NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) AND ANY PERSON(S) UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA716/2023
[2024] NZCA 375

BETWEEN	JOSEPH TUIMAVAVE Appellant
AND	THE KING Respondent

Hearing: 25 June 2024

Court: Ellis, van Bohemen and Hinton JJ

Counsel: T W Luders for Appellant
E J Hoskin for Respondent

Judgment: 8 August 2024 at 2.00 pm

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by van Bohemen J)

[1] Following a jury trial in the District Court at Kaikohe, Joseph Tuimavave was found guilty of three charges of sexual conduct with a young person under 16,[1] and

[1] Crimes Act 1961, s 134(3). Maximum penalty: seven years' imprisonment.

one charge of strangulation.[2] He was sentenced by Judge de Ridder to three years' imprisonment and his name was automatically entered onto the Child Sex Offender Register.[3] Mr Tuimavave appeals his convictions.

Relevant background

[2] The following background is taken from the police summary of facts, Judge de Ridder's sentencing notes, and evidence that was not disputed at trial.

[3] The alleged offending occurred in January 2021. The complainant was, at the time, a 14-year-old girl camping with her family at Mahinepua Bay, in Northland.

[4] On the afternoon of 16 January 2021, the complainant and two of her cousins (RF and RT) walked away from the camping area along the beach to its far end. A man was also at the beach. No one else was present.

[5] RF went for a swim while the complainant and RT sat on some rocks. The man approached the girls and engaged in conversation with the complainant. The man was shirtless, wearing only a pair of black shorts and a straw hat.

[6] The man asked the complainant her name and where she was from. In an attempt to get away from the man, the complainant walked into the water and swam alongside RF. The man commented to RT that he could not touch her because she was wearing glasses.

[7] The man followed the complainant into the water. For a period, the girls and the man interacted, throwing stones. When the complainant and RF got out of the water and walked up the beach, the man followed them and came close to the complainant and her cousins. The man again asked the complainant her name, where she was from and who her parents were. The complainant did not respond, but RT did.

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2 Section 189A(b). Maximum penalty: seven years' imprisonment.
3 *R v Tuimavave* [2023] NZDC 21085.

[8] The man grabbed the complainant from behind, pushed her into the water and wrapped his arms around her, moving her into the water with a tight grip. He squeezed the complainant's chest. She could feel the man's hands groping her breasts, groin area and around her bottom over the top of her clothes. The complainant described the touching as sexual and that she felt the man's hands grabbing and moving all over her body.

[9] The man then grabbed the complainant by the neck. The complainant tried to pull his hands away as the man pulled her towards him and into the water. When a boat came into the bay, he let the complainant go and walked away.

[10] The next day, on 17 January 2021, the complainant and RT encountered the man in his car. RT had a short conversation with him before she and the complainant walked back to their campsite.

[11] The complainant did not say anything to her parents about the incident at the time. However, on 30 March 2021, the complainant disclosed the incident to a teacher at her school. The police were called and the complainant's parents were informed. Later that afternoon, the complainant told her mother (MP) what had happened at Mahinepua Bay. The complainant told her mother that the man had a white beard, that he looked Māori because of the colour of his skin, and that he was not wearing a shirt but had on "black-ish" shorts.

[12] On 1 April 2021, the complainant described the man to her father (HK). She said he was a Māori guy with a grey beard and a straw hat. She told her father the car was a tan colour, similar to the colour on the wrapping of a box for a present that she and he were wrapping for the complainant's older sister (SP) who was coming home that weekend for Easter. The same day, HK telephoned his sisters, who lived in the area, to tell them what had happened to his daughter and told them of her descriptions of the man and his car.

[13] On 2 April 2021, MP told her older daughter (SP), who had returned home that day for the Easter break, what had happened to the complainant.

[14] On 4 April 2021, HK's sister (PS), who lived at Wainui Bay (a short distance down the coast from Mahinepua Bay), telephoned HK to say there was a car that matched the complainant's description at the property next to her house. HK drove to PS's house and saw a grey or tan-coloured Ford Falcon over the fence between the properties. PS told HK that she had met the man who drove the car, but she did not know him.

