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

IN THE DISTRICT COURT
AT HAMILTON

CRI-2016-024-000895
[2017] NZDC 23191

THE QUEEN

v

[TUNGIA ELISARA]

Hearing:	11 October 2017
Appearances:	Mr Dillon for the Crown Mr Prentice for the Defendant
Judgment:	13 October 2017 at 1.00pm

RESERVED JUDGMENT OF JUDGE A S MENZIES
[Defendant's application to exclude visual identification evidence]

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[1] The defendant applies under s 101 of the Criminal Procedure Act 2011 to exclude intended Crown visual identification evidence on the grounds that it does not comply with the requirements of s 43(3) of the Evidence Act 2006.

[2] The defendant initially faced two charges as set out in the Crown prosecution notice dated 12 May 2017. Those two charges were theft and accessing a computer system for dishonest purpose.

[3] Prior to the hearing of this application, the Crown applied to amend the charges which application was granted. The effect of the amendment is that both the charges referred to have been replaced by one charge of receiving as set out in the Crown charge notice dated 4 October 2017.

[4] The broad background circumstances are a complaint by the complainant that she entered a transaction through Facebook with the defendant to purchase an iPhone. The transaction proceeded and the complainant maintains the phone received had previously been stolen. The defendant has now been charged with receiving in respect of that iPhone.

[5] It is the Crown case that after negotiating the sale on Facebook, the defendant met the complainant at a service station. The complainant had previously accessed a Facebook page which she understood related to the defendant. She identified the person who attended the service station to complete the transaction by reference to the photograph on the Facebook page.

[6] The complainant discovered fairly promptly that the phone she had obtained as a result of the transaction had previously been stolen and complained to the police. The chronology of events as set out in the defendant's submissions is then as follows:

> (a) *15 January 2016* – Crown alleges the defendant sold the phone to [the complainant] at [the service station].
>
> (b) *28 February 2016* – Police speak to [the complainant]. She provides details of the incidents which are recorded in a job sheet prepared by [the Constable].
>
> (c) *5 December 2016* – the defendant is spoken to by police and denies the offending.
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> (d) *6 December 2016* – the defendant makes her first appearance in Court.
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> (e) *22 May 2017* – Police obtain a picture of the defendant from her Facebook profile said to have been posted on 22 November 2016. Police note that a prisoner photograph of the defendant had been taken at the time of her arrest, but was not uploaded into the police computer system and could not be found.
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> (f) *28 May 2017* – Police obtain formal statement from [the complainant] and conduct the formal procedure.

[7] As noted in that chronology, the police took a prisoner photograph of the defendant but it was lost in the police system.

[8] As a consequence, when the police followed a formal procedure, the police obtained a photograph of the defendant from her Facebook page. That photograph is

one of the eight photographs which is part of the Crown evidence in the form of the photo montage that was presented to the complainant from which she picked out the photograph of the defendant.

[9] The defence application is based on two grounds. The first is that the formal procedure was not conducted as soon as practicable after the alleged offence was reported to police. Secondly it is argued the formal procedure did not comply with the requirements that the photo of the defendant should be similar to the other persons whose photographs were used.

[10] The legal framework for such an application arises from s 45 of the Evidence Act which provides:

> **Admissibility of visual identification evidence**
>
> (1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.
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> (2) If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.
>
> (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 suspect is compared to no fewer than 7 other persons who are similar in appearance to the suspect; 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 suspect; and
>
> (d) in which the person making the identification is informed that the suspect 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.

(4) The circumstances referred to in the following paragraphs are **good reasons** for not following a formal procedure:

(a) a refusal of the suspect to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or a video record that shows a true likeness of that person):

(b) the singular appearance of the suspect (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared):

(c) a substantial change in the appearance of the suspect after the alleged offence occurred and before it was practical to hold a formal procedure:

(d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant:

(e) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence occurred and in the course of that officer's initial investigation:

(f) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a chance meeting between the person who made the identification and the person alleged to have committed the offence.

[11] In relation to the first issue, the chronology of events confirms that the formal procedure in which the montage was provided occurred in May 2017. The police first spoke to the complainant in February 2016 some 15 months earlier. In the absence of fairly exceptional circumstances, it is difficult to see that such a lapse of time could be argued as meeting the "as soon as practicable" test. There are no such exceptional

circumstances here and indeed the Crown accepts that the procedure was not carried out as soon as practicable.

