

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-004-007886
[2018] NZDC 6006**

THE QUEEN

v

JOSHUA KANE SYMES

Hearing: 27 March 2018
Appearances: M Ropati for the Crown
L Freyer and V Veikune for the Defendant
Judgment: 27 March 2018

ORAL JUDGMENT OF JUDGE E P PAUL

[1] Joshua Kane Symes faces one charge of aggravated robbery. It is alleged [in July 2017] at Auckland being together with other persons unknown robbed [the complainant] of a Samsung Galaxy smartphone valued at \$1388 and a Casio G-Shock wrist watch valued at \$100. The maximum penalty for this crime is 14 years' imprisonment. Mr Symes has been represented by Ms Freyer and Mr Veikune. Mr Ropati has prosecuted the matter for the Crown.

[2] I heard evidence over one day on 26 March 2018. I adjourned the hearing so I could review my decision and deliver it orally this morning. Because I am delivering an oral decision I reserve the right to expand on or clarify the reasons for my decision today.

[3] In terms of the offending itself, the Crown are required to satisfy me the defendant was one of the three attackers, and the Crown are required to satisfy me that it was the defendant who took the smartphone and G-Shock watch from [the

complainant] dishonestly and without claim of right with the intention of depriving [the complainant] of that property permanently, and I have to be sure the defendant used violence to take that property. Furthermore I must be sure the defendant was acting together with the other men and that there was a joint enterprise.

[4] In summary, the prosecution case against Mr Symes is that [in July 2017] Mr Symes the defendant has with his two associates, a male Māori and a male Samoan, violently robbed [the complainant], of his smartphone and watch at the rear of the TAB located at the [location deleted]. The defence case is [the complainant] was robbed by one of the defendant's associates, the male Māori, [companion's name deleted], also known as [companion's AKA name deleted]; that the defendant was not involved but merely witnessed the robbery. The defence have acknowledged this is not a case of the complainant mistakenly identifying the defendant, rather, the defence case is the complainant has falsely implicated the defendant with the robbery out of fear of the real robber who the defence say was [the companion].

[5] The issue broadly for me to decide is was it the defendant, Mr Symes, who attacked the complainant assisted by his two associates or does the alternative explanation that it was [the companion] who carried out the robbery alone raise a reasonable doubt in my mind as to the identity of the robber?

[6] Before I begin my consideration of the evidence in this Judge-alone trial it is important that I set out my role. Essentially I am required to decide whether the essential elements constituting the alleged offence have been proved beyond reasonable doubt. This is a criminal prosecution. The onus is on the Crown to prove the elements of the charge beyond reasonable doubt. There is no onus on the defendant, Mr Symes, to prove or disprove anything. Not all facts need be proven beyond reasonable doubt, only the elements of the charge.

[7] In this case the defendant has given evidence himself. The fact that the defendant gave evidence on his behalf does not change the onus or standard of proof that I have referred to.

[8] I have considered all of the evidence that has been placed before me in this trial. This includes the evidence given on oath, the evidence read to the Court without objection and the exhibits produced. Clearly, the evidence I have heard in this trial with the various conflicts cannot all be correct. The divergence in the evidence simply does not allow for that to occur. As I have said, I have looked at all the evidence with the aim of being objective, careful, impartial and dispassionate in my assessment of the evidence. It has been necessary for me to consider the honesty, reliability and credibility of each witness. Clearly I do not have to accept everything that a witness says or reject everything that a witness says. I am entitled to accept and reject parts of what a witness said in their evidence.

[9] In considering the evidence of each of the witnesses I have considered the reasonableness, coherence and probability of the evidence of each witness. I have considered their evidence in terms of whether their evidence is consistent with or is supported by other evidence. I have particularly and cautiously examined evidence that I considered was contradictory, inconsistent and unsupported. There are other matters that I have also taken into account in considering the evidence of each of the witnesses. These include the appearance, demeanour and manner of the witnesses that was observed at the time that the incident took place or not, whether witnesses were under the influence of alcohol or drugs at the time they made their observations that they rely on in giving their evidence in this trial, the reliability of witnesses, the opportunity witnesses had to perceive, that is, see material facts and the ability of the witness to articulate what was perceived or what was seen by them.

