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

IN THE YOUTH COURT
AT AUCKLAND

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

CRI-2018-204-000200
[2019] NZYC 123

THE QUEEN

v

[QR]

Hearing: 18 March 2019

Appearances: B Mugisho for the Crown
V Reid for the Young Person

Judgment: 18 March 2019

ORAL JUDGMENT OF JUDGE A J FITZGERALD

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[1] [QR] faces two charges of aggravated robbery. One is alleged to have been committed at the [store deleted] on 3 January 2018, the other on 26 March 2018. Both charges are denied.

[2] The admissibility of visual identification evidence of police witnesses is challenged. In relation to the 3 January 2018 charge, the witness is a [WA]. In relation to the 26 March 2018 charge, the evidence is of [Detective 1]. The police are no longer seeking to admit [Detective 1]'s identification evidence and so it is only [WA]'s evidence that concerns me today.

[3] Section 45 Evidence Act 2006 governs this situation. A formal identification procedure was not followed here in relation to [WA]'s evidence and so the first thing I must decide is whether there was a good reason for not doing so. I find there was not a good reason.

[4] The submission for the police is that [QR] was already someone known to [WA] when he allegedly identified him on 3 January 2018. That was on the basis [WA] had observed [QR] for about an hour at the dairy on 30 December 2017, served him twice, and recognised clothing he was wearing.

[5] However, as Ms Reid point out, the evidence does not support those assertions. CCTV footage does not show [WA] serving [QR] on 30 December 2017. [ZD], who is the storekeeper and complainant, is shown serving [QR] on the two occasions [QR] is in the store that day.

[6] [WA] did not observe [QR] for anything close to an hour. The first time [QR] enters the store, he is inside for about one minute. During that time, [QR] and [WA] pass each other for about one to two seconds. [WA] concedes the two never came face-to-face, there was no eye contact, and they did not speak to each other. Under cross-examination, [WA] accepted that he did not walk and follow and watch [QR]. [WA] also accepted that during some of the time [QR] was in the shop, he ([WA]) was talking to [ZD], looking at his phone and looking in different directions. On occasions when [WA] went out of the store, when [QR] and some other young people were outside, [WA] accepted it was not a situation where he kept watching [QR].

[7] The second time [QR] enters the store on 30 December 2017, he is in there for 31 seconds. Again, [WA] did not serve [QR] and there was no eye contact between them, nor face-to-face contact nor any conversation between them. They were never directly in front of each other.

[8] [WA] did not know [QR] before 30 December 2017 and does not actually identify him to the police as such. When he spoke to police after the robbery on 3 January 2018, he says the boy he saw that day was one he served at the store on 30 December 2017. The police therefore need to rely on the CCTV footage to try and make the identification of [WA] valid, but as already indicated, some of what [WA] says is not borne out by the CCTV footage.

[9] In addition to what I have already mentioned, he incorrectly says that two boys and two girls came to the store. He is also mistaken about some of [QR]'s clothing that day. On 3 January 2019, he is also incorrect about some of the clothing he said the boy was wearing. For example, he says that the person he observed with the baseball bat committing the robbery was wearing a white t-shirt. In fact, the person shown is wearing a black hoodie with the hood up. [WA] accepts that he observed that person for nine or 10 seconds at a distance, side-on, and that there were things obscuring his view.

[10] In *Harney v Police* the Supreme Court say the following, starting at paragraph 26:[1]

> [26] We are satisfied that where the visual identification evidence takes the form of a recognition by the eyewitness of someone already known to the witness (whether through personal contact or from photograph or film and whether or not the person is known by name to the witness), that can constitute a further good reason for not following a formal procedure. That was the position, rightly in our view, taken by the Court of Appeal in *R v Edmonds*.[2]

Before continuing with the quote, I just interpose here that in the *R v Edmonds* case, the defendants were actually known to the witness, unlike the present situation. Continuing with the Supreme Court's comments:

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[1] *Harney v Police* [2011] NZSC 107.
[2] *R v Edmonds* [2009] NZCA 303.

> [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 defence, in that it may expose an element of unreliability in the identification, there will not be good reason in terms of s 45(1).
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> [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. On the other hand, if the prior acquaintance with the defendant's appearance is slight only, such a procedure will usually have value; the potential weight of the witness's opinion may not be much greater than that offered by a complete stranger. There can be, however, no formulaic requirement, such as that the defendant must have been "well" known to the witness. The degree of prior contact or knowledge of appearance, and its sufficiency, must be assessed in each case taking account of all the circumstances.

[11] In this case, the evidence establishes that [WA]'s prior acquaintance with [QR] was only slight and, therefore, a formal procedure would have had value and should have been followed. Interestingly, [ZD], who is shown in the CCTV footage serving [QR] twice on 30 December 2017, and therefore having some interaction and face-to-face contact, was unable to identify [QR] as the alleged attacker.

[12] Given that a formal procedure was not followed, [WA]'s identification evidence is inadmissible unless the prosecution prove, beyond reasonable doubt, that the circumstances in which the identification was made had produced a reliable identification.

[13] That onus has not been discharged for reasons that will be clear from what I have already said. [WA] had relatively limited time to observe [QR] on 30 December 2017 and 3 January 2018. His observations were not direct, were short in duration, and obscured at times. He was also incorrect in a number of respects in his identification evidence and it is therefore unreliable. [WA]'s identification evidence is therefore excluded.

A J FitzGerald
Youth Court Judge