IN THE SUPREME COURT OF NEW ZEALAND

SC 122/2016
[2016] NZSC 169

BETWEEN	DOMINIQUE ANITA RETI Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, Arnold and Ellen France JJ

Counsel: M F Laracy for Applicant
A J Ewing for Respondent

Judgment: 21 December 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant was convicted after trial before a jury on one count of robbery. She appealed unsuccessfully to the Court of Appeal against her conviction.[1] The principal issue on appeal arose from the admission of evidence of a formal identification procedure in the course of which the victim of the robbery, Cui Ping Tan, identified the applicant as her assailant a photo montage. Ms Tan is a Mandarin speaker and the procedure was translated to her by her daughter.

[2] The applicant seeks leave to appeal to this Court on the ground that the Court of Appeal was wrong to conclude the requirements relating to formal identification

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1 *Reti v R* [2016] NZCA 447 (Miller, Courtney and Woodhouse JJ) [*Reti* (CA)].

procedures were met.[2] In particular, the proposed grounds of appeal focus on the requirement in s 45(3)(d) of the Evidence Act 2006 that a formal procedure for obtaining visual identification is one 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;

Background

[3] The conviction arises out of a street robbery in central Auckland on the evening of 13 May 2015. After a struggle, the assailant succeeded in grabbing Ms Tan's handbag and then ran to a waiting getaway car. The contents of the bag included a wallet with credit cards and a Longines watch.

[4] Ms Tan and three other eye witnesses described the assailant as a male. They also gave inconsistent evidence about the offender's ethnicity. The applicant is a Maori female.

[5] The day after the robbery Ms Tan underwent a formal identification procedure. The police officer involved recorded that Ms Tan had identified photograph number five, namely, the applicant from the montage. The officer also recorded that Ms Tan was told "that the person to be identified may, or may not be, among the persons depicted in the photoboard".

[6] It appeared that there was some uncertainty expressed by Ms Tan in answer to questions on the form, for example, there was a reference to Ms Tan answering "5 or 8" on two occasions but she also was recorded as saying "No.5 looks more like the person".

[7] At trial, Ms Tan said that she identified the person in photograph number five.[3] The police officer involved confirmed that and it appears that the officer had written "5 or 8" by mistake.

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2 The applicant sought an extension of time. We have treated the application as within time as it was filed electronically within time.

3 She said initially she had said "5 or 8" but "after checking the second look" she was "very sure it was number 5".

[8] In dismissing the appeal, the Court of Appeal proceeded on the basis the officer had deposed that she explained this was a formal process and asked Ms Tan's daughter to translate what she said. The officer said she instructed Ms Tan's daughter to explain that "the offender might not be in the montage" and that the daughter then spoke to Ms Tan.[4]

[9] The Court said that those facts justified the inference that "absent something, such as something about the circumstances, that might displace it, the officer's explanation was faithfully translated".[5] The Court was satisfied there was nothing to displace the inference here. Nor was the Court of the view that the applicant had proved on the balance of probabilities that the identification was unreliable.

Assessment

[10] The proposed appeal focuses on two issues. The first of these issues relates to the standard of interpretation required to ensure compliance with s 45(3)(d). The applicant says that where a witness needs an interpreter, a high standard of interpretation is required to ensure there has been strict compliance with s 45(3)(d). Given that standard, the Court of Appeal could not draw the inference it did that the requirements of s 45(3)(d) were met.

[11] Secondly, the applicant relies on what is described as a misstatement by the Court of Appeal in its judgment when the Court said the relevant facts included that the police officer told Ms Tan's daughter "to explain that the *offender* might not be in the montage".[6] There is no reference in s 45(3)(d) to the "offender", which instead refers to "the person to be identified".

[12] We accept that the standard of translation and the approach to interpreting in this context may be a question of more general or public importance. But this case really turns on the factual question as to whether the inference drawn by the Court of Appeal was available. There is no evidence, apart from that of the officer, as to what

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4 At [14].
5 At [14].
6 At [14] (emphasis added).

occurred so, for example, there is no basis for considering the adequacy of the current police guidelines covering this situation.[7]

[13] There was a challenge to the admissibility of the visual identification evidence in the District Court but the applicant did not raise the issue of the translation.[8] There was no evidence therefore from Ms Tan's daughter, for example, as to what she did or what she understood as to her role.

[14] The second proposed ground of appeal does not raise any issue of general or public importance. While the officer's sworn statement of what she advised Ms Tan recorded that she used the statutory language at trial the officer said she told Ms Tan the montage may not contain the photograph "of the person who committed the crime". However, in the circumstances, we do not see issues arising from this variation as giving rise to a more general question. As the applicant accepts, the Court of Appeal confirmed the importance of s 45(3)(d).[9] The statutory requirement and its purpose were correctly stated elsewhere in the judgment.

[15] Nor do we consider that there is any risk of a substantial miscarriage of justice. There were issues about identification because of the various inconsistencies amongst the eye witnesses which were canvassed at trial.[10] The Court of Appeal considered the identification of a male assailant was explicable when one looked at the photo montage.[11]

[16] Importantly, there was quite powerful circumstantial evidence supporting the Crown case. This had two main threads. First the Longines watch taken from the handbag was found on the applicant's partner about seven hours after the robbery.

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7 New Zealand Police *Investigative interviewing witness guide* (June 14, 2012) <www.fyi.org.nz> at 42.

8 *R v Reti* [2015] NZDC 23278.

9 *Reti* (CA), above n 1, at [12].

10 One of the eyewitnesses said the offender had brown skin and another that the offender was of Asian descent.

11 *Reti* (CA), above n 1, at [18]. Language differences may also explain the reference by Ms Tan to the assailant as "he". See for example Philip J Guo "Common English mistakes made by native Chinese speakers" (24 December 2008) <http://www.pgbovine.net>, which explains there are not separate gender pronouns in Chinese so when speaking English, Chinese speakers do not always use separate pronouns.

The applicant admitted giving the watch to her.[12] Secondly, the applicant was later found in a car driven by the owner of the getaway vehicle. Ms Tan's credit card was also found in the car. The getaway car was located at a block of flats at which both the car's owner and the applicant were staying.

[17] For these reasons, the requirements for the grant of leave to appeal under s 13 Supreme Court Act 2003 are not met. The application for leave to appeal is dismissed.

Solicitors:
Public Defence Service, Wellington for Applicant
Crown Law Office, Wellington for Respondent

[12] The applicant's explanation was that she had given her partner the watch as an engagement gift as she did not have a lot of money to buy a ring.