



Supreme Court of New Zealand

16 August 2013

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

**KOVINANTIE VAHAFOLUA FUKOFUKA v THE QUEEN (SC 95/2012)
[2013] NZSC 77**

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

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. The charges arose out of an incident on 9 November 2010 when the complainant was attacked by a number of young men. As a result of this attack, the complainant lost consciousness. A number of his belongings were stolen.

At the scene, the complainant was unable to identify to the police any of his attackers. When questioned by the police the following day, he 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 left side of his mouth, short hair and a grey t-shirt”. He did not say that he recognised this person as someone he had previously met.

On 24 March 2011, Detective Constable Tane Walters produced a photo montage for the complainant. This did not include a photograph of Mr Fukofuka and the complainant said that he was not able to identify anyone. He did, however, tell the Detective Constable that he had recognised one of his assailants as someone who had been at Te Wananga o Aotearoa on a particular course. On the basis of this information, the police put together a second photo montage which contained Mr Fukofuka's photograph. This was shown to the complainant on 7 April and he identified Mr Fukofuka as one of the offenders.

The Crown's case against Mr Fukofuka was based solely on the complainant's identification of him as one of his attackers. This triggered s 126 of the Evidence Act 2006, which prescribed a mandatory warning in relation to the use of identification evidence that the trial Judge had to communicate to the jury in his summing up. Mr Fukofuka challenged the Judge's summing up in the Court of Appeal on grounds which included the complaint that the Judge had not complied with s 126. The Court of Appeal dismissed the appeal and Mr Fukofuka appealed to the Supreme Court.

The Supreme Court has unanimously allowed the appeal. The Court found that the Judge failed to meet the mandatory requirements of s 126 of the Evidence Act in two respects. First, he did not tell the jury that a mistaken identification can result in a serious miscarriage of justice and in particular did not make it clear that the risk of this is not just theoretical but has occurred in actual cases. Secondly, he did not direct the jury that a mistaken witness can be convincing. More generally, he also failed to identify appropriately the strengths and weaknesses of the identification evidence.

Accordingly, the appeal was allowed and a new trial ordered.

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