

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-004-006280
[2018] NZDC 3833**

THE QUEEN

v

[SAMAN KEASHKEAR]

Date of Ruling: 27 February 2018
Appearances: A Linterman for the Crown
D Schellenberg for the Defendant
Judgment: 27 February 2018

**RULING OF JUDGE K J GLUBB
Visual and Voice Identification**

[1] The defendant, [Saman Keashkear], faces trial on one charge of burglary scheduled for this Court on 9 April 2018. The Crown brings application to admit both visual and voice identification as part of their case.

[2] The facts, in summary, are that the complainant, who is a [teenage] girl, lives in a set of townhouses in [location deleted] with two neighbouring properties. She has lived there all her life. Throughout that time, the defendant has also occupied a neighbouring property. In her formal written statement, she says that she retired to bed on 19 June 2017 at about 11.00 pm. She locked her door and her windows were closed. Prior to that, she had heard her mother close and lock the front door, which she said was by the garage. Her room on the ground floor. At about 1.17 am on

20 June 2017, she heard her bedroom door unlock and then the door opened slowly. She thought it was her sister and she slightly raised her head.

[3] In her formal written statement, she says:¹

Last night, that is Monday 19 June 2017, at about 6.00 or 7.00 pm, I was in my bedroom. I heard my mum close and lock the front door. The garage was also closed. The door lock has a particular sound, so you hear two things; first, the door close in a secure position and then the latch or bolt slide into the frame. I have two windows in my bedroom and they were both locked closed.

At about 11.00 pm I locked my bedroom door and went to bed. My bedroom door is locked by a key which slides a small bolt into the frame of the door. At about 1.17 am on Tuesday 20 June 2017, I heard my door unlock. It seemed really fast but the door was opened slowly. Like I heard the door slowly creak open. I thought it was my sister. I slightly raised my head and saw the door slightly open. All I saw was a figure, it was dark and no lights were on in the house. My curtains were slightly open, so there was some light coming into the room. It wasn't pitch black. I put my head back down and pretended to be asleep.

I heard this person open the door fully and walk slowly into my bedroom. The person stood at the foot of my bed for a while. I was thinking, if it was my sister, she would have turned on the light straightaway. The figure of the person was large, a lot bigger than my sister or my mother.

The person saw that I was awake. I sat up and looked directly at the person. I was feeling scared. I did not know whether it was a person that I knew or not. I did not know whether to scream or not, I was thinking if I screamed, he might cover my mouth and become physical. He was fully clothed. Wearing a long-sleeved jacket and pants. It was pants because it was covering his skin.

I then heard the person say, "don't tell anyone". It was a male voice. It was [Saman]'s voice, and then I saw a little bit of his face, I saw his big nose and square face. I have heard his voice before and I have seen him recently while going off to school or coming home.

He repeated, "don't tell anyone" a number of times. He was kind of whispering and kind of talking in a quiet voice. I didn't know what to do, so I said, "okay."

I told him to leave, he replied, "listen, I need to talk to you today" I kept telling him to leave. He started saying things like "I have seen you many times & I like you" he said something about my mother and sister but I don't know exactly what he said. I told him to leave again.

He asked "can I kiss you" I said, "No!" He then said, "okay, have a good night, sleep well." He then walked out of my bedroom and out of the front door. I heard the front door close. He did not lock it.

¹ Formal written statement (FWS) of [witness 1] dated 20/6/17, at page 2 line 18 – page 3 line 26.

I waited for about five minutes because I was quite scared and not sure if he had left or not, although I did hear the front door close. I then went directly upstairs to my sister's bedroom. I woke her up, I kept repeating what happened and she like sat up.

[4] She subsequently complained to her dean at school and, as a result of that, the police were called and the statement that I have just read into the record was obtained at 3.06 pm on 20 June 2017. From that statement, the complainant purports to:

- (a) Identify the defendant visually; and
- (b) Identify the defendant by voice recognition.

