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BUT...

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M. 62/93

94/173

IN THE MATTER

of an Application for
Directions
pursuant to Section 344A
of
the Crimes Act 1961

BETWEEN

~~HER MAJESTY THE QUEEN~~

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Applicant

UNIVERSITY OF OTAGO
- 7 APR 1994 AND
LAW

WAYNE BARNES
DEREK LANCE McFARLAND

Accused

Ruling: 26 January 1994

Counsel: *Philip Smith* for Crown
Ken Bailey for Accused Barnes and McFarland

RULING (2) OF TOMPKINS J.

Mr Bailey, for the accused Barnes and McFarland, having given notice to the Crown Solicitor that the evidence of a witness, Mr Lather, relating to the identification of his clients, is to be challenged, the Crown has applied for an order pursuant to s.344A of the Crimes Act 1961 that Mr Lather's evidence be admitted at the trial.

The draft indictment contains four counts alleging that the four accused committed an aggravated robbery at the Westpac Bank at Ruakaka on 8 January 1993, the further counts arising directly out of that alleged aggravated robbery. It is the case for the Crown that the accused Misa and Midwood were the principal offenders, that is the two that carried out the aggravated robbery, and the accused Barnes and McFarland were guilty of these offences as parties.

As part of the Crown case against Barnes and McFarland the Crown seeks to prove that these two were at the Whangarei hospital at 1.00am on the morning of 8 January 1993 some seven or eight hours before the robbery occurred. The Crown alleges that they were there in a small white van and that one of them had and was using a cell phone. The Crown also allege that one of the robbers at the bank had a cell phone and although the two robbers at the bank made their initial get away in a brown Mitsubishi Sigma they made their ultimate get away in a small white van. The Crown will also be relying on evidence from Telecom relating to the use of cell phones and the identification of the cell phones used with the accused or their associates.

In order to establish that Barnes and McFarland were the two persons at the hospital with a cell phone and using a white van, the Crown relies on the evidence of Mr Lather who, at the relevant time on the early morning of 8 January, was a telephonist at the Whangarei Base Hospital. He gave evidence at the deposition hearing of two persons approaching the entrance to the hospital one of whom went up to the counter and asked Mr Lather whether a person named Ryder was a patient at the hospital. Mr Lather noticed that that person was carrying a cell phone. The other person was visible to Mr Lather outside the doors of the hospital. At one stage he asked the first person for the results of the enquiry. Shortly after they left, he saw a smallish white van drive out of Hospital Road. When Mr Lather gave evidence at the deposition hearing he identified Barnes and McFarland as the two men he saw at the hospital early on the morning of 8 January. It is that evidence of identification that Mr Bailey seeks to have excluded from the trial.

Later on the morning of 8 January the Police stopped a small white van at Warkworth. Barnes and McFarland were in the van. Because of the possibility of their being involved in the robbery that had taken place earlier that day they were asked to remain at the Warkworth Police Station while a woman who had observed the two bank robbers leaving the bank was brought to Warkworth for identification purposes. She, having seen the two, told the Police that they were not the persons she saw leaving the bank. While Barnes and McFarland were at the Warkworth Station they were each photographed, that is photographs of each of them were taken face on and side on. Because they had not been identified as the bank robbers they were then allowed to leave.

The next day, 9 January, Detective now Sergeant Hoyle interviewed a Mr Sehmb who was also at the Whangarei hospital early on the morning of the 8th. Mr Sehmb was able to identify the small white van at the hospital as that shown in photographs produced by the Police. Mr Sehmb when asked at the deposition hearing to identify the two persons he had seen at the hospital was unable to do so. Mr Sehmb suggested to Detective Hoyle that he approach Mr Lather. Having obtained the statement from Mr Lather about the two men at the hospital Detective Hoyle first showed Mr Lather black and white photographs taken by a camera at the bank showing the robbers in the bank. Mr Lather said that the persons at the hospital were not those shown in those photographs. Detective Hoyle then showed Mr Lather the colour photographs of Barnes and McFarland that had been taken at the Warkworth Police Station the previous day. Mr Lather said that the persons in the photographs were the persons he had seen at the hospital.

The Crown does not seek to lead from Mr Lather the evidence of his identification from the photographs. It relies solely on the dock identification Mr Lather has made and anticipates will make at the trial.

The essence of Mr Bailey's submission is that it was improper for the Police Officer to show the single photographs of Barnes and McFarland to Mr Lather under the circumstances that existed and that the evidence of dock identification by Mr Lather should be excluded because the prejudicial nature of it outweighs its probative value and more particularly because of the risk that Mr Lather's dock identification has been affected by the photographs that he was shown.

