on the basis of the proviso to s 385(1) of the Crimes Act 1961.[11] This was not because the Court of Appeal was satisfied that the appellant was guilty but rather because it considered the errors made by the Judge to be insufficiently material to warrant the allowing of the appeal.

[24] In proceeding in that way, the Court did not follow the approach to s 385(1) adopted in *R v Matenga*.[12] Under that approach, the first question for the Court of Appeal was whether there had been a miscarriage of justice for the purposes of s 385(1)(c). In context, this turned on whether the misdirection as to identification "could ... have affected the result of the trial".[13] If of the opinion that the misdirection could not have affected the result of the trial, the Court should have dismissed the appeal on the basis that there was no miscarriage of justice. But if not of that opinion, it was not open to the Court of Appeal to rely on the proviso unless it was independently satisfied of the appellant's guilt. Since that was not the basis upon which the Court of Appeal approached the case, the apparent reliance on the proviso was misplaced.

The origins and evolution of the requirement for an identification warning

[25] For at least 60 years, New Zealand judges have been required to exercise considerable caution in relation to identification evidence.[14] The current legislative

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[11] Repealed on 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011 and the Crimes Amendment Act (No 4) 2011 Commencement Order 2013.

[12] *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.

[13] At [30].

[14] See *R v Fox* [1953] NZLR 555 (CA). In that case, the Court at 560–561 followed the approach adopted by the High Court of Australia in *Davies v R* (1937) 57 CLR 170 at 181–182 and also referred to earlier New Zealand authorities citing *R v Jeffries* [1949] NZLR 595 (CA) and *R v Glass* [1945] NZLR 496 (SC).

scheme, however, has its origins in the judgment of the English Court of Appeal in *R v Turnbull*.[15] In that case the Court observed:[16]

> *Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases,* although small compared *w*ith the number in which evidence of visual identification is known to be satisfactory, *necessitates steps being taken by the courts, including this court, to reduce that number as far as is possible*. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.
>
> First, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

[26] The emphasised words in the passage we have just cited make it clear that the "reason for the need for such a warning" was the reality that miscarriages of justice resulting from mistaken identifications had been known to occur. So the direction envisaged by the Court of Appeal was along these lines:

> I warn you that there is a special need for caution before convicting the accused in reliance on the correctness of the identification evidence. The reason for this warning is that miscarriages of justice resulting from mistaken identification have been known to occur. You must take into account the reality that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.

Thus an explanation of the "reason for the need for such a warning" was a discrete requirement which was not satisfied simply by reference to the reality "that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken".

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15 *R v Turnbull* [1977] QB 224 (CA).

16 At 228 (emphasis added).

[27] The Court in *Turnbull* also gave advice as to how a judge might sum up more generally on identification evidence:[17]

> ... the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
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> Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

To be noted is that the Court envisaged that the summing up on the strengths and weaknesses of the identification evidence would primarily be the Judge's own work and would not just be by way of paraphrase of the addresses of counsel. As well, it is clear from the last sentence that the caution which is necessary in relation to identification evidence extends to evidence of recognition,[18] albeit that such evidence may be more reliable that other forms of identification evidence.[19]

[28] The approach taken in *Turnbull* was legislatively adopted in the form of s 344D of the Crimes Act as inserted in December 1982 which provided:[20]

> **344D Jury to be warned where principal evidence relates to identification**
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> (1) Where in any proceedings before a jury the case against the accused depends wholly or substantially on the correctness of one or more visual identifications of him, the Judge shall warn the jury of the

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17 At 228.

18 A point also made by this Court in *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [16].

19 At [17].

20 Repealed on 1 August 2007 by s 215 of the Evidence Act 2006.

special need for caution before finding the accused guilty in reliance on the correctness of any such identification.

(2) The warning need not be in any particular words but shall—

(a) Include the reason for the warning; and

(b) Alert the jury to the possibility that a mistaken witness may be convincing; and

(c) Where there is more than one identification witness, advert to the possibility that all of them may be mistaken.

