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IN THE YOUTH COURT
AT AUCKLAND

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

CRI-2020-204-000036
[2020] NZYC 398

THE QUEEN

v

[JS]

Hearing: 31 July 2020

Appearances: A Kempster and H Clark for the Crown
D George for the Defendant

Judgment: 31 July 2020

RULING OF JUDGE E P PAUL

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[1] [JS] faces one charge of being armed with an offensive weapon, namely a knife, robbed [the complainant] of a mobile phone on [date deleted] 2020 at Auckland. That being a charge of aggravated robbery. He seeks a discharge pursuant to s 147 on that charge. He is represented by Ms George his youth advocate. The Crown for the police are represented by Ms Kempster and Ms Clark. Both Ms George and Ms Kempster filed submissions in preparation for this hearing. I have had an opportunity to review those submissions and the supporting documents.

[2] I have also heard oral submissions from counsel today and had the opportunity to view the CCTV footage relied on by the Crown. I should record because I am delivering this decision orally after viewing evidence and hearing from counsel, I reserve the right to clarify or expand on the reasons for my decision.

[3] Ms George in her oral submissions today submits all issues are in dispute in these proceedings. That on the Crown evidence the identification of [JS] is unreliable. She has reminded me there has been no formal identification carried out of [JS] following the alleged offending, which is conceded by the Crown. There is no explanation why that was not done by the police given [JS] was taken into custody relatively shortly after the alleged offending, and there is no evidence that I have had presented to me as to any good reason why a formal procedure was not carried out.

[4] In the defence submissions Ms George accepts [JS] can be seen prior to the alleged aggravated robbery outside the [McDonald's]. She also concedes he can be seen subsequent to the aggravated robbery again outside the [McDonald's]. She does not accept the footage in [a nearby Park] relied on by the Crown identifies [JS] in [the Park] at the time of the alleged offending. She submitted the descriptions provided by the complainant and the two witnesses are not reliable.

[5] She says that given the amount of time spent by the complainant and the witnesses with the alleged offenders and associates, they would have had an opportunity to observe the alleged offender, and their descriptions would have been far more accurate. Essentially she says they are generic descriptions of young Polynesian and/or Māori males. She says given the vague and inconsistent descriptions given by the witnesses, the absence of any formal identification carried

out by the police, and on the defence case, [JS] being seen before and after the alleged offending at some distance at the [McDonald's], it is simply insufficient evidence at its highest for a jury properly directed to return a finding of guilt.

[6] Ms Kempster for the Crown took me in a careful way through the CCTV footage, and I accept at 1.18 there is footage of [JS] and five (what appear to be) teenage associates both male and female outside the [McDonald's]. The Crown rely on footage at 1.52 am in [the Park] of a male running across the screen from left to right followed by what appears to be at least one of the females who can be seen in the earlier and later footage at [the train station], to say that that is [JS] on the screen. Certainly in the short time that we can see the individual running across the screen he appears similar, but I am not satisfied any jury could confidently say or identify that as [JS] running across the screen. It would not be an appropriate inference on the Crown evidence at its highest for a jury to draw the inference that that was in fact [JS] in my view.

[7] Ms Kempster then took me to the footage outside the [train station] at 3.30 am and clearly we see [JS] arriving there with one associate a short time later, it appears three other associates who join together with [JS] are the same group. Subsequently the evidence as we saw on CCTV footage, [JS] running from the group from right to left in the direction roughly of the waterfront I guess, and then police following shortly thereafter.

[8] It is also the police case that he was attempting to hide from the police. We did not see that footage but I have no doubt that that is the position. I do not take any issue with that.

[9] The Crown in their submissions say the CCTV footage is not visual identification evidence and can be led at any trial. The defence do not seriously dispute that. It is what can be made of that CCTV footage which is relevant in these proceedings.