[10] Other matters include the memory and judgement of the witnesses. We know in this trial that alcohol had been consumed by the witnesses and also drugs had been taken. I take into account the interest that any particular witness may have in the outcome of the case, by this I mean whether the witness had a motive to lie, exaggerate, distort, minimise the actions of any of the parties; any bias or prejudice exhibited by any witness; the relationship between the witnesses; whether witnesses could be described as independent or whether there was an existing relationship. In looking at this aspect I have looked for independent sources to either support or refute the evidence. I have considered whether independent evidence supported or detracted from other witnesses' evidence.

[11] However, the lack of independent evidence is not fatal. Many cases involve issues of credibility without independent advice. Clearly the Crown are relying on the identification of the defendant made by the complainant so his credibility and reliability must be at issue in this trial. In considering that I take account of the reasonableness, coherence and probability of events occurring in the manner described by the witnesses; how the witnesses performed under cross-examination; the appearance, demeanour, sincerity and manner of those witnesses as they gave their evidence. However, I should say that Judges usually place little weight on demeanour alone as it can be deceptive and an arbitrary characteristic.

[12] I have considered whether the matters that I have raised have either adversely or positively affected my view of the witnesses' evidence and I am also aware that a witness, although honest and sincere, may be genuinely mistaken about events. A witness needs to be not only honest and sincere but also reliable and credible. Witnesses do not all see the same things. Witnesses do not place the same weight on what they see. Witnesses may also have different abilities to recall. Evidence can often be accurate about essential details but not about secondary or minor matters. I should also state that this case involves high emotions, violence, and inconsistencies between witnesses are to be expected.

[13] I have also borne in mind the timing between this particular incident which is alleged to have occurred on [in July 2017] and the date of trial, 26 March, approximately a nine month gap.

[14] I also wish to emphasise that in reaching my decision it is neither necessary nor am I required to articulate findings about every item of the evidence. My role is to determine whether the Crown have proved the elements of the alleged offence beyond reasonable doubt. In doing that, however, it is necessary for me to resolve some primary disputes over the facts.

[15] In coming to my conclusions I also want to emphasise I am entitled to draw inferences. An inference is simply a logical deduction from two or more proven facts. The making of inferences occurs by Judges on a daily basis in a deductive process of assessing evidence.

[16] I now turn to the evidence I heard in this trial. [The complainant's] evidence was [in July] he was behind the TAB at the [location deleted]. He was with two men he knew, [associate 1], [associate 2], and some others. They were drinking alcohol, beers. It was then that the defendant Joshua showed up with two others. The complainant described Joshua as, "The white fella." The second male with him was a Samoan guy, the third male was Māori. He gave evidence that the defendant talked about ganking someone and he said he was planning to rob someone and buy some crack. His evidence was the defendant was encouraging his two associates, telling them that if they did it they could go halves but if he did it they would get nothing. The complainant recalls the defendant asking him about the artist Tupak. The complainant says he pulled out his phone, an S8 Plus he described being metal and gold.

[17] The complainant then said he felt he was getting targeted and that he was going to leave. His evidence was Joshua asked him for a cigarette. The complainant says he was seated at the time and that when he went to get the cigarette that is when the defendant punched him in the face and he fell backwards onto the roadway, and that is when Joshua and the two others starting kicking and punching him. He recalls Joshua standing over him, telling him to give him the fuckin phone, asking him whether he wanted to die and that he would kill him. He says Joshua took the phone from his pocket and also took the watch off his wrist, and his evidence was the men left and he was able to manage to get on his bicycle, ride to the dairy and then home to call the police.

[18] He went on to say he saw Joshua two days later and again called police. He confirmed he was shown some photos and he identified Joshua pretty quickly in the photos he was shown.

[19] He was cross-examined and accepted he had been drinking alcohol and was tipsy at the time. It was put to him that he had an argument with the male Māori associate of Joshua's, an issue about the landlord. He denied that. He confirmed that he was shown the photo board where he identified the defendant. He also went on to confirm that he was shown a photo board but failed to pick out the male Māori. He

confirms he was shown this board on 3 August. It was put to him he deliberately failed to pick out the male Māori who we now know to be [the companion].

[20] It was put to the complainant he failed to pick out [the companion] because he was scared of him. The complainant rejected that. He maintained it was the defendant who had attacked him and he was the man he had identified. He was cross-examined about the subsequent call [two days later] where he spoke to police on the 111 number telling them he had seen the defendant and that he had been chased by the defendant. It was put to him he had never told the 111 caller he had been chased. He accepted he may not have told the caller but maintained that is what happened.