The structure and much of the language of s 344D came straight from *Turnbull*. For this reason it is apparent that the s 344D(2)(a) requirement was not satisfied by simply saying that the reason for the warning are the considerations mentioned in s 344D(2)(b) and (c). Instead, trial judges should have explained that the reason for the warning was that miscarriages of justice resulting from mistaken identifications had been known to occur. In practice, however, the Court of Appeal generally accepted that the explanation of the reason for the warning could be confined to the considerations mentioned in s 344D(2)(b) and (c).[21] As well, it was perhaps too tolerant of directions that did not refer in explicit terms to the possibility that mistaken witnesses can be convincing but instead attributed that possibility to "honest" and/or "reliable" witnesses, either treating such language as substantially meeting the requirements of the section[22] or, alternatively, concluding that the error was immaterial.[23]

[29] In the course of its work on the Evidence Code, the Law Commission initially envisaged a statutory requirement for more elaborate directions on identification. In the end, however, it was persuaded that a provision along broadly

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21 See *R v Joseph* CA358/01, 20 May 2002 at [14]–[16]; *R v Hewett* CA350/03, 12 December 2003 at [24]–[29]; and *R v Ma'u* [2008] NZCA 117 at [45]–[49]. In these cases the point was not discussed in any detail and *Turnbull*, above n 15, was not extensively analysed.

22 *R v Maniopoto* CA117/86, 9 October 1986 at 7–8; *R v Fitness* CA299/88, 21 June 1989 at 5–6; *R v Brown* CA530/95, 2 May 1996 at 2–3; *R v Brown* CA154/97, 28 July 1997 at 4; *R v Reardon* CA325/98, 18 March 1999 at [11]; and *R v Hui* CA2/02, 26 August 2003 at [14].

23 *R v Accused (CA 125/87)* [1988] 1 NZLR 422 (CA) at 425–426; and *R v Hoko* CA31/91, 18 September 1991 at 4–5.

the same lines as s 344D would suffice.[24] The only material differences between s 344D of the Crimes Act and s 126 of the Evidence Act are:

(a) The "shall" in s 344D becomes "must"; and

(b) The "reason for the warning" is specified in s 126(2)(a) rather than left to be divined by reference back to *Turnbull*.

The new word "must" emphasises the need for compliance. And s 126(2)(a) made it clear that the reason for the warning had to be explained otherwise than just by reference to s 126(2)(b) and (c).

A literal approach to s 126(2)(a)?

[30] Mr Boldt, for the Crown, contended for a literal approach to s 126(2)(a) under which the Judge is merely required to warn the jury that a mistaken identification can result in a serious miscarriage of justice. Such a warning might be thought to be pointless as it will be perfectly obvious to anyone involved in a criminal case resting on identification that a conviction based on a wrong identification will result in a serious miscarriage for the particular defendant. And if a warning in those terms is all that is necessary, it would be easy to dismiss the requirement as so lacking in weight and substance (or "viscosity" as Mr Boldt put it) that non-compliance would be of no practical consequence.

[31] We see this interpretation as inconsistent with the purpose and spirit of s 126 and incompatible with its legislative history which shows that the reason for the warning is that experience has demonstrated that mistaken identifications do sometimes result in miscarriages of justice – that this is not just a possibility but rather something which has been known to happen. The phenomenon of

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[24] Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [216]–[217]. See also Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C398].

miscarriages of justice resulting from mistaken identification is not confined to England. Indeed it is easy enough to think of New Zealand examples.[25] So there is no reason why New Zealand judges should adopt a lesser standard than that insisted on in *Turnbull*.

[32] We might add as well that the idea that breaches of s 126(2)(a) do not matter is not congruent with the mandatory language of the section. The direction under s 126(2)(a) is one which "must" be given. The legislature is not to be taken to have stipulated that in relation to a direction that can be omitted without adverse consequence.

[33] There is nothing novel in our view that trial judges should tell juries that the risk of a serious miscarriage of justice resulting from mistaken identification evidence is not just theoretical but has occurred in actual cases. This was spelt out by the Court of Appeal very clearly in *Uasi v R*.[26] In delivering the judgment of the Court, Clifford J analysed *Turnbull* in the same way as we have and discussed subsequent English and Australian authorities to the same effect and then went on:

> [38] In our judgment, the reference in s 126(2)(a) is best understood in the context of that United Kingdom and Australian practice, and indicates that the reference to avoiding the risk of a miscarriage of justice is to be identified separately from the risk of identification evidence being objectively unreliable. Furthermore, we think that the reference to avoiding the risk of a miscarriage of justice should, whatever words are used, make it clear that that risk has been identified on the basis of actual cases in the past, and is not something which is purely theoretical.