[5] Section 4 Evidence Act 2006 defines visual identification as:

- (a) An assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
- (b) An account (whether oral or in writing) of an assertion of the kind described in paragraph (a).

[6] Under s 45(1) Evidence Act, visual identification evidence is admissible 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 is good reason for not following a formal procedure. That evidence is admissible in criminal proceedings unless the defendant proves, on the balance of probabilities, that the evidence is unreliable.

[7] In this case, no formal procedure was followed and the Crown expressly place reliance of s 45(4)(e) which reads:

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.

[8] Turning then to the voice identification, s 4 provides:

Voice identification evidence means evidence that is an assertion by a person to the effect that a voice, whether heard first-hand or through mechanical or electronic transmission or recording, is the voice of a defendant or any other

person who was connected with an act constituting direct or circumstantial evidence of the commission of an offence.

[9] Section 46 Evidence Act relates to the admissibility of voice identification evidence. Section 46 provides:

Voice identification evidence offered by the prosecution in a criminal proceeding is inadmissible unless the prosecution proves on the balance of probabilities that the circumstances in which the identification was made have produced a reliable identification.

[10] The distinction between s 45 and s 46 is clear; visual identification is admissible unless it has been proved on the balance of probabilities that it is unreliable, whereas for voice identification, it is presumptively inadmissible unless the prosecution establishes that the identification is reliable on the balance of probabilities.

[11] As was held in *R v Edmonds*,² recognition evidence, which the complainant in this case purports to give, is within the ambit of s 45, but it follows also within the ambit of s 46. In the Supreme Court's decision of *Harney v Police*,³ the Court noted the following:

[27] It does not follow, of course, that merely because identification evidence takes the form of recognition of a person known to the defendant, that factor will necessarily provide a good reason for dispensing with a formal procedure. It will not do so unless the appearance of the alleged offender was sufficiently known to the witness before the time of the alleged offending that a formal procedure would be of no utility. Where a procedure would serve a "useful purpose" from the point of view of the defense, in that it may expose an element of unreliability in the identification, there will not be good reason in terms of s 45(1).

[28] The sufficiency of the familiarity of the witness with the defendant's appearance and the utility of a formal procedure need to be gauged in the individual case. In determining the issue of utility of a formal procedure the judge who is ruling on admissibility needs to consider the particular circumstances in which the witness has previously seen the defendant and how, and with what degree of cogency, those prior circumstances demonstrate that the witness had the capacity to identify the defendant with accuracy. Where there has been extensive past association, that is likely to provide a powerful argument against a formal procedure...

² *R v Edmonds* [2010] 1 NZLR 762 (CA) at [37] - [38].

³ *Harney v Police* [2012] 1 NZLR 725 (SC) at [27] & [28].

[12] In *[case 1 name removed]*⁴ the Court dealt with voice recognition evidence. The Court identified three types: (a) Lay recognition evidence: evidence of a witness who is familiar with the defendant's voice. Familiarity usually owes itself to close acquaintance before the offence. (b) Expert recognition: on the basis of ad hoc expertise; and (c) Expert analysis: voice sampling and analysis. These two latter categories have no application on the present facts. Considering the nature of the voice identification evidence to be given in this case, it is clear it falls within the description of lay recognition evidence.

[13] In the assessment of matters which could be taken into account, the Court in *[case 1]* detailed those as follows:⁵

[73] However, the authorities do point to circumstances that ought to be taken into account, to the extent relevant in any given case, when assessing voice recognition evidence:⁶

(a) the witness's degree of familiarity with the person identified. As noted earlier, there is evidence that familiar voices can be identified with a high degree of accuracy;

(b) any identifiable properties of the voice that distinguish it from others;

(c) the duration of the speech to be identified and anything about it that might affect recognition, such as the manner in which the voice was being used and its clarity for the witness;

(d) any delay between hearing the speech to be identified and making the identification, and anything else that might affect the memory of the witness;

(e) the characteristics of any recorded speech used to make the identification and the quality of the recording;

(f) anything about the circumstances of the identification that may create a psychological predisposition to identify a person selected by an investigator;

(g) whether any police procedure used to make the identification has been adequately documented;

(h) the witness's ability to distinguish among voices;

(i) any hesitation in making the initial identification;⁷

⁴ *[Case 1]* [2015] NZCA 73 at [54].