[15] HK went to the fence and saw a man that matched the complainant's descriptions. HK made a video recording and took photographs of the man and the car on his cell phone. Using Facebook Messenger, HK sent copies of the photographs to SP. It is not in dispute that this was Mr Tuimavave and his car.

[16] On 5 April 2021, SP and the complainant had a conversation in which the complainant described what had happened at Mahinepua in January. As SP said in her evidence, which was not challenged, SP showed the complainant the photograph of the car that HK had taken the previous day. According to SP, the complainant looked at the photograph for a few seconds, then turned her head and cried an intense deep hurt cry. She cried for a period of five to 10 minutes. SP asked the complainant if that was the car the man drove. The complainant nodded her head. SP then showed the complainant the photograph of Mr Tuimavave and was asked if that was the man who had grabbed her. The complainant nodded and said "I think so." However, when asked about her uncertainty, the complainant said, "[f]rom his neck down" it looked like him but that she just did not recognise his face.

[17] In the course of the same conversation, SP zoomed in on the photo of Mr Tuimavave's car and pointed out that they could see a dark brown coloured cowboy hat and a straw hat. The complainant said that that was the straw hat that the man was wearing. The complainant then googled "straw hats" on her phone and showed SP an image of a straw hat similar to the hat the man had been wearing.

[18] On 6 April 2021, the complainant was interviewed by police. The complainant was unable to describe the man's face but said he was probably Māori because he had dark skin. She also said he was probably in his late 50s or early 60s, was not wearing a shirt but was wearing a straw hat and black shorts, was "biggish" around the stomach

and had a beard with grey hairs. She thought he had brown or blue eyes and was nearly six foot tall. She did not think he had any tattoos. She was pretty sure the hat had two strings coming around and had a green rim. A short time later, she said the rim was green or black. When shown a photograph of Mr Tuimavave, she said she was not sure if he was the man. However, when shown a photograph of Mr Tuimavave's car, she said it was the one she saw the day after the incident at Mahinepua.

[19] On 7 April 2021, Mr Tuimavave was arrested and charged with doing an indecent act on a young person.[4]

[20] On 7 and 8 April 2021, RT and RF were interviewed by police.

[21] RT, who was 12 at the time of the interview, said the man looked like he was in his 60s, had a grey short beard, his hair was similar and he was Māori. She said he had very dark brown skin, was shirtless and barefoot, but that otherwise she could not remember what he had been wearing. She did not see any tattoos. She said his face was wrinkly and his teeth were "quite rottenish". She also said he did not wear anything on his head, was of skinny build with a big belly, and had hazel or brown eyes. When asked to describe the car, she said it was "like a, kinda old blue car."

[22] After the interview, police undertook a formal identification procedure and showed RT a photo montage which included a photograph of Mr Tuimavave. When asked to identify the man who had touched the complainant, RT pointed to a photograph of another man.

[23] RF, who was 14 at the time of the interview, said the man was dark skinned, was around the same height or taller than the girls. RF did not think the man had any tattoos. She said he was medium build. She could not remember what he was wearing or his face. She thought he would have been between 30s and 50s.

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[4] Later, on 6 July 2021, a strangulation charge was also brought against Mr Tuimavave. Then, on 27 August 2021, the Crown charges were finalised, and it was on these charges that Mr Tuimavave was found guilty.

[24] After the interview, police undertook a formal identification procedure and showed RF a photo montage which included a photograph of Mr Tuimavave. When asked to identify the man who had touched the complainant, RF was unable to identify anyone in the montage.

The trial

[25] The sole issue at trial was identity: was Mr Tuimavave the man on the beach?

[26] The complainant, her cousins (RT and RF), her mother (MP), her father (HK), her father's sister (PS), and the complainant's sister (SP), all gave evidence. The video interviews of the complainant, RT and RF were played.

