ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA226/2015
[2016] NZCA 353

BETWEEN	TAKATU AHOMIRO Appellant
AND	THE QUEEN Respondent

Hearing:	30 May 2016
Court:	Ellen France P, Clifford and Katz JJ
Counsel:	D A Ewen for Appellant S C Carter for Respondent
Judgment:	28 July 2016 at 10 am

JUDGMENT OF THE COURT

A **The appeal against conviction is allowed. The convictions are set aside and a retrial is ordered.**

B **Any questions of bail are to be dealt with in the District Court.**

C **The record of the first warning given to the appellant by the District Court on 2 December 2014 is cancelled in respect of the convictions set aside pursuant to s 86F of the Sentencing Act 2002.**

D **Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or**

other publicly available database until final disposition of retrial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Ellen France P)

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Introduction

[1] The appellant was convicted after trial in the Tauranga District Court of wounding with intent to cause grievous bodily harm, aggravated burglary, injuring with intent to injure and threatening to kill. The appellant appeals against conviction on the basis the admission of evidence as to his identification has given rise to a miscarriage of justice.[1] He also says the directions of the trial Judge, Judge Harding, in relation to that evidence were inadequate.

Background

[2] The appellant was jointly charged that, together with Tama Waitai, Carl Tremayne and Jay Beguely, he had committed the various acts in relation to Anthony Sowry (wounding), to Shannon Winders (injuring with intent and threatening to kill), and, in relation to Mr Sowry's home, aggravated burglary. The appellant alone was convicted of threatening to kill. The other three men were acquitted on that charge. Guilty verdicts were otherwise returned on the charges against all four men.

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[1] An appeal against sentence was abandoned.

[3] The incident giving rise to the charges took place in the evening of 22 December 2013. The first of the victims, Mr Winders, was visiting the home of his father, Mr Sowry.

[4] Four masked men forced their way into Mr Sowry's home. The defendants had weapons including a pinch or crowbar, a metal torch and a set of knuckledusters. Three of the men had Filthy Few gang insignia on their clothing.

[5] Mr Sowry told the men to leave. He was then attacked and hit on the face and head. He was badly injured, losing part of an eyeball, and was left blind in one eye.

[6] When Mr Sowry told the men to leave Mr Winders tried to run through the house but was dragged back into the lounge. He was hit in the face with the pinch bar. The men demanded money from Mr Winders. Mr Sowry and Mr Winders were forced to get two vehicles ready for the attackers to use. They were vehicles on the property which Mr Sowry had been doing up. The two cars were a two-toned (white and blue) Cadillac and a Porsche. A number of items were taken and placed in the cars. The men also took bankcards from Mr Sowry and Mr Winders and forced them to provide the PIN numbers.

[7] The man identified at trial by Mr Winders as the appellant left in the two-toned Cadillac. The man Mr Winders identified as Tama Waitai left in the Porsche. It appears another of the men left in a gold-coloured Nissan the men had brought with them. The fourth man left in a Commodore.

The identification of the appellant at trial

[8] The issues on appeal about the identification of the appellant arose in this way. At trial, Mr Winders gave evidence as to how he had identified each of the men involved in the assault. For example, he said he could tell one of the men was Tama Maney (also known as Tama Waitai). He had "hung around with him in the past" and had known him for some five, six or seven years. He recognised Mr Waitai's voice and they had a conversation that evening that was a variant on a discussion they had had on previous occasions as to whether Mr Winders had beaten Mr Waitai's child whilst Mr Winders was in a relationship with Mr Waitai's partner.

[9] The man Mr Winders identified as the appellant was referred to by Mr Winders as "the crowbar man". Mr Winders gave evidence that the crowbar man spoke to him saying "you won't remember me, but I remember you. You used to beat your missus up" and then that he was "gonna kill" Mr Winders. Mr Winders said that he could not really see the crowbar man's hair but he could see "above his eyes forehead sort of area".

[10] As the incident progressed, Mr Winders said the other men used the name "Snax" in relation to the "Māori guy with crowbar"/"crowbar man". Mr Winders explained that as soon as he heard the name, "I was like, f..k I know that person" that is, he knew Snax. Mr Winders was in the shed with Mr Waitai and the man he described as "the skinny white guy" (Mr Beguely) and Mr Waitai told Mr Beguely he should not use the name Snax. Mr Winders confirmed that Snax was the man who made the threat to kill.

