EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT TIMARU

CRI-2015-003-000108
[2016] NZDC 15549

THE QUEEN

v

HENARE TE MANA TOA CARROLL

Date of Ruling:	16 August 2016
Appearances:	A R McRae for the Crown L Heah for the Defendant
Judgment:	16 August 2016

RULING 1 OF JUDGE J E MAZE

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[1] This is an application to declare admissible or inadmissible the evidence of [the Constable] that the man who assaulted one of two men in East Street, Ashburton was one and the same as the man who assaulted him, the Constable, a moment or two later.

[2] At a voir dire [the Constable] said he was the driver of a marked patrol car in East Street and was directed to a disturbance a short distance away. As he drove up to the scene of the disturbance he saw a group of people on the pavement. He saw one man, whom he described as Māori with a dark top and a baseball cap, punch a man in a purple shirt. The assaulted man fell to the ground. [The Constable] spoke to [the 2nd Constable] who was in the passenger seat, but kept his eyes on the man in the baseball cap. He stopped the car and got out. He jogged behind the man with the

baseball cap, who was walking away from the scene. The man in the baseball cap began watching the officer, and then turned and punched him, before running off.

[3] At interview and here I am referring to Detective Jenkins' formal written statement, the defendant admitted punching a police officer. [the Constable] did not know the defendant at all.

[4] The Crown submits this evidence from [the Constable] which in effect identifies the defendant as the person who assaulted the man in the purple shirt is not visual identification evidence as defined in s 4 Evidence Act 2006. However, if the Court considers it is, then there was good reason for not following a formal identification procedure by virtue of s 45(4)(d) and/or (e) and the evidence is admissible unless the defendant shows it is more probably than not unreliable. The Crown submits that has not been achieved.

[5] Ms Heah submits that this evidence is visual identification evidence because it has the effect of identifying this defendant as the person who assaulted the man in the purple shirt. She submits the police lacked good reason for not following a formal identification procedure with [the Constable] and, therefore, the Crown must show, beyond reasonable doubt, the circumstances in which [the Constable] identified the defendant, as the offender against the man in the purple shirt, have produced a reliable identification, before this evidence is admissible.

[6] When does s 45 apply? In *E (CA113/09) v R (No 2)* [2010] NZCA 280, the Court of Appeal was considering when a warning under s 126 is required. The Court referred to earlier decisions of *Peato v R* [2009] NZCA 333 and *R v Turaki* [2009] NZCA 310, saying that visual identification evidence was as defined under s 4, whereas observation evidence was evidence about a person's actions. In observation evidence the person's actions at the scene are in dispute, while in visual identification evidence the dispute is about whether the person was at or near the scene at all. It is necessary to identify what is the real issue, reliability of the identification of the defendant, or accuracy of evidence about his actions while at the scene. Where a case depends substantially upon the ability of a witness to identify accurately an offender a s 126 direction is required and that is a matter to which I will return in due course.

[7] Section 45 was designed to attempt to address the mounting evidence that inaccurate identification evidence has been responsible for a number of miscarriages of justice. It is considered that juries put high weight on what might be identification of a stranger, after a fleeting glance only, and the expression of confidence, the purported memory of surrounding detail, and consistency, are not necessarily indicative of accuracy and reliability. Distortions can arise through the investigation, collection of evidence, and because of the inherent unreliability of perception and memory, and here I am referring to *Edmonds and Keil v R* [2009] NZCA 303.

[8] So s 45 is designed to guard against what may be unreliable evidence placing a defendant at or near the scene of an offence. Potentially unreliable evidence about what he did at that scene, for example, because it is reasonably possible the witness mistakenly attributes the actions of one person to another, is addressed within the direction for a s 126 warning.

[9] Therefore, as [the Constable]'s evidence is that he saw and followed the man who assaulted the man in the purple shirt, and that the man he followed turned and punched him, that evidence is not visual identification evidence of the kind at which s 45 is directed. The defendant admits punching the police officer, but denies assaulting the man in the purple shirt. The issue is the reliability of [the Constable]'s observations of the defendant before he, the officer, stopped the patrol car. I accept, therefore, that s 45 does not apply.

[10] If I am wrong in that, I would nevertheless have to conclude that s 45(4)(e) would apply as good reason for not holding a formal identification procedure. The officer relied on his own observation linking the two events to the one offender and the albeit limited view of events afforded by the security footage. The defendant had admitted at interview that he was at or near the scene of the assault of the man in the purple shirt.

[11] In those circumstances, s 45(1) would apply with the onus on the defendant to show unreliability. While I recognise that there is on the face of it a basis for submission to the jury about the reliability of the officer's observations and the ample scope for mistake, I cannot say on the evidence currently available it is more probable

than not that it would be unreliable evidence. However, as my primary finding is that as this is not about who was at the scene, but about what those at the scene did, then the admissibility of the evidence is not governed by s 45.

[12] That leads me then to s 126 which I believe in the light of *Edmonds and Keil* requires me to give a 126 direction.

J E Maze
District Court Judge