

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-044-002878
[2018] NZDC 8841**

THE QUEEN

v

SHANE KERRY AMBLER

Date of Ruling: 4 May 2018
Appearances: B Mugisho for the Crown
P Syddall for the Defendant
Judgment: 4 May 2018

RULING OF JUDGE B A GIBSON

[1] The defendant seeks to exclude the admissibility of visual identification evidence pursuant to s 45 Evidence Act 2006. The defendant was identified from a photograph montage by the complainant and the complainant was shown the montage by the police approximately seven hours after the aggravated robbery had occurred when at 3.30 am on [date deleted] 2017 the complainant and his partner were confronted by several men who had alighted from a vehicle near where they were walking.

[2] The argument essentially is that the presentation of the defendant on the night was different to the photograph shown in the montage to the complainant, in that the photograph of the defendant shown to him was some five years old and showed him with short cropped hair and only a small amount of facial hair, whereas on the morning

in issue he had unkempt hair described almost as an ‘afro’ and a more developed moustache and facial hair around his chin. In all other respects his facial features in the two photographs were more or less identical.

[3] The police job sheet provided as part of the Crown submissions notes that the constable who compiled the montage had been told that Mr Ambler had presented on arrest with short hair and no facial hair and so he selected a photograph which resembled that and ensured that the other seven persons in the montage were of reasonably similar appearance.

[4] The defence accepts that the other seven persons in the montage shown to the complainant were of similar appearance to the photograph of the defendant, the argument being that a more recent photograph ought to have been used which more closely resembled the way the defendant presented on the night. The defendant says that it is not as if the police would not have had more recent photographs as the defendant is a habitual criminal who had been convicted of several offences over the past few years and accordingly the requirements for admissibility were not met.

[5] Section 45 of the Evidence Act 2006 deals with the admissibility of visual identification evidence obtained by way of a formal procedure and also where there is no good reason for not following a formal procedure. In this case, the police followed a formal procedure. Section 45(1) states that, “*The evidence is admissible unless the defendant proves on the balance of probabilities that the evidence is unreliable.*”

[6] Section 45(3)(b) states that, “*A formal procedure is a procedure for obtaining visual identification evidence in which the person to be identified is compared to no fewer than seven other persons who are similar in appearance to the person to be identified.*” Mr Syddall accepts that specification was met. His argument is that the change in appearance of Mr Ambler, in terms of how he presented on that night from his earlier photograph, ought to be taken into account and suggests that the evidence is not reliable, so that the defendant has proved on the balance of probabilities that the proposed visual identification evidence is unreliable and ought not to be led.

[7] He accepted there was no case directly in point but in *Faifua & Hepburn v R*¹ Courtney J, giving the reasons of the Court noted at paragraph 21 that, “S45(3)(b) does not require consistency between the photo board and a description,” where it was alleged that the photo board was not consistent with the description given by the complainant in that case, “*but instead requires consistency between the image of the person to be identified and the other images.*”

[8] In my view, that obligation under s 45(3)(b) has been met in this case. The complainant himself, in his answer to the questions the police standard instructions require to be answered, noted in relation to question 4, which was, “Do you have any additional comments?” said that he was not 100 percent sure as photos could be old. Consequently, the complainant himself recognised that it was possible he was being shown an old photograph of the defendant but nevertheless he was still able to identify him as the person who assaulted him.

[9] In my view, the requirements of s 45(3)(b) have been met. I am not satisfied that the defendant has proved on the balance of probabilities that the evidence is unreliable. The evidence is admissible, there may be issues of weight but that is not a matter I am required to determine at this point. I am satisfied that the evidence is reliable and is admissible as visual identification evidence and accordingly allow the evidence to be led.

B A Gibson
District Court Judge

¹ *Faifua & Hepburn v R* [2011] NZCA 152