[11] The next day Mr Winders identified the appellant from a photo montage prepared by police. He was asked how he managed to pick the appellant from the photo montage. He said it was basically just the "eyes and forehead and just like the top of his head".

[12] In cross-examination he accepted his processes over the course of the incident in his father's home were "sort of like process of elimination" in that "there's only one guy it could have been because you'd pigeon-holed in your mind the other three hadn't you?"

[13] The following exchange then occurred:

> Q You I think said he was Māori?
>
> A Yes.
>
> Q You could work that out — and that would be from skin colour?
>
> A Yes.
>
> Q You said he had a chubby sort of large build?
>
> A Yes.

…

Q … you just snatched a glimpse every so often?

A Yes.

[14] Mr Winders said the lower part of the man's face was covered with a piece of material. The appellant has four large Fs tattooed across the bottom of his face. The tattoo starts below his eyes in line with a point partway down his nose. Mr Winders said he thought he tattoo must have been covered up when the appellant was in the lounge. He also explained that the appellant did not have the four Fs tattoo when Mr Winders knew him.

[15] Mr Sowry gave his evidence-in-chief via video interview because of his injuries. He said it was the crowbar man who beat him removing his eye. He does not identify the assailants but he does generally confirm the account of Mr Winders. For example, he said the man with the crowbar "made [a] comment to [Mr Winders] about his son, about something happened there as well".[2] As a result of this discussion, Mr Sowry thought the appellant and Mr Winders "obviously knew each other". He also explained that the crowbar man was with the Cadillac and left in that car. He described the crowbar man as stocky and Māori, "part Māori … possibly". Finally, his evidence was that the men were wearing Filthy Few sweatshirts.

[16] The other important identification evidence came from the appellant's former girlfriend, Lucinda Kent. She had known the appellant for eight years. Ms Kent confirmed the appellant's nickname was "Snaximusprime", "Snaximus" or "Snax".

[17] She described some cars arriving at her father's address at around 11.30 pm on the night of the attack of Mr Sowry and Mr Winders. She saw two cars. When police took her initial statement she said Mr Waitai was driving one of the cars although at trial she was not sure about that. She told the police the driver of the other car was similar in physical description to "Rico" (Mr Tremayne) but at trial she said that he could have been in the car.

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2 In cross-examination Mr Sowry had difficulty remembering this discussion.

[18] Two other cars arrived. One was described as a two-toned car. When Ms Kent first saw that car she thought that the appellant was the driver but when he did not talk to her, she was not sure. She had told the police in her initial statement that it could have been the appellant. In cross-examination she said it was an "impression". Shortly after the cars had arrived at her father's property that night Ms Kent sent a text message to her partner saying "Tak [her nickname for the appellant] just turned up".

[19] The jury also heard about a series of text messages in early January 2014 between Ms Kent and the appellant. The first message we note is one in which Ms Kent told the appellant "you'll get through this but you won't see me again. You dragged my whānau into this. I should have stood up to you ages ago." She explained that when she referred to dragging her whānau into this she meant "letting people bring stolen cars" to her family's property.

[20] Ms Kent received a text message from the appellant on 5 January that said "Just go see them and tell them you know nothing". She replied saying "I've been. They want me for a witness for the Crown." The appellant's response was "[d]on't ring from your clean number that you've been contacting the pigs with."

[21] The other exchange of messages between Ms Kent and the appellant related to the appellant's nephews. For example, he sent a message to Ms Kent saying "[j]ust got to make sure they don't find out about my nephews. Let them chase me as long as the young fellas stay safe. I'll take the hit if I have to." That was followed by a further message from the appellant to Ms Kent saying "shouldn't have never let them go."[3]

[22] In some of the text messages the appellant referred to himself as "Snax".

[23] In cross-examination, Ms Kent accepted that she knew at least two people associated with the Filthy Few who have various "Snax"-related nicknames. For example, she said she knew of a man nicknamed "Oversnax". She had heard of another man referred to as "Undersnax" but had not met him.

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[3] Another text message suggested the appellant had an alibi.