[21] We then had the evidence of [Constable 1] read. His evidence was of taking a statement from [the complainant] on the night of [the alleged incident], the night following the incident, and also taking some photos of [the complainant] and the scene at night. It should be noted that the offending occurred during daylight hours and there is no dispute about that.

[22] [Constable 2] then gave evidence, and his evidence was [five days later] he spoke to the [complainant]. He placed a photo board in front of him with the usual cautions about the complainant's use of that photo board. His evidence was the complainant immediately identified image number 5, that being an image of the defendant, and the comment he recorded was, "Where do you recognise him?" And his comment recorded was, "From him bashing me." Comments recorded at the time from the complainant was, "I never forget a person's face who stood me over." The officer confirmed the male the complainant identified was the defendant, Mr Joshua Symes.

[23] The evidence of [Constable 3] was read. He simply effected the arrest of the defendant. The officer in charge, [Constable 4] then gave evidence. His evidence was that the defendant agreed to provide an interview that was recorded by way of a disc and that interview was played in Court yesterday, 26 March. He confirmed that a further photo board with [the companion], was shown to the complainant but the complainant failed to identify [the companion] as one of the offenders.

[24] The defence cross-examined [Constable 4] about [the companion], that on the complainant's version of events and the defendant's, [the companion] was one of the attackers. Police confirmed he was not charged. The officer said in explanation that was not his decision. The defence suggested to police that [the companion] was an eye witness which was not disputed by [Constable 4]. [Constable 4] was also cross-examined about further enquiries he made with various persons named during the incident. He said he approached both [associate 1] and [associate 2], the two men behind the TAB. Both declined to make a statement. He also said enquiries were made with Cash Converters but was unable to provide any helpful information about those enquiries.

[25] At the end of the Crown case the defence elected to give evidence. Mr Symes was called. His evidence was very much in line with his exculpatory evidential video interview, with a little further background. He said that morning he had been at his home with [the companion] and [the companion]'s mum, that they had been drinking Cody's; that they left at about 10 or 11 in the morning. He denies taking anything with him, no bag, no alcohol, that they went to the rear of the TAB, that the purpose was to go drinking. His evidence was he had seen the complainant there but did not speak to him. He accepted he had drunk further alcohol that had been offered to him by [associate 1] and [associate 2], as it was offered to his two associates.

[26] His recollection of the incident was he asked the complainant for a cigarette and then it was [the companion] who then asked for a cigarette after him and it was [the companion] who attacked the complainant; that they both went over the wall, the concrete wall referred to in the police exhibits; that there was a tussle; that [the companion] got on top of [the complainant]; that he then ran off. Mr Symes says he and the Samoan guy also climbed the same wall and ran off and it was in the alleyway that [the companion] showed him the phone and watch that Mr Symes said was just taken from the complainant. His evidence was he had an idea that those things, the phone and watch, had come from [the complainant]. He then went on to explain he along with [the companion] and the Samoan returned home. He remained at his home while [the companion], the Samoan, and [the companion]'s mum then left for the shops. They returned from the shops sometime later and as a result of their pawning

off the goods stolen, which was the clear inference, the power went on in Mr Symes' house and these people returned with a box of alcohol, smokes, a tinnie and some cash.

[27] In cross-examination it was put to Mr Symes he derived direct benefits from this robbery. He accepted his power came on. He accepted there was alcohol, drugs and money but he went on to say he got nothing out of it. He accepted he gave an accurate description of the Galaxy phone and G-Shock watch that was stolen but his explanation was he was able to do that because they were shown to him by the robber, [the companion]. He accepted under cross-examination there could be no confusion or mistake that he was the white guy referred to by the complainant, accepting that the Māori fella was of a solid build and that the Samoan was wider and shorter, and so he accepted that when the complainant talked about the white guy he was talking about him, the defendant. No further evidence was called for the defence.

[28] In terms of assessing that evidence I have reminded myself of a number of warnings that are necessary. Firstly, I have reminded myself where evidence may be unreliable of the need for caution in deciding whether, first, to accept the evidence and the weight to be given to that evidence. Despite what appears to be a concession by the defence that the white guy, as identified by the complainant, is the defendant I still warn myself where the Crown case relies on identification evidence, that a mistaken identification can result in a miscarriage of justice. I have also warned myself that a mistaken witness may well be convincing. I bear all those warnings in mind when assessing the strength of the evidence presented in this trial.