[10] In terms of the formal statements where the Crown rely on the descriptions given by the complainant and two witnesses, the Crown say s 45 does not apply. I am

not persuaded by the argument in support of that particular submission. That is reinforced by the fact that we have differing descriptions of the alleged offender who the Crown say is [JS].

[11] Clearly s 45 was put in place to address this very situation, and avoid the conflict in evidence between the Crown witnesses. For the Crown to now invite me to prefer the complainant's description over the other two witnesses, in my view, is fraught with difficulty.

[12] The Crown say the CCTV footage before and at [the Park] and subsequently, along with [JS]'s behaviour attempting to avoid being arrested, support the Crown case against [JS]. As I say they invite me were there any inconsistencies between the description of the offender to prefer the complainant's version, and invite me to combine that description with the footage in [the Park] and the footage at [the train station] effectively as sufficient for a jury properly directed to return a guilty verdict.

[13] In fact the test is enunciated in *Parris*.[1] On the state of the evidence at this stage it is clear that either a properly directed jury could not reasonably convict or that any such conviction would be unsupported by the evidence. So that is the classic test enunciated in *Parris*.

[14] What I have to determine is what the Crown case at its highest can establish. What it can establish is [JS] was outside [the train station] at 1.18 and appears to be with a group of five to six other teenagers both male and female. What the police can prove is that at 3.33 [JS] returns to the [McDonald's] with another male and is joined by three associates who appear to be female, who may have been some of the associates he was with earlier at 1.18.

[15] I have already indicated my view of the footage in [the Park]. Certainly the person seen running across the screen appears similar to [JS] and also the female associate following on behind. But that in my view is not evidence that affirmatively identifies [JS]. Even if we accept that is [JS] all it does is place him at a time in [the Park], it certainly does not place him at the scene.

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[1] *Parris v Attorney-General* [2004] 1 NZLR 546 (CA).

[16] I then turn to the identification evidence. Admission of the identification evidence must be undermined by the failure by the police to conduct a formal identification as required by s 45 Evidence Act 2006 and there has been no good reason provided to me why that occurred. It would have been relatively simple in my view, given [JS] was apprehended at about 3.30 and just shortly after 3.30 that morning to prepare the necessary montage and carry out that procedure with complainant and witnesses.

[17] Why is this important? Because if one conducts a review where the complainant and witnesses' identification of the offender who presented the knife, they are different, they are generic, and frankly they are unconvincing. The [complainant] says, "He has dark skin, short hair, maybe 18, thinks wearing blue or black t-shirt, shorts also dark, wearing black Champion shoes and long black Champion socks".

[18] [Name deleted – witness 1] says, "Māori, aged 16, 1.75 metres, slim build, wearing black t-shirt, long brown trousers, black Nike boots, cream coloured bum bag strapped around his body, Mohawk hair style." None of that fits the description of [JS].

[19] Finally, [name deleted – witness 2] says, "Maori/Pacific Islander, shorter than me mate, I am 1.8 centimetres, skinny build, short black hair, clean shaven, 16 to 17 baggy dark brown trousers, t-shirt in dark colour, black sport shoes". Again, a generic description of, as we can see, a lot of young males in [Auckland] at night if you look at that McDonald's footage at [the train station], but referring to long trousers.

[20] No good reason has been presented for a failure to carry out the necessary identification of [JS] when that clearly was available to the police. They simply from what I heard, did not turn their mind to it, and given the conflicting and generic descriptions of the alleged offender by the complainant victim, it seems to me that the police do not have proper evidence they could rely on to identify [JS] at the scene carrying out the aggravated robbery.

[21] One can certainly be suspicious, but in the absence of evidence of any of the goods that were stolen being found, in the absence of any admissions, in my view

the police case falls well short of what is required on an application for a discharge under s 147.

[22] I am satisfied no properly directed jury could reasonably convict on the state of the evidence as it is and, accordingly, I will grant the discharge pursuant to s 147.

E P Paul
Youth Court Judge