It has been recognised that where photographs have been improperly shown there remains a risk that that may create a "displacement effect" in the mind of the witness so that a subsequent direct identification is founded on the photograph rather than on memory of the initial observation: *R v Harris* [1991] 7CRNZ 611 *Hardie-Boys J.* at 614, *R v Hicks* [1992] 8CRNZ 73 *Casey J.* at 75. In *Hicks* *Casey J.* referred to the ever present risk of the photograph identification influencing the dock identification so that it cannot be said it will not continue to be a potent factor in any identification made in Court.

In support of this principal submission, Mr Bailey submitted that, in showing the single photographs in the way that he did, Detective Hoyle was in breach of the Police General Instructions relating to the use of photographs for identification now of suspects. I need not set out details of those instructions, the essential parts for present purposes being that the Police should conduct the identification of persons suspected of committing offences in the fairest possible manner, that identification parades should be used and that if photographs are to be used a number, at least eight, should be shown to the witness.

Mr Smith, for the Crown, submits in response that these instructions did not apply because at the time the photographs were shown to Mr Lather these two accused were not suspects. Detective Hoyle said that the purpose of showing Mr Lather the photographs was to eliminate Barnes and McFarland as he was aware that they had been spoken to in Warkworth, was aware that they had not been identified as the robbers and thought they had been eliminated from the enquiry. Mr Bailey challenges this statement. Detective Hoyle acknowledged in cross examination that in reliance on the information he had been given by Mr Sehmb he had a belief that Barnes and McFarland were the people involved in the white van using a cell phone at the Whangarei hospital. But Detective Hoyle maintained that he still had nothing to connect McFarland and Barnes with Ruakaka or being anywhere near Ruakaka on the Friday morning.

In this situation it is a little difficult to understand why he thought it necessary to show Mr Lather the photographs of Barnes and McFarland when Mr Lather had already confirmed that the persons he saw at the hospital were not those shown in the photographs of the bank robbers. But it may well be that he considered it appropriate, simply as a matter of normal investigation, to find out whether the two persons at the hospital were Barnes and McFarland and for that purpose to use the photographs that had been taken at the Warkworth station the previous day.

In my view, at that stage, Detective Hoyle did not have grounds for believing that Barnes and McFarland were involved in the robbery. But he was aware that a cell phone had been used at the robbery and that the robbers had made their ultimate get away in a small white van and that one of the two persons seen at the hospital had a cell phone and they left the hospital in a small white van. So, while he may not have had grounds for believing that they

were involved in the robbery, he may well have accepted a possibility of some degree of involvement, the nature of which at that stage he would not be able to ascertain.

The authorities have recognised a distinction between the use of photographs at the stage of investigation in order to obtain information leading to the identity of the accused and the subsequent use for evidential purposes at the trial: *R v Hicks* [1992] 8CRNZ 73 at 74. Whilst Detective Hoyle may not have been using these photographs to obtain information leading to the identity of the robbers, I consider he was using them because, as I have stated, there was at least some possibility that they may in some unknown way have been involved.

In these circumstances, I do not consider that the instructions set out in Rule J. 21 of the Police General Instructions necessarily applied. However, this is not the end of the matter. Whether or not he was acting in breach of the instructions or otherwise improperly, the fact is that these single photographs were shown to this witness and that witness later has given evidence of the identification of the two persons at the hospital as being the persons he saw in the dock. The issue therefore remains whether there was a real likelihood that this dock identification was made independently of the photographs or has been influenced by their being shown to the witness on the 9th of January.

I am not satisfied that the witness is likely to have been influenced by the showing of the photographs for two principal reasons. First, the photographs were shown to him in the day after he had seen the two men at the hospital in the manner in which I have described. He had direct dealings over the counter with one of them and had what appears to have been a good opportunity to observe the other. His dock identification at the depositions was made on 25 August 1993 some seven months after he had seen the photographs. Secondly, he referred in evidence today to some differences that he thought existed between the men he saw on the photographs namely, the nature of the clothing that they were wearing, the absence of any reference in his descriptions to the Police to tattoos on the hands and face of McFarland, the absence of any reference to a moustache on the part of Barnes and his description of Barnes' hair as light brown whereas it is shown in the photograph as dark brown. As to the clothing, his comment was that he thought they must have changed their clothing between when he saw them and when the photographs were taken. These differences indicate that when

considering the persons he saw at the hospital he is still today influenced rather by what he saw then than what he saw in the photographs.

Having concluded for these reasons that his recollection has not been displaced by the photographs and because I consider that the detective when showing the photographs to Mr Lather was doing so in the course of investigating the circumstances surrounding the offending, rather than for the expressed purpose of identifying the robbers, it is my conclusion that at the trial Mr Lather may be asked whether he can identify the two persons at the hospital from amongst the accused in the dock. If he does so then of course the jury will need to be given a very clear direction of the risks to be attached to such an identification. In the end it will be for the jury to decide whether it is satisfied that the persons at the hospital were the persons Mr Lather identifies, if in fact he does so.

Chambers J