[27] In evidence in chief, the complainant said the man's car was a "Ford off-gold car." In cross-examination, the complainant agreed she had told her father the man was a Māori man, with grey in his beard and a straw hat. When asked if the hat had a green rim, she said, "[y]es, that is what I [believe] I remembered." She was then shown a photograph of Mr Tuimavave's hat and the following exchange occurred:

> Q Is that the hat you're referring to?
>
> A Yes.
>
> Q Can you tell us what colour the rim of the hat is?
>
> A Black.

[28] Defence counsel then questioned the complainant about what she had told the police at her interview about the colour of the man's eyes, whether he had tattoos, whether he was shirtless, the colour of his car and when she had seen the car.

[29] When RF was asked in cross-examination why she thought the man was in his 30s to 50s, she said she did a wide spectrum because she was not good at identifying ages. She said he looked a bit on the older side, but she had said 30 just in case she was wrong on that.

[30] HK and PS gave evidence of the circumstances of HK's filming and photographing of Mr Tuimavave and his car. PS also gave evidence of first meeting

Mr Tuimavave when he came onto her property in December 2020 or January 2021 because he was looking for her brother-in-law. PS described him as wearing shorts, a singlet and a straw hat, and being aged somewhere in his 60s. PS said she met Mr Tuimavave a number of other times. She said he was always in the same clothes although sometimes he was shirtless and just wore black shorts.

[31] SP gave evidence of her conversation with the complainant on 5 April 2021, of the complainant's reaction when shown a photograph of Mr Tuimavave's car, and of the complainant's uncertainty when shown a photograph of Mr Tuimavave.

[32] A statement by Mark Paul, a local resident who lived near Mahinepua Bay, was read by consent. In his statement, Mr Paul said he had known Mr Tuimavave for many years and that Mr Tuimavave had come to visit him earlier in 2021. Mr Paul said Mr Tuimavave had been looking for a place to stay so he let him stay with him sometimes. Mr Paul said that: he had never seen anyone other than Mr Tuimavave drive his brown Falcon; Mr Tuimavave always wore summer clothes — shirt, shorts and a hat; and, while Mr Tuimavave sometimes stayed with Mr Paul, Mr Tuimavave had told Mr Paul he would stay down at Wainui and Mahinepua beach as well.

[33] PS and Ihaka Lendon, who had been a police officer at the time of the incident, gave evidence about the community in the area. PS said she had lived in the Wainui Valley with her husband for a very long time. She said there were 22 or 23 homes at Wainui and everyone knew each other. She said Mahinepua was "probably a little bit lesser, with family … all knowing each other".

[34] Mr Lendon said he had lived in the Far North for a long time. He described the area of Wainui and Mahinepua as follows:

> Geographically close in terms of community, like a village, people live within close proximity, everyone's related and if they're not related, they certainly know who lives in their space. So small population, mostly whakapapa to that space. But those that live in that area certainly know who's in the space.

[35] The Crown's case was circumstantial and was based on the following:

(a) Mr Tuimavave broadly matched the descriptions offered by the complainant, RT, and RF — being an older Māori man with a largish belly and a grey-streaked beard.

(b) Mr Tuimavave regularly wore the outfit described by the complainant — no shirt, black shorts and a wide-brimmed straw hat.

(c) Mr Tuimavave drove a tan/gold car that matched the complainant's description.

(d) Mr Tuimavave was in the Kaeo area between December 2020 and April 2021.

(e) The beach where the offending occurred is in a secluded, close-knit community with only about 20 residents.

(f) Mr Tuimavave and his car were seen by others in the area, including PS, during the period December 2020 to February 2021.