[24] Ms Kent's father gave evidence of seeing two vehicles, including the two-toned blue and white Cadillac, at his property "stashed behind the sleepout and with stuff" in them. He thought they looked suspicious and called the police. He also confirmed his statement to the police that he had seen the appellant at his property about a week before the cars arrived.

[25] The evidence at trial included footage showing two men at an ATM one of whom was wearing a camouflage jacket and black pants with a red stripe. Items similar to these were found in Mr Tremayne's bedroom. The Crown case in closing was that the man in the camouflage jacket was Mr Tremayne and the other man at the ATM machine was the appellant. That other man was wearing a dark hoody and dark pants with a faint white or grey stripe down the side. A black long-sleeved Filthy Few top was found in the appellant's bedroom. The top matched Mr Sowry and Mr Winders' descriptions of the appellant's clothing that night but the clothing was not distinctive.

[26] There was no forensic evidence or cellphone polling data linking the appellant to the crime.

[27] The appellant gave evidence. He denied going to Mr Sowry's home that night. He said that Ms Kent had turned up at his place early in the morning of 23 December 2013. His evidence was that he did not know anything about the cars at her address at that time but agreed that he would ask around. He said he told Ms Kent he would go and see the vehicles to see if he could identify the cars as belonging to anyone at the Filthy Few Motorcycle Club. For that purpose, he and another man went back to Ms Kent's father's place. He said he did not recognise either car but he made enquiries about them at the headquarters of the Filthy Few.

[28] The appellant's evidence was that he had a number of nicknames. Those nicknames were "Tak", "Taka", "Snaximus", "Snaximusprime", "Takeafew" and just "Snax". He also explained that there were other people associated with the Filthy Few with whom he linked the nickname Snax such as, "Oversnax", "Snaxtified", "Snaxformiles", and then there were the supporters who are called the "Liversnaxs" and one of his nephews, he said, was sometimes called "Undersnax" by the other

members because the appellant was his mentor. He said that the name Snax was associated with the eating habits of his section of the Filthy Few, which he referred to as a chapter.

[29] There was also evidence of references to Snax in a diary found in Mr Tremayne's room. The appellant said that the reference in the diary to "Snax H" was reference to another member who was also known as "Hairy Monster" because "he rides a Ducati Monster and he's got a hairy face".

[30] The appellant's evidence as to nicknames was supported to some extent by Mr Beguely's evidence. Mr Beguely confirmed the other members of the Filthy Few have nicknames that were Snax or variations on that, for example, "Oversnax".

Resemblance evidence?

[31] The appellant says, first, that Mr Winders' evidence as to the identity of the appellant during the incident is resemblance evidence only. Accordingly, Mr Ewen submits this evidence was not admissible as visual identification evidence.[4] He relies on Mr Winders' acceptance in cross-examination that he concluded that the crowbar man must be the appellant by a process of elimination and on the note taken by the officer undertaking the photo montage that recorded Mr Winders' observation the man shown in the photograph looked "similar" to the man at his father's home.

[32] The associated submission is that the warning given by the Judge in the terms of s 126 of the Evidence Act 2006 was inapt. Mr Ewen says it was necessary to explain the difference between identification and resemblance evidence and to refer to the factors that might affect the reliability of that evidence. It is also submitted that the standard s 126 warning ran the risk of giving the impression the evidence should be given more weight than it warranted.

[33] We see no merit in that aspect of this appeal. The review of Mr Winders' evidence shows that, having talked to the appellant and then having heard his name, Mr Winders recognised the appellant. We interpolate here that both the appellant and

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4 Defined in the Evidence Act 2006, s 4(1).

Mr Waitai were concerned at the time that Mr Winders might do just that. Further, Mr Sowry's impression was that the appellant and Mr Winders knew each other.

[34] This case can be contrasted with *R v Turaki*[5] and *R v Young*[6], which the appellant relied on to support the proposition Mr Winders' evidence should have been treated as resemblance evidence. In *Turaki*, the Court was dealing with the submission an identification warning under s 126 of the Evidence Act should have been given. The Court said no identification warning was required for the three witnesses who gave "description evidence and thus a type of resemblance evidence forming circumstantial evidence of identification".[7]

[35] To illustrate the evidence categorised in this way in *Turaki,* one of those witnesses described seeing three males outside the address. Her evidence was:[8]

> … one [was] a little short male with short hair and another [was] a male with a good physique, short clean cut hair and wearing a basketball shirt with the number 28. He was leaning against her car. She described the third male in the following terms:
>
> (a) Very thickset, chubby with fuzzy hair, the biggest of the three;
>
> (b) Six feet tall;
>
> (c) A colour in his hair of a reddy ginger colour;
>
> (d) Afro hair, very thick;
>
> (e) Holding a black umbrella;
>
> (f) Green looking bomber jacket on top.

