IN THE SUPREME COURT OF TONGA **CR 126 of 2016**
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **R E X** **- Prosecution**

AND: **HEAMANI LOPETI** **- Defendant**

BEFORE THE HON. JUSTICE CATO

Mr Aho for the Crown
The Accused was unrepresented

RULING AFTER VOIR DIRE

[1] This prosecution concerned a charge of armed robbery of a Chinese store in Longolongo Tongatapu on the 25th March 2016. The maximum sentence for armed robbery in Tonga is 20 years imprisonment. The trial commenced on the 27th April 2017 and a voir dire was undertaken on the 2nd May, 2017 as a consequence of events arising at trial concerning identification. Overnight, I have considered the matter and made this written ruling. Mr Aho emphasised that he would like me to record my ruling in writing, so that a copy could be forwarded to the Commissioner. Because I consider the matters of trial practice that arose to be important for the orderly administration of criminal justice in Tonga I have acceded to Mr Aho's invitation.

[2] During the course of the armed robbery, the proprietor of the store, a Ms Ying Lu, was confronted by the robber who, was masked and demanded money from her which she gave to him

contained in a couple of boxes that were removed from the store. He, during the robbery, fired a pistol into the wall behind Ms Lu. After leaving the store, he made off in a motor vehicle.

[3] In the store, a video security camera operated. It was fixed in focus on the counter and pictured Ms Lu and the robber with the pistol. The camera film did not however assist in identification. There was no forensic or other evidence produced by the prosecution in the case. It seems as though the police focus was directed on the accused Mr Lopeti from information gained from an informant who was not called as a witness in the case. Ms Ying Lu could not advance any evidence that identified Mr Lopeti as the robber.

[4] It seems Mr Lopeti was interviewed concerning the robbery and declined under caution to make any statement or about the third of April 2016. He was again interviewed on the 19th May, 2016 and again declined to make a statement.

[5] On the 25th May, he was charged with the offence. At that stage, it would appear other than the informant's information, there was little evidence that Mr Lopeti was the robber. He had, it was alleged made an incriminating verbal statement on the third of April after declining to participate in a record of interview, in which it was alleged that he told officers he only has a few more targets left and when he is released he will continue committing armed robberies of Chinese shops until he has completed his target list. This statement had been recorded by Detective Lolomanaia in the presence of Detective Heimuli, the officer in charge, in the station diary but neither officer had made any entry in his notebook and the accused was never given an opportunity to authenticate the station diary entry.

[6] A witness to the incident, Ioko Manavahetu also known as Ioko Latu, was an employee who shortly before the robbery was outside near the front of the building when the robber appeared. She saw him for a very short time before he pulled his mask down as he entered the store. I am satisfied that the lighting outside was good. She said she was able to see his face for a short time before he entered the shop and pulled the mask down over his face. She was about 8 or 9 metres away. She then went closer to the entrance and saw the gunman approach the counter and heard a shot fired. As he went out, he saw her, told her not to run and pointed the gun at her and made off in a Pajero motor vehicle. She and the owner's husband gave chase but could not catch up with the robber.

[7] Evidence was given that two other officers had shown her a number of 10 photographs as a montage shortly before trial in late April 2017, one of those being the accused Mr Lopeti whom she identified as the robber. The montage procedure had been suggested to the police by Mr Aho who had realised that the evidence as it stood for trial was seriously deficient. No identification procedure had been carried out by the police and that would have meant the prosecution would have to rely on a dock identification which, in other cases, this Court has criticised. Had the evidence remained in that state, I would have admitted the photo montage evidence for the jury to consider because, I am satisfied that it involved a fair presentation of photographs with curial directions following Turnbull v DPP [1977] 1 QB 234 because the identification fell into the fleeting glimpse category. I would have also directed the jury that, because the photo montage procedure took place a year after the robbery, the delay might have affected the reliability of the witness's identification. I would also have admitted the evidence of the alleged verbal statement by Mr Lopeti asserting his intention to carry out further armed robberies, which Mr Aho submitted was

evidence of coincidence and supporting evidence following Turnbull of Ms Latu's identification; albeit, with a very strong direction to the Jury to take care following the approach and suggested directions of the High Court of Australia in McKinney v The Queen (1990-91) 171 C LR 609. There, the Court insisted that statements of this kind by a person in custody should be accompanied by strong curial warnings. I was particularly concerned about this evidence because the alleged verbal statement had been made after Mr Lopeti had declined to enter into an interview with police earlier. Although I was concerned about both aspects of evidence, the appropriate procedure was, in my view, to admit the evidence for the Jury to consider with appropriate directions to them on the need for care.

[8] However, the nature of the evidence changed after Mr Lopeti had asked Ms Latu if she had been shown a photo of him on a phone taken of him by Detective Lolomanaia. She agreed that she had been shown such a photograph. Mr Aho, very understandably and almost immediately, expressed his surprise at this and said he had not been told anything about this before he had instructed the police to engage in the photo montage show of photographs to Ms Latu shortly before trial. At this point, I ordered a voir dire and sent the Jury away for what was to be a long adjournment.

[9] Ms Latu, on the voir dire, said that she had asked Detective Lolomanaia if he had a photograph of this person so she could look at it. She said he had showed her a photograph in his phone and it was a close up of the accused's shoulder and face. She told him that was the man. She said she had looked at it for about a minute. She said she told Detective Lolomanaia that she was certain that this was the man she had seen. She confirmed that Lolomanaia had said, when she asked whether he had a

photo, that he had and that she should tell him whether that was the man or not.