The Judge's summing up

[36] In summing up, the Judge stated:

> [30] As I have already commented, the Crown case is one based on circumstantial evidence and circumstantial evidence relies on reasoning by inference. It gets its force from involvement of a number of factors which taken together point to the guilt of Mr Tuimavave. The analogy that is often drawn is of a rope. Any one strand of the rope may not support a particular weight but the combined strands are strong enough to do so. The logic that underpins a circumstantial case is that Mr Tuimavave is either guilty or he is the victim of an implausible and unlikely series of coincidences.
>
> [31] The [case for the] Crown is that there are several establish[ed] facts from which you can draw the inference that Mr Tuimavave was responsible for the offending against [the complainant]. In particular he was in the area at the time, the physical description is of him and of his clothing and of the car the Crown say all point to him. Whether you accept that these facts have been established and whether you draw the inference that the Crown invites you to draw is a matter for you as are all matters of facts. Of course the defence case is that these were very general descriptions of the man responsible and of the

car, there is no positive identification of Mr Tuimavave and in fact one of the Crown witnesses identified somebody else.

[32] The important point for you in terms of drawing inferences is that you must remember an inference is a conclusion drawn from proven facts, it is not a guess. On this aspect of the case the ultimate question for you is whether you are satisfied that it was Mr Tuimavave who carried out the offending against [the complainant].

…

[34] Mr Annandale [for the Crown] pointed out to you that the Crown case does rely on circumstantial evidence to establish that it was Mr Tuimavave who assaulted [the complainant] on the beach. He invited you to look at [the complainant]'s evidence first and also invited you to look at the level of detail that [the complainant] gave both to her sister and in the police interviews about what she said had happened. In particular what she said about the man and the car and what she said about the photos she was shown of the man responsible and the photo of the car.

[35] [The complainant] referred to her evidence about what she said about the face of the man who attacked her and her evidence about that is not surprising in Mr Annandale's submission given that she said he was wearing a straw hat and she later gave a positive identification of that straw hat but she said that she was looking down when the man was speaking to her and then that the man attacked her from behind and in those circumstances [the complainant] could not focus on his face.

…

[38] [Mr Annandale] then focussed on the descriptions given by [RT], [RF], and [the complainant] herself and the physical characteristics and the detail they gave about the man responsible together with the clothing. He then submitted that the description of the car is relevant as well and pointed out [the complainant]'s description of it and that she said it had a straw hat inside and [the complainant] said it was like the one that the man who attacked her at the beach was wearing.

…

[46] As far as the man at the beach is concerned, only three people can give a description of the man who was responsible and he then took you through what those three people – that is [RT], [RF] and of course [the complainant] herself had to say. [Mr Natusch for the defendant] noted in particular that [RT] said there was no tattoo but also [that] the man was not wearing a shirt. [RF]'s description was very brief. [Mr Natusch] noted that there were two police line ups and in those [RF] did not recognise anyone as being responsible or being the man at the beach. [RT] did identify the man who she said touched [the complainant] but the man she identified was not Mr Tuimavave.

[47] He then also noted in [the complainant]'s description she in particular said that the man responsible did not have a tattoo where in fact Mr Tuimavave does have a distinctive tattoo. He also drew to your attention the photo of Mr Tuimavave shown to [the complainant] by her sister and the question her

> sister asked about the face and [the complainant]'s response was I just do not recognise his face.
>
> [48] Mr Natusch then put together the evidence of the descriptions of the man on the beach from the three young women and said on that evidence the age could be anywhere from the 30s through to the 60s, the eyes could be hazel, brown or blue. The build could be a medium build or slight with a big belly and the hair could be black or brown and overall he submitted to you the overall description of those matters could apply to a large number of men in the Kaeo area.
>
> …
>
> [52] Well as I have said, I have endeavoured to summarise what I understood to be the essential points that Mr Annandale and Mr Natusch were making to you in their addresses but you must take into account all of what they had to say, but as I said a few moments ago, what you make of what they had to say is entirely a matter for you.

Leave to appeal out of time

[37] This appeal was filed out of time. The notice of appeal was filed on 27 November 2023 — 45 working days after Mr Tuimavave was sentenced.

[38] The Crown's position is that as the delay is relatively short and there has been no prejudice to the Crown, an extension of time is not opposed.