[36] Similarly in *Young*, the witness did not make a positive identification from the photo montage. She said that "the main one I picked was number 2, 2 and 6 but I stated at the time that 2 was most likely".[9] The Court said that was evidence of resemblance, not of identification. It was a "significant circumstantial factor" but not

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5 *R v Turaki* [2009] NZCA 310.
6 *R v Young* [2009] NZCA 453.
7 *R v Turaki*, above n 5, at [58]. See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014) at 505 on resemblance evidence.
8 At [12].
9 *R v Young,* above n 6, at [6] and [34].

"positive identification evidence".[10] Although Mr Winders at times expressed himself in an equivocal way, read overall, his was a positive identification.

[37] In the circumstances Judge Harding was correct to give the warning that he did of the dangers of such evidence.

The photo montage

[38] We turn then to the challenge based on the use of the photo montage. The argument is twofold. First, that it was inappropriate to use the montage and, secondly, that the montage did not comply with the requirements in the Evidence Act applicable to a photo montage.

[39] The first submission draws on an observation in *Harney v Police* relating to the considerations relevant to determining procedure.[11] The Supreme Court observed that "[w]here there has been an extensive past association, that is likely to provide a powerful argument against a formal procedure".[12]

[40] A difficulty for us is that there was no challenge to the admissibility of this evidence prior to trial or at trial. We therefore have no findings about, for example, the nature of the prior association or as to the reliability of the evidence. On the material before us, it seems more likely the past association between Mr Winders and the appellant was not extensive. The police officer who undertook the photo montage procedure recorded the following notes of his discussion with Mr Winders:

> I haven't seen Snax for years and years. The last time I saw Snax he had long hair. We didn't call him Snax then. I can't remember his name and I just remember him having long hair like the one in photo 7 and it was scruffy. If I saw his body shape I think I might know him. He was quite stocky, the guy Snax last night.

[41] The material before us suggests that the degree of contact or knowledge was not such as to make undertaking the formal procedure inappropriate.

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10 At [34].
11 *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [28].
12 At [28].

[42] However, we do not need to reach a conclusion on this because, as we now explain, we consider the procedure undertaken did not meet the requirement in s 45(3)(b).

[43] Section 45 of the Evidence Act deals with the admissibility of visual identification evidence. Section 45(1) provides that where the police follow a formal procedure in obtaining visual identification evidence that evidence is admissible in a criminal proceeding "unless the defendant proves on the balance of probabilities that the evidence is unreliable". Section 45(2) provides that if a formal procedure is not followed and there was no good reason for not doing so, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.

[44] Section 45(3) then describes a formal procedure for these purposes. Section 45(3)(b) provides 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 7 other persons who are similar in appearance to the person to be identified.

[45] This Court in *Ah Soon v R* said that whether the montage shows persons of "similar" appearance to the appellant "is a fact-dependent evaluative exercise".[13] Randerson J continued:[14]

> Whether the others shown in the montage are similar in appearance to the suspect is a question of degree. Similar does not mean identical. The police are not required to go to extraordinary or impractical lengths to ensure that those shown are similar in appearance. However, there may be cases where an accused person has particular identifying features which, unless the others shown in the montage have similar features, may lead to a witness unfairly picking out the accused. The guiding principle must be whether the photo montage or other formal procedure is such as to avoid any material risk of predisposing the witness to identify the accused.[15]

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13 *Ah Soon v R* [2012] NZCA 48 at [23].

14 At [23].

[15] That approach was applied by this Court in *Fukofuka v R* [2012] NZCA 510 at [22]. The Supreme Court allowed Mr Fukofuka's appeal against that decision on the ground the trial Judge's

[46] Applying the approach in *Ah Soon* to this case, we note first that the appellant has facial tattoos on his neck and below his eyes but a clear forehead. The following table describes the tattoo coverage of each person in the montage shown to Mr Winders.

