

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA36/2023
[2023] NZCA 544**

BETWEEN TAMA FUSITUA
Appellant
AND THE KING
Respondent

Hearing: 20 July 2023
Court: French, Thomas and Moore JJ
Counsel: Q Duff and G T Duff for Appellant
N J Wynne for Respondent
Judgment: 2 November 2023 at 4 pm

JUDGMENT OF THE COURT

- A The appeal is allowed and the conviction for aggravated robbery is quashed.**
B No retrial is ordered.
-

REASONS OF THE COURT

(Given by French J)

Introduction

[1] On a Sunday afternoon in 2019, a man aged 64 was confronted in his garage by three young males. They threatened him and then seriously assaulted him causing injuries to his eye. His phone and iPad were stolen.

[2] The incident was witnessed by three neighbours, one of whom called 111. Neither the neighbours nor the victim recognised the attackers, but they gave

descriptions to the police. Two of the neighbours spoke to the attackers. The neighbours and the victim also stated they saw the attackers heading down the street in the direction of the Panmure town area, which was only a short distance away.¹ Later the police obtained CCTV footage from various businesses in the Panmure town area.

[3] The footage showed three young males walking together along the streets about half an hour after the time of the attack. It was not disputed that the appellant was one of the three shown in the footage.² The other was a Mr Aramoana and the third a younger person whose identity is suppressed because of his age.

[4] The police alleged that the three males matched the descriptions given by the eyewitnesses and charged each of them with aggravated robbery. The young person was prosecuted in the Youth Court. We were not told the outcome of that prosecution. Mr Fusitua and Mr Aramoana (aged 20 and 21 respectively at the time of the incident) were tried together in the District Court. A hearing date for the joint trial had to be abandoned because Mr Fusitua failed to turn up and could not be found. A new date was set. When Mr Fusitua again absented himself, the trial Judge, Judge Thomas, decided to proceed without him.³ Mr Fusitua was legally represented throughout.

[5] The jury acquitted Mr Aramoana but found Mr Fusitua guilty.⁴

[6] Mr Fusitua now appeals his conviction on the grounds the verdict was unreasonable because it is irreconcilable with the not guilty verdict of his alleged co-offender. No issue is taken with any of the Judge's directions, including those relating to Mr Fusitua's absence and the reliability of identification evidence.

The identification evidence

[7] It is convenient to set out the identification evidence in table form, detailing

¹ Although this was disputed, on the evidence Panmure was the most likely direction.

² His name came to the attention of the police after portions of the CCTV footage were shown on television. When interviewed by the police, Mr Fusitua admitted being the person wearing a grey singlet and bucket hat.

³ *R v Aramoana* [2022] NZDC 17815.

⁴ He was sentenced to a term of imprisonment of five years and six months: *R v Fusitua* [2023] NZDC 4396.

each of the descriptions given by the eyewitnesses alongside the name of the defendant whom the Crown alleged was the person described. The last column contains our descriptions of the still photos taken from the CCTV footage:

Defendant	Victim	111 caller	Husband of 111 caller	Neighbour 3	CCTV
Mr Fusitua	First to enter the garage, young Polynesian aged 18 to 20, grey T-shirt, beige shorts, beard (not a huge beard, very light), a very narrow moustache, black hair in a ponytail, and had beer in clear glass bottle.	Grey singlet, grey bucket hat, the most aggressive, skinny build, short, too far away to see if he had any tattoos, scars or piercings, quite young (late teens or early 20s), Māori, and thug looking.	Grey singlet with black trim around the edges, gave his last name as Hafoa, kept yelling “37 Crip gang”, removed some of his clothes as if he was keen for a fight, Māori or Tongan, 20 to 21 years old, 178cm tall (taller than him), muscular build, and short to medium length black hair.	Tongan, grey singlet with black edging (like a hem) on the sleeves and collar, a bit shorter than him (at 5 feet 10 inches), a Tongan flag tattoo on his neck and shoulder area, tattoos all over his neck around his shoulder, tribal tattoos on both arms, and early to mid 20s.	Black bucket hat, short hair or bald, black shoes, beard, narrow moustache, grey/white shorts, grey singlet with black edging around the collar and arm holes and a black pocket, something black with white on it slung over his left shoulder, does not appear to have arm tattoos, and at some points carrying a bottle.
Mr Aramoana	Third person to enter the garage, Polynesian, young (around 18 or 20), older than the second guy, same height as first guy, taller than the second guy, black T-shirt, (shorter sleeved), a normal sized bag (not too big) under his shoulder with the bag at the back a strap over his shoulder, and carrying beer in clear glass bottle.	Wearing baggy black shirt, looked quite young (late teens or early 20s), Māori, and thug looking.	Māori, 20 years old, 178cm, skinny build, wearing black T-shirt with no collar, a black jumper wrapped around his neck like a scarf, a black hat covering his hair, grey or brown shorts, and black shoes.	Wearing a black bucket hat, Māori, and carrying a clear beer bottle.	Blue cap (not a bucket hat) with lettering (possibly TipSC), blue shoes, gold chain, at some points carrying a bottle, black waist bag with white Adidas logo on the front, dark coloured (possibly grey) socks, baggy black T-shirt, and baggy light coloured shorts.
Young person whose identity is suppressed	Second person to enter the garage, very young (around 16), Polynesian, not big, similar to his height (168cm), blue hoodie with the hood on, – very difficult to see his face, and carrying a glass beer bottle.	Wearing a baggy blue/royal blue shirt, baggy shorts, between slim and medium build, quite young (late teens or early 20s), Māori, and thug looking.	Māori, 16 years old, skinny build, approximately 150cm, much shorter than him and the others, green cap, unable to see his hair, hood up on his purple windbreaker jacket, peach coloured cargo shorts, white shoes, and carrying a black Nike pouch about the size of a tissue box with one long zip on top and a small one in front with a white Nike tick on the front.	Younger than 20, wearing a light coloured backpack, and Māori.	Shortest and smallest, blue Adidas T-shirt, dark blue/black shorts, dark coloured shoes, white socks, black/dark coloured backpack, and black/dark coloured hair.