[39] We are satisfied it is appropriate to grant an extension of time.

The appeal

[40] Mr Tuimavave's notice of appeal states that the jury's verdict was unreasonable because:

> … the jury could not have been sure that [Mr Tuimavave] was the offender in circumstances where there was no visual identification evidence to suggest that and where one of witnesses to the offending identified someone other than [Mr Tuimavave] as the offender.
>
> The circumstantial evidence and the description evidence of the offender were insufficient to establish guilt beyond a reasonable doubt, particularly where the description given was generic in a Northland summertime beach setting (shirtless, [Māori], straw-hat, black shorts).

[41] In written submissions, counsel for Mr Tuimavave added the further ground that the Judge erred in summing up by not giving an identification warning to the jury,

and that error created a real risk that the outcome of the trial was affected. Although Mr Luders substantially modified that ground in his oral submissions and no longer said the Judge should have given a direction in accordance with s 126 of the Evidence Act 2006, he maintained that some direction was necessary to caution the jury, particularly after the Judge stated that the complainant had given a positive identification of the straw hat the man was wearing.

[42] Mr Luders submitted that if the first ground of appeal were accepted, the proper course would be to direct a judgment of acquittal. On the second ground, he said that, while a successful appeal would ordinarily result in the matter being directed for retrial, the Court should direct a judgment of acquittal given the age of the allegations, the age of the complainant and direct witnesses, the time since the alleged commission of the offence, the likely delay between the appeal result and any retrial, and the fact that the appellant has fully served the sentence of three years' imprisonment.

Approach on appeal

[43] Under s 232(2) of the Criminal Procedure Act 2011 (CPA), the Court must allow an appeal if, having regard to the evidence, the jury's verdict was unreasonable or a miscarriage of justice has occurred for any reason. Otherwise, the Court must dismiss the appeal.[5] A miscarriage of justice includes any error, irregularity or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected or that has resulted in an unfair trial or a trial that was a nullity.[6]

Was the jury's verdict unreasonable?

Legal principles

[44] The Supreme Court in *Owen v R* considered the test for an unreasonable verdict to be as follows:[7]

> The question is whether the verdict is unreasonable. That is the question the Court of Appeal must answer. The only necessary elaboration is that expressed earlier, namely that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the

5 Criminal Procedure Act 2011, s 232(3).
6 Section 232(4).
7 *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

> required standard that the accused was guilty. We do not consider it helpful to employ other language such as unsafe, unsatisfactory or dangerous to convict. These words express the consequence of the verdict being unreasonable. They should not be used as tests in themselves.

[45] The Supreme Court endorsed the following aspects of this Court's decision in *R v Munro*:[8]

> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
>
> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
>
> (f) An appellant who invokes s 385(1)(a) [now s 232 of the CPA] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

Submissions for Mr Tuimavave

[46] Mr Luders highlighted the differences in the descriptions of the man in the evidence of the three eyewitnesses — the complainant, RT, and RF — with regard to his ethnicity, age, beard and hair colour, build, clothing and teeth. He submitted that these differences, alongside the failure of any of the three witnesses to see Mr Tuimavave's large tattoo, the difference between the evidence of the complainant and that of RT about the colour of the car, and, in particular, RT's visual identification of another person as the man, ought to have left the jury with reasonable doubt. He said the Crown's circumstantial evidence, including Mr Tuimavave fitting parts of the descriptions given, being in the Kaeo area and being dressed in similar but

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[8] At [13], citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

otherwise generic summer attire in a Northland setting, was an insufficient and unreasonable basis to be sure of the charges beyond reasonable doubt.

Submissions for the Crown

[47] Ms Hoskin, Crown counsel, submitted that, although the Crown case was circumstantial, it was more than sufficient to satisfy the jury that Mr Tuimavave was the man on the beach. Ms Hoskin said the jury was appropriately and thoroughly directed as to the presumption of innocence, and the onus and standard of proof. She submitted that the trial record appropriately supported Mr Tuimavave's convictions and this ground of appeal should fail.