⁵ *Ibid* at [73].

⁶ See *Harney v Police*, above n 47, at [30]–[33], where the Supreme Court similarly addressed the circumstances in which an informal visual identification is admissible or a formal one inadmissible.

⁷ An eyewitness who hesitates at length may be less accurate than one who reacts promptly: Ormerod, above n 61, at 617.

(j) anything else about the circumstances that bears upon reliability.

[14] In *R v Edmonds*, the Court distinguished between visual identification evidence and recognition evidence, noting that recognition evidence is generally more reliable than stranger identification. Where recognition evidence is relied upon and where there is sufficient familiarisation, there appears good reason to dispense with the formal procedures. The Court said:⁸

[73] We thus consider there would be good reason not to conduct a formal identification procedure where the witness recognises an accused, except where such a procedure would serve a useful purpose such as would likely be the case where there is a slight acquaintance only or in the case where the accused denies that he was the person whom the witness claims to know as referred to by Lord Hoffman at 70 above.

[15] Both tests rely on familiarity and, in this Court's assessment, they are equally relevant, subject to the circumstances under consideration. In this case, there was both visual and voice identification. Essentially, that identification coincided. It occurred as the defendant allegedly stood at the foot of her bed in a darkened room and spoke to the complainant.

[16] Defence initially conceded that there was good reason for the police not to have conducted a formal procedure but then, after further consideration, resiled from that position and submitted that, in fact, there could have been good reason for the police to have done so. The basis for that submission was on the off-chance that the complainant may have been unsure upon reviewing eight photographs of like individuals. In making that submission to the Court, defence also placed reliance on a claim that the police may not have inquired if there had been other home intruder offences in recent times in the vicinity. There is no evidence before this Court on that latter aspect.

[17] Noting the familiarity of the complainant with the defendant, nothing turns on this point. If anything, in my assessment, it would have simply served to bolster the identification made by the complainant in what were clearly challenging

⁸ *R v Edmonds* [2010] 1 NZLR 762 (CA) at [73].

circumstances, absent any apparent benefit to the defendant. I am satisfied on the material that is before me that the police had good reason to not conduct a formal procedure. It, therefore, falls to the defence to prove that the identification made was unreliable on the balance of probabilities.

[18] When I look to an analysis of this application and the competing interests, they can be usefully combined. This was a complainant who had, on her evidence, known the defendant for her entire life. She saw him regularly, he has been into her house more than once, he used to routinely transport her and her sister to [details deleted]. She would regularly see him outside his home when she came home from school. She says that he would regularly attempt to engage her in conversation. It follows she would have been:

(a) very familiar with his appearance; and

(b) very familiar with his manner of speech.

[19] In the formal written statement, she described him in the following terms:⁹

- tall
- large build
- older than 50
- he is from [country deleted]
- he has [hair colour removed]
- he has big nose and kind of square face
- he does not have a beard and is always clean-shaven
- [occupation details deleted]
- he speaks with an accent.

[20] When she saw him in her room, she said that, initially, she did not recognise him but then she saw his big nose and square jaw and she described him as large and

⁹ FWS of [witness 1], page 1 line 15 – page 2 line 2.

fully clothed. She did not speak of any facial hair and that is consistent with her description of him always being clean-shaven.

[21] Counsel for the defence place some reliance on the fact that she described him as large, but I observe that is a relative assessment. She is a [teenage] girl, an adult male might well appear large to her. Little turns on that point. When in the room he spoke a number of phrases as detailed and she both recognised him visually and by voice.

[22] In terms of the environment, this was in the early hours of the morning. I infer from that that the house was quiet and there was no other noise or interference in terms of distraction. This would have made for an excellent assessment of the voice heard. He was standing in close proximity to her. Her reporting of the identification was immediate and there was no hesitation. Five minutes after the defendant had allegedly left, she immediately went to her sister, woke her and reported what had happened. That account has not changed and that is specifically what she told the police as well.