[12] The focus therefore shifts to the second issue which arises in the context that the visual identification evidence will only be admissible if the Crown proves beyond reasonable doubt that the circumstances in which the identification was made produced a reliable identification.

[13] The defence argument is that the Crown obligation to establish beyond reasonable doubt that the visual identification process was reliable cannot be met. That is primarily because the defence argues that the photograph of the defendant, which was obtained by the police from Facebook, is sufficiently different to the other seven photos to infringe the requirements in s 45(3)(b).

[14] The defence argues that issue is particularly important because there had been earlier Facebook interaction and the complainant had viewed Facebook photographs. It is not known whether the complainant had seen the actual photo used in the montage previously and the defence argument is that there is a risk the process was tainted by the complainant's earlier familiarity with Facebook photographs.

[15] The defence refers to the Court of Appeal decision in *Ah Soon v R*[1] in which a similar argument was before the Court. In that case criticism related to blond streaks or tips in the assailant's hair. The witness referred to the assailant as having blond tips and the Court accepted that none of the other seven people in the photo montage had blond tips. Two had blond or bleached hair but those were best described as patches of significantly greater size or prominence than blond tips as shown in the appellant's photograph.

[16] For that reason the Court accepted that there was a real risk that the attention of the complainant would be unfairly drawn to the appellant as the only one in the photo montage who met that description. The Court's conclusion was that given the deficiencies in the photo montage relating to similarity in appearance and delay (in that case six weeks) the Court concluded that not much weight could be given to the

[1] [2012] NZCA 48.

identification the complainant made many weeks later. Therefore the Court came to the "inevitable conclusion" that the prosecution could not meet the high threshold required under s 45(2) and the evidence of identification from the photo montage was not admissible.

[17] The Crown position is that the earlier involvement with Facebook photographs in fact strengthened the value of the identification evidence. This was because the initial photograph viewed by the complainant was smaller with the person's face partially obscured by other objects in the photograph. The fact the complainant was then able to pick out the defendant from the photograph in the montage some 15 months later therefore in the Crown submission, added weight to the identification.

[18] The Crown also argued that the photograph of the defendant in the montage is not significantly different from the other photographs in the montage and does not warrant the criticism that has been raised. Irrespective, the Crown says even if the criticism were justified, it is not determinative.

[19] The Crown submissions then make reference to the seven other photographs including variable head positions, all photographs having women with dark hair with some highlighting. All photographs also showed young women with studs in comparable positions in their lower lip.

[20] The Crown argues that the identification process has produced a reliable identification and the necessary onus has been met.

[21] Turning to the first ground raised by the defence, I am satisfied that the visual identification procedure was not carried out as soon as practicable. The Crown concedes that is the case and therefore carries the onus to establish beyond reasonable doubt that the process that was carried out was reliable.

[22] I have viewed the photo montage in question. That records eight photographs of young woman of broadly similar appearance. I accept there are consistencies and similarities throughout. Hair colours are similar, they are all young women of Maori or part Maori appearance, they all have comparable studs through their lower lip, and

there are variable head positions and a number of different coloured backgrounds. The photograph of the defendant does not stand out in any of those respects. It does however stand out for other reasons. Firstly, the photograph of the defendant shows her wearing lipstick. She has a slight smile on her face and the photograph has the presentation of a posed photograph consistent with the photograph having been arranged for the purposes of being placed on a Facebook page – which it was.

[23] There is no one telling issue (although the obvious lipstick is close) but there are a number of subtle differences in the defendant's photograph which cause it to stand out from the others. Given those features there was a real risk that the attention of the complainant would have been unfairly drawn to the defendant as the only one in the photo montage with those features. That is particularly so in the context of the earlier viewing of Facebook photographs by the complainant and the presently unanswered question as to whether the complainant had previously seen that actual photograph.

[24] As in the *Ah Soon* decision, there are deficiencies in the photo montage both as to delay and similarity in appearance. Therefore only limited weight can be given to the identification the complainant made 15 months later. The conclusion inevitably follows that the Crown cannot meet the high threshold of beyond reasonable doubt required under s 45(2). I therefore determine that the evidence of identification from the photo montage is not admissible.

A S Menzies
District Court Judge