Analysis

[48] It was clear from the closing submissions of the Crown and the defence and from the Judge's summing up that the principal issue for the jury to determine was whether Mr Tuimavave was the man on the beach.

[49] While Mr Luders has understandably focused on the differences in the evidence of the complainant, RT and RF, their evidence was not the only evidence that bore on the identification of Mr Tuimavave. There was also the evidence of Mr Paul and PS about Mr Tuimavave's presence in a small and remote area, his use of his car, and his appearance and clothes — all of which reinforced the evidence of the three eyewitnesses. PS and Mr Lendon gave evidence about the small size of the communities at Mahinepua and Wainui Valley, where everyone knew each other and who was in the area. There was also the evidence of SP about the complainant's reaction when shown the photograph of Mr Tuimavave's car.

[50] Subject to the discussion that follows regarding the adequacy of the Judge's directions on identification, having regard to all the evidence, we do not consider that the jury could not reasonably have been satisfied to the required standard that Mr Tuimavave was guilty.

Was an identification direction, or some other direction, required?

Legal principles

[51] Section 126(1) of the Evidence Act 2006 provides:

> In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.

[52] Section 4(1) of the Evidence Act defines visual identification evidence as:

> (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
>
> (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a)

[53] In *Ponga v R*, this Court held:[9]

> [37] … Description evidence is circumstantial evidence provided by an eyewitness referring to physical features or characteristics of the person involved in an offence. In *R v Turaki* and in *R v Joseph* this Court said that s 126 has no application to such "description" evidence. This is because s 126 warnings are only needed where a possibility exists that a witness may have mistaken one person for another. That possibility does not exist where no person is positively identified.
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> …
>
> [41] It can, however, be difficult to fit particular evidence into a particular category as used in the cases. The evidence may engage aspects of more than one category. …

[54] This Court in *Joseph v R* explained the reason for that position:[10]

> [39] … The reasons are twofold. First, and at a fundamental level, a warning to a jury is only necessary where, on the evidence, the possibility exists that a witness may have mistaken one person for another. The possibility of that mistake does not exist where there is only description evidence.

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9 *Ponga v R* [2014] NZCA 496 (footnotes omitted).
10 *Joseph v R* [2013] NZCA 290 (footnote omitted).

> [40] Secondly, if no witness has identified the defendant, then a s 126 warning to the jury about relying on the correctness of the identification of the defendant is not needed, and is inappropriate. The jury would be confused and would wonder what the Judge was talking about.

Submissions for Mr Tuimavave

[55] Mr Luders submitted that the Judge should have made identification warnings on several bases. First, he said a warning was required in relation to the complainant's evidence that it was the same hat in the back of Mr Tuimavave's car as the one worn by the Man at the beach. Mr Luders said that evidence was a form of recognition evidence — not description evidence. He notes both the Crown and the Judge described that evidence as a "positive identification" and says an identification warning was required.

[56] Secondly, Mr Luders submitted that s 126 was engaged when RT gave a visual identification of someone other than the defendant. He said the case against Mr Tuimavave depended wholly or substantially on the incorrectness of that identification in that the jury had to be sure that RT's formal identification did not produce a reliable identification before it could dismiss the possibility that RT had correctly identified the offender. Mr Luders said that, because RT's formal identification was in competition with the asserted positive identification of the hat, an identification warning was required.

[57] Mr Luders said, if he were wrong that the positive identification of the hat was recognition that triggered s 126, he submitted, in the alternative, that this was a case where the jury should have been warned about the danger of relying on the "identification" of a common straw hat when reaching its verdicts.

Submissions for the Crown

[58] Ms Hoskin said no identification warning was required and it was unsurprising and did not constitute an error that the Judge did not give one. She submitted there was no visual identification evidence to trigger s 126 because the complainant and her two cousins described the offender but did not go further and purport to identify Mr Tuimavave as the offender.