[29] I start firstly with what we do know and what is not in dispute in this trial. It is not in dispute [the complainant] was robbed behind the TAB at the [location deleted]. It is not in dispute the complainant's phone was taken. It is not in dispute the complainant's watch was taken. It is not in dispute the complainant suffered injury as a result of the robbery. That is evidenced by the complainant's own evidence but also the photographs taken of him shortly after the robbery. It is not in dispute that the defendant, Joshua Symes, was there at the rear of the TAB at the time of the robbery. It is not in dispute that the defendant was accompanied by a male Māori and a male Samoan. It is not in dispute it was a punch that knocked [the complainant] to the ground, and it is not in dispute that the defendant was aware of the description of the

items taken and was able to articulate that information. In short, the only issue at this trial is who delivered the punch and, it follows, who took the phone and watch.

[30] The complainant's evidence was as a result of the defendant saying he was going to gank someone that [the complainant] felt targeted. It is unsurprising then that, feeling targeted, [the complainant]'s evidence was he decided to leave. While occupied providing a smoke to the defendant the complainant was punched by the defendant and knocked to the ground. The complainant's evidence was all three men including the white guy kicked and punched him. It was the complainant's evidence there were demands for his phone and watch made by the defendant and it was the defendant who took those items from him, that he then ran off.

[31] The complainant's evidence was he immediately reported these matters to police. It was noted in the evidence he made a statement of what occurred that same night. Some five days later the complainant was able to identify the defendant from a photo board and commented he would never forget that person's face who stood over him and bashed him.

[32] Here I apply the warning I have already indicated regarding identification evidence, in particular mistaken identification evidence but it seems to me the complainant's identification evidence is supported by the defendant's own admissions he was present during the course of his evidential video interview. This in no way alters the onus of proof. The evidential video interview of the defendant is something I am entitled to take into account. Significantly, it was the complainant who identified the white guy as his attacker and clearly the white guy must have been the defendant.

[33] The defence suggestion that [the complainant] has only identified the defendant because he is afraid of the [the companion] is not supported by any other evidence in this trial except, of course, the defendant's own assertion that it was [the companion]. I remind myself that it is the defendant who is at jeopardy here in terms of the outcome of this trial. Again, there is no onus on him but this suggestion of the complainant being fearful of the male Māori was rejected by the complainant despite it being put to him forcefully and, as I say, there is nothing to support that assertion beyond what the defendant has said.

[34] Also, there is no doubt the defendant benefited almost immediately from the robbery. His power went on and alcohol, smokes and a tinnie were brought to the house. The defendant disputes he got any benefit of those but that is hard to believe in all the circumstances. These people had been drinking at that house earlier that morning, sharing alcohol, had gone to the TAB where further drinking occurred, had subsequently returned home and then more alcohol was delivered to the house. It really defies credulity that the defendant did not engage in the consumption of those various items. Also, the defendant's own actions observed at the time were inconsistent with the defence he now relies on that he was simply an innocent bystander doing nothing. He was one of the three men who ran off following the aggravated robbery.

[35] Also, the defendant's own account in his evidential video interview place him at the scene with an intimate knowledge of the robbery. That knowledge, combined with the complainant's identification of him being the white guy, leads to the conclusion that the evidence supports the defendant being the robber. I do remind myself about the effect of alcohol both on the defendant and the complainant in their accounts but these events occurred in broad daylight. The witnesses had a good opportunity to observe those who were present and who carried out the various actions.

[36] As I say, the complainant's account and description of events and those involved was consistent despite some differences in description which were highlighted under cross-examination of the complainant, but ultimately those matters are insufficient for me to reject the substance of his account. His account remained constant, in particular, that his attacker was the white guy, that it was the Māori and Samoan associates who then joined in on the robbery.

[37] Ultimately I am entitled to rely on the Crown case. I reject the defence explanation of the events and I find the elements of the charge proved beyond reasonable doubt. For completeness, I find it was the defendant who struck the complainant, assaulting him and taking his property by force, and that it was the two associates who then joined in to enforce the violence in that robbery.

[38] Having found the elements of the charge proved beyond reasonable doubt the defendant will be convicted of this charge.

[39] Mr Symes, I have found the charge proved so you will be further remanded in custody to your sentencing date on 2 July at 11.45 am. I am directing the usual pre-sentence report and appendices.

E P Paul
District Court Judge