[10] Later, she had been shown the photo montage by two different officers with Lolomanaia outside the room, he having taken her to the identification process. She said that she pointed out a photograph and recognized that as the photo of the accused that she had seen in the phone given to her by Lolomanaia. Later, Mr Lopeti asked her why did you tell Lolomanaia if there was a photo of me to see and she said that she did not ask for a photo of him but had asked if Lolomanaia had any photo for her to see if she could recall the face of the person she had seen.

[11] Detective Lolomanaia confirmed that at a meeting he had with the witness, also at the request of Mr Aho, to secure further evidence from Ms Latu, on the 3rd October 2016, that he had shown a photograph of Mrs Latu which, he said, had not been in his phone and was a full body shot because Ms Latu had asked him if he had a photograph of the person involved in the robbery. He denied that he had tried to advance the case on identification by showing her the photograph. He agreed somewhat reluctantly, I thought that at the time the police had charged Mr Lopeti they had no evidence of identification of him as the robber and, it seems, were relying on an informant whomthey had no intention of calling to give evidence, at trial.

[12] I did not find satisfactory at all that he made no mention of this to Mr Aho or to either of the independent officers at the montage procedure before to his knowledge that had taken place. He seemed to say he had not made any mention of it to Detective Heimuli, the officer in charge, either although the latter confirmed he had in his evidence on the voir dire. Nor had it been mentioned in the supplementary statement taken from the witness on the same day. The effect of this, as I pointed out to

Lolomania, was that, had Mr Lopeti not raised the issue, the case would have gone to the jury without anybody knowing that Ms Latu had been shown a photograph of the accused alone prior to the montage procedure. This omission had the potential to cause a serious miscarriage of justice.

[13] On several occasions, I have indicated that I have been very concerned about the Tongan police's failure to adopt proper identification procedures, namely parades or photo montages, and it seems their reliance on dock identifications which I had been reluctant to accept. I consider that Detectives Lolomanaia and Heimuli were not acting dishonestly, but both lacked adequate education and training about proper police practice and procedure which is concerning. Both were senior police officers and Detective Lomomanaia should not have allowed the witness to see a single photograph of the accused. Both he and Haimuli should have advised Mr Aho what had happened so that a true picture of the evidence could be placed before the Jury. The procedure adopted in this case was unfair. At best, the approach of the police officers Lolomanaia and Heimuli to the seriousness of the issue of identification was careless. There was no reason, if the finger of suspicion had pointed to Mr Lopeti through informant sources, that an identification parade or photo montage process (should he have declined to participate in a parade) could not have been undertaken closer to the time of the robbery.

[14] I was dissatisfied with the procedure adopted to such an extent that I consider there was much more than a real risk in this case that showing Ms Latu the single photograph of the accused which she said she recognized as the same photograph in the photo montage would contaminate the integrity of the photo montage identification. I note that quite a long period had elapsed since

the single photograph had been shown to her before the photo montage. However, the fact she recognised the photograph in the montage as the same as the photo in the phone troubled me that her identification of the accused in the montage had been derived from seeing the earlier photograph in October 2016 rather than from an independent recollection of the robber from the scene. I have not overlooked the fact that Lolomania had said it was a different photo but, on this point, I accept the witness Latu that they were the same. This case illustrates what has been described as the danger of the displacement effect referred to by Gibbs CJ, and Stephen J in Alexander v The Queen (1981) 145 CLR 395 at p 400 and at p 409; that is the photo montage process was contaminated by the risk that it was from the earlier photograph that her recollection of the accused was derived rather than from her independent recollection of him at the scene. This was also confirmed, I thought, from the answer she gave that she had wanted Lolomanaia to show her a photograph to see whether the person depicted in it was the robber. Detective Lolomanaia should, at that stage, if his training had been adequate, have recognized that showing one photograph could lead to error and an unfair and possibly inaccurate subsequent identification of the accused. He should not have proceeded in the way he did.

[15] The point arises as to what effect the failure to adopt a fair procedure should have in this trial. The law concerning evidence of identification from photo montages was summarized by Richmond P in *R v Russell* [1977] 2 NZLR 21 (CA), at p 27 referring to *R v Doyle* [1967] VR 698 thus;

> "In the first place we respectfully agree with what was said in *R v Doyle* that evidence of identification by photograph is legally admissible and relevant. The real question in all cases is whether or not the trial Judge ought to have exercised in favour of the accused his discretion to exclude admissible and relevant evidence on

> the ground that its prejudicial effect is out of all proportion to its evidential value, or on general grounds of fairness. All the decided cases are, we think no more than illustration of this principle."

[16] In this case, there was nothing objectionable or prejudicial in that sense of the photograph of the accused in the photo montage. It was not a mug shot so the objection in Dwyer and Ferguson [1925] 2 KB 799 does not apply. But as that judgement also declares it is wrong to show a single photograph of an accused to a person who is afterwards to be called as an identifying witness. When this occurs there is, as here, a serious risk of contamination of the integrity of identification. As I have said, I consider that this risk is obviously present here to such an unacceptable extent that the reliability of the fleeting glimpse identification is further diminished. In my view, to admit this evidence following what was unsatisfactory police practice would be wrong. The evidence is, in my view, so diminished in its integrity and probative value, that it would be impossible for a jury to reliably act and convict upon it even were a strong warning given. In R v Christie [194] AC 545, at page 560, Lord Moulton observed ;

> "a trial judge would be in most cases acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses over the conduct of a prosecution in order to prevent such evidence being given where it would have little or no evidential value."

[17] I have not over looked the alleged verbal statement