[23] The formal written statement of her sister reports an immediate recounting of events, where the complainant said [Saman] had been in her bedroom at 1.17am watching and talking to her. Her account detailed therein is entirely consistent with what she later told the police, and supports of the identification made.¹⁰

[24] The defence, in submissions, addressed the fact that the room was dark, the complainant could not immediately identify the person who was standing within about two metres of her at the foot of her bed and he submitted that the defendant does not have a large figure. That the visual identification relies on the voice identification, which he submits is unreliable. In terms of the voice identification, defence accepts that the defendant and the complainant know each other.

[25] Turning to address the identifiable or distinguishing features of the voice, defence points to the fact that the Crown relies on the fact that she said he is the only neighbour with that particular accent. Defence submits that there would be many people within the population of New Zealand who might well speak with an accent

¹⁰ FWS of [witness 2] dated 20/6/17 at 3.08pm at page 3 line 8 – page 4 line 6.

such as that. In terms of the duration of the speech, defence submit that it was brief, in a dark room, when she had just woken up. It was not a prolonged discussion. The Crown counter that by the fact that there were a number of phrases spoken over that period, it was not a single phrase, and she had ready opportunity to consider it.

[26] Defence acknowledge that there is no issue in terms of delay and whilst the complainant has identified the defendant as being the person from both visual and voice identification, defence places some reliance on an apparent animus between the complainant and the defendant. In her formal written statement, she describes him as being creepy¹¹.

[27] She had also written a note, seemingly to her mother, on the account given by [Detective Constable 1]¹², which was ostensibly a joke threatening the defendant, it would seem. Defence say that she had, for some reason, identified the defendant on this day out of this animus or dislike for the defendant. While this may be a matter to raise when challenging the weight to be given to that evidence, I do not believe it undermines the cogency of the identification made. In relation to the visual identification, the Crown submits that the complainant had significant familiarity with the defendant and, given the circumstances surrounding the identification, the defendant cannot prove on the balance of probabilities that it did not produce a reliable identification.

[28] In relation to the voice identification, the Crown submits that there were multiple opportunities for the complainant to hear the defendant's voice and confirm it was the one she recognised. They also submit further, because it occurred at night in the complainant's bedroom, which was downstairs, and her sister and mother were asleep at the time, there were no other noises or voices nearby that could have confused or distracted her. The Crown submits that given the long-standing association with the defendant, the unique characteristics of his voice, the accent identified and the environment in which she heard the voice; on the balance of probabilities, it all indicates that the circumstances in which the identification was made produced a reliable identification. They also submit that evidence will be helpful to the fact finder.

¹¹ FWS of [witness 1] page 2 line 9: "He gives me and [my sister] the creeps."

¹² FWS of [Detective Constable 1] dated 8/9/2017.

Ultimately, what weight is placed on that will be a matter for any jury with the necessary caution issued pursuant to s 126 Evidence Act 2006.

[29] While the circumstances of the identification were challenging, not simply because of the darkness in that room but also given the presence of a strange figure in the complainant's room, having entered and being at the foot of her bed early in the morning; it does not, in my assessment, compromise that quality or reliability of the identification.

[30] In combination, given the clear and established long-standing familiarity, the identification made is demonstrably reliable. These two forms of identification need to be considered in tandem and it is artificial to separate them. Their combination is mutually supportive of each other and is a relevant part of the circumstances to be considered for the other. I have no doubt that recognition was immediate from this combination of factors, visual and voice recognition.

[31] I am satisfied that the defendant has not established on the balance of probabilities that the visual identification is unreliable. Moreover, I am equally satisfied that the Crown has established on the balance of probabilities that the circumstances in which the voice identification was made have produced a reliable identification.

[32] I rule that the evidence of visual and voice identification is admissible at trial.

K J Glubb
District Court Judge