[59] Ms Hoskin said the suggestion that the complainant's evidence about the hat rendered her evidence "recognition evidence" did not withstand scrutiny. She said the complainant simply agreed with a suggestion, put to her by defence counsel, that the hat she described the man wearing was the hat pictured in the photo booklet. Ms Hoskin notes that question was deliberately put to the complainant in cross-examination in an attempt to damage her credibility, by highlighting the apparent inconsistency between her description of a hat with a green rim and the photograph of the appellant's hat with a black rim.

[60] Ms Hoskin accepted that RT offered visual identification evidence but submitted that the requirements of s 126 were not made out because the case against Mr Tuimavave did not wholly or substantially rely on the correctness of that identification. She said that, while the case for Mr Tuimavave might have depended on the correctness of RT's identification, the case against him did not. She suggested that a warning to the jury to have exercised caution before relying on RT's identification would have been to the detriment of Mr Tuimavave's case.

[61] In response to the submission that the Judge should have given a warning even if one was not required under s 126, Ms Hoskin maintained that there was no identification evidence in the trial so a warning was not warranted and would not have made sense to the jury.

Analysis

[62] As Mr Luders accepted at the hearing, this case was about description evidence. In terms of what this Court said in *Ponga*, the Crown evidence was circumstantial evidence provided by eyewitnesses referring to physical features or characteristics of the person involved in an offence. This was description evidence, not identification evidence; the eyewitnesses did not identify or "recognise" Mr Tuimavave. Accordingly, there was no risk that a witness may have mistaken Mr Tuimavave for someone else. The fact that RT indicated someone else when shown the photo montage does not change that reality. Whoever that person was, they were not on trial and, as argued by Ms Hoskin, their identification did not trigger s 126

because the Crown's case did not wholly or substantially rely on that identification being correct — in fact, quite the opposite.

[63] Accordingly, on this basis, there was no need for an identification warning, and it would well have been confusing for the jury if one had been given.

[64] The Judge's reference to the positive identification of the straw hat was stated as an aside when summarising Crown counsel's submission that the straw hat explained why the complainant was not able to give evidence of the man's facial features. The only other reference to the hat in the summing up was when the Judge summarised Crown counsel's submission regarding the complainant's descriptions of the man and the car. The Judge noted that the complainant had said the car had a straw hat inside "like the one that the man who attacked her at the beach was wearing".

[65] While it would have been preferable for the Judge not to have referred to the complainant's "identification" of the hat, the complainant had confirmed, in response to a question from defence counsel, that the hat in the photograph she was shown was the hat to which she had been referring. In that sense, the Judge's observation was not wrong. However, it is apparent from the context of his remarks that the Judge's principal point was that it had been established that the man who attacked the complainant was wearing a hat. This was descriptive in nature. He did not say or suggest that the wearer of the hat identified by the complainant had, therefore, been identified as the person who had attacked her.

[66] Regardless of the use of the phrase "identification of the hat", it was clear that the person who attacked the complainant was wearing a hat like the one found in Mr Tuimavave's car. Moreover, it was clear from the evidence that Mr Tuimavave generally wore a straw hat when in the area of Mahinepua Bay between December 2020 and February 2021. These were some of the strands of evidence that the jury could properly take into consideration in reaching its verdicts. But they were far from the only strands of evidence that pointed in the direction of Mr Tuimavave being the person who had attacked the complainant. While the Crown placed some significance on the identification of the hat in its closing, it was not suggested in the Judge's

summing up that the identification of the hat, as opposed to the description of the hat, played any significant role in identifying who had attacked the complainant.

[67] For that reason, there was no need for the Judge to warn the jury of the special need for caution when relying on the complainant's identification of the hat. Moreover, in the context of this case we consider it would have been confusing for the jury if the Judge had given a specific direction regarding the complainant's evidence about the hat.

[68] For these reasons, we are satisfied that the Judge did not make an error by not giving a specific direction about the evidence relating to the hat and that no miscarriage of justice occurred.

Result

[69] The application for an extension of time is granted.

[70] The appeal is dismissed.

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