Male 1 Indistinct tattoo on cheeks and lower neck. Light tattoo of skulls across forehead.	**Male 2** Full face tattoo. "ROGUE" on forehead.	**Male 3** Light tattoo covering lower half of face below eyes. Clear forehead.	**Male 4** (Mr Ahomiro) Tattoo of four "Fs" in black and red covering lower half of face below eyes. Neck tattoo. Clear forehead.
Male 5 Full face moko.	**Male 6** Full face and neck tattoo.	**Male 7** Tattoo on right side of face only. Light coverage of right side of forehead.	**Male 8** Moko covering lower half of face below eyes. Clear forehead.

[47] The appellant's clear forehead was of some significance in light of Mr Winders accepting in cross-examination that the offender had "no sign of a tattoo" on the forehead. As the table shows, in the montage only two other persons have a clear forehead (photographs 3 and 8). The person in photograph 7 has a light tattoo on part of the right side of his forehead. As it happens, Mr Winders knew the man in photograph 3. Because of the view we reach as to the effect of the non-compliance with the requirement the other subjects be similar in appearance, we do not need to decide what impact the fact Mr Winders knew this person had on the reliability of the montage.

[48] This is not a situation where the police would have been unable to find photographs of other persons with some facial tattoos but clear, or at least mostly clear, foreheads. Importantly, given the limited parts of the face Mr Winders had seen as the means of identifying the appellant, the photographs did not show seven men of similar

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directions did not comply with the requirements of s 126 of the Evidence Act: *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1.

appearance and there was in the circumstances a material risk of the montage predisposing Mr Winders to identify the appellant. In particular, the coverage of his tattoos was a unique identifying feature so there was a risk Mr Winders' attention would be drawn to him.

[49] The Crown cannot be said to have shown beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.[16]

[50] We turn then to consider whether the Crown can nonetheless show that a conviction was inevitable.[17]

[51] This was a fairly strong Crown case. A number of points can be made. First, Mr Winders' identification was supported by that of Ms Kent. Mr Ewen submits Ms Kent's identification was not definitive because she accepted in cross-examination that she had the impression it was the appellant. However, we consider it was open to the jury to assess her evidence in light of her intimate knowledge of the appellant and her obvious reluctance to incriminate her former boyfriend. Mr Winders' identification also drew some, more general, support from Mr Sowry's evidence. Secondly, the text messages supported the identification of the appellant as one of the offenders. Thirdly, the appellant was in the area at the time and the jury was able to assess his explanation for his visit to Ms Kent's father's property. Finally, the appellant was associated with the other offenders. There is no dispute the appellant is a patched member of the Filthy Few.

[52] Those factors need to be weighed against the well-recognised difficulties with identification evidence. The prescription for formal processes like the montage is designed to try to allay these difficulties so compliance is important.[18]

[53] Further, the Crown in closing treated the photo montage as an important piece of evidence. Identification was obviously the central issue at trial. The Crown prosecutor started her opening with a summary of the identification evidence against

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16 Evidence Act, s 45(2).
17 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [43]–[44].
18 See Law Commission *Evidence* (NZLC R55, 1999) at [C127] and [C224].

each of the four men. In terms of the appellant she identified six factors. They were the appellant's nickname, the fact that he had been picked out of a photo montage by someone who had not seen him for years, the cars were taken to the property where his former girlfriend was staying, Ms Kent identified him albeit somewhat reluctantly, the text messages, and the fact that the appellant was on the run but had been ordered in by those higher up in the Filthy Few. Finally, the Crown prosecutor said that the appellant had been identified in the photo montage despite the tattoo because Mr Winders felt his forehead and his eye shape was sufficiently distinctive. Ms O'Brien said this was "quite a powerful piece of evidence".

[54] When all of these factors are considered we are not satisfied conviction was inevitable.

Result

[55] The appeal against conviction is allowed. The convictions are set aside and a retrial is ordered. Any questions of bail are to be dealt with in the District Court.

[56] The record of the first warning given to the appellant by the District Court on 2 December 2014 is cancelled in respect of the convictions quashed pursuant to s 86F of the Sentencing Act 2002.

[57] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of the retrial. Publication in law report or law digest is permitted.

Solicitors:
Crown Law Office, Wellington for Respondent