Should the appeal be allowed?

[34] In respectful disagreement with the Court of Appeal, we are firmly of the view that what the Judge said as to identification did not, in substance, satisfy the requirements of s 126(2)(b). The Judge's direction that an honest witness can be mistaken did not direct the minds of the jurors to the reality, established by actual

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[25] See Stuart Grieve *Report to the Minister of Justice Concerning Claim by David Dougherty for Ex Gratia Payment* (Ministry of Justice, 28 November 2000 and 20 June 2001) and Robert Fisher *Report for Ministry of Justice on Compensation Claim by Aaron Lance Farmer* (Ministry of Justice, 25 February 2010). Other material on the dangers of identification evidence was set out in *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [33]–[36], referred to by this Court in *Harney v Police*, above n 18, at n 16.

[26] *Uasi v R* [2009] NZCA 236, [2010] 1 NZLR 733 at [35]–[38].

cases, that witnesses may be mistaken even though their evidence is convincing. It follows that the Judge failed to comply with the mandatory requirements of s 126(2) in two respects and not just one, as the Court of Appeal thought.

[35] More generally, the structure of the summing up was far from ideal. The Judge did not himself identify the strengths and weaknesses of the identification evidence. As the passage we have cited from *Turnbull* illustrates, this is best practice.[27] Instead of analysing the evidence, the Judge contented himself with a paraphrase of the arguments of counsel. If done succinctly and in an orderly way,[28] this approach may suffice. But the Judge's paraphrase of the arguments of counsel was neither succinct nor orderly. He did not deal with the competing arguments together. Instead he interposed a discussion about the appellant's evidence between his review of the Crown and defence submissions as to identification. This was distracting because it interrupted what should have been a coherent analysis of the quality of the identification relied on by the Crown. As well, as already discussed, there was the conflation of the discussions between the complainant and the police on 9 and 10 November 2010. This may well have been a result of the Judge only engaging with this aspect of the case through what had been said by counsel rather than directing his own mind to the strength or otherwise of the identification evidence.

[36] In this case, there were two particular problems which should have been drawn to the attention of the jury. They were:

(a) The fact that the complainant had seen the appellant at the Wananga provided an explanation for his ability to pick out his photograph from the second photo montage and for this reason, there was an associated risk that the identification from the second photo montage might seem to be more reliable than it really was.[29] And:

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27 As set out above at [27].

28 For instance, along these lines: "The Crown relies on the following five factors as supporting the identification ... . The defence relies on the following six factors as detracting from the reliability of the identification ... ."

29 A point made in *Harney v Police*, above n 18, at [17].

(b) The risk of a mistaken identification was exacerbated by the lapse of time between the offending (on 9 November 2010) and the presentation of the second photo montage (on 7 April 2011).

The Judge's summing up did not address the first problem at all and the second was only addressed incidentally when the Judge was paraphrasing the closing address for the defence.

[37] As we have already noted, the written question trail sheets which the Judge gave to the jury only addressed the elements of the offences. This was of limited assistance to the jury as this was substantially a single issue case, turning on whether the appellant had been one of the men who attacked the complainant. If the jury found against him on that issue, it was practically inevitable that he would be found guilty on both counts. In this context, if the Judge considered that an issues sheet (or similar) was appropriate, it should have been addressed to the factors which bore on the identification evidence and meeting the s 126 requirements.

[38] All in all there was a failure on the part of the Judge to do what is required whenever identification is in issue. There was, in particular, a failure to inject into his summing up the appropriate and statutorily required level of scepticism as to identification evidence. Given this failure and, as well, in the context of a Crown case which was based solely on the identification evidence with the other issues we have outlined, we are far from persuaded that the error by the Judge can be dismissed as immaterial.

A concluding comment

[39] In the course of argument, we were referred to a number of recent and post-Evidence Act Court of Appeal decisions involving non-compliance with s 126 of the Evidence Act. For this reason, we emphasise the importance of trial judges complying with the mandatory requirements of s 126 and its underlying policy.

Disposition

[40] The appeal is allowed and the convictions are quashed. A retrial is ordered leaving it to the Crown to decide whether to proceed with such a trial. The appellant is remanded in custody pending such retrial but is at liberty to apply for bail at the District Court.

Solicitors:
Crown Law Office, Wellington for Respondent