[8] In seeking to uphold the conviction, the Crown contends that the different verdicts are capable of a rational explanation. It says the identification evidence

relating to Mr Fusitua was stronger than the evidence relating to Mr Aramoana. It also points out that the jury was required, and hence directed, to assess the evidence in respect of each defendant separately.

[9] We agree that the evidence against Mr Aramoana was weaker. His counsel provided the jury with a blown-up version of a still photo of Mr Aramoana from the CCTV footage. There are striking differences between the photo and the descriptions given by the eyewitnesses. None of them mentioned the gold chain, which is very distinctive and prominent, as is the blue cap. His blue shoes also stand out and he is not carrying anything.

[10] We also agree that the jury had to consider the evidence relating to each defendant separately. However, the strength of the Crown case against each of them was dependent to a reasonably significant extent on the unlikely coincidence of the three of them, who generally resembled the three attackers in terms of height, age and appearance, being together in the vicinity of the attack only 30 minutes after it happened.

[11] Thus, to a reasonably significant extent, the cases did stand and fall together.

[12] The problem for the Crown case that was created by the acquittal of Mr Aramoana is compounded by some aspects of the identification evidence relating specifically to Mr Fusitua. The most critical of these is the absence of any evidence that Mr Fusitua has extensive and distinctive tattoos, as seen by one eyewitness. Although Mr Fusitua was not in the courtroom, the jury did see a video of him being interviewed by the police eight months after the robbery. Mr Fusitua, who denied any involvement in the attack, is wearing a long-sleeved hoodie with the hood over his head covering his neck during the interview. It is impossible to know whether he has the tattoos described or not. Somewhat surprisingly, at no time during the interview is he asked whether he has any tattoos. Nor is he asked if he would be willing to remove his hoodie. We understand that it is common practice when a suspect is arrested that any distinguishing marks will be recorded on an arrest sheet.⁵ The arrest sheet for Mr Fusitua was not produced in evidence.

⁵ Policing Act 2008, s 32.

[13] The other difficulties with the identification evidence relating to Mr Fusitua are less significant but nevertheless relevant. Those difficulties are the differences between the eyewitness descriptions, despite some broad similarities, and that some (but not all) of the attire described can fairly be regarded as generic for young males of that age and ethnicity. That is why the tattoo evidence assumes the importance it does.

[14] Having regard to all these matters, we have misgivings about the safety of the conviction and hence the risk of a miscarriage of justice. We have therefore decided that it is in the interests of justice to quash the conviction.

[15] That then raises the question of whether a retrial should be ordered. This being a case where the Crown has failed to prove its charge on the evidence available to it, we conclude in accordance with usual practice that there should not be a retrial.⁶

Outcome

[16] The appeal is allowed and the conviction for aggravated robbery quashed.

[17] No retrial is ordered.

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ *H (SC49/2021) v R* [2022] NZSC 42, [2022] 1 NZLR 21 at [39]; and *R v E (CA308/2006)* [2007] NZCA 404, [2008] 3 NZLR 145 at [146], citing *Reid v R* [1980] AC 343 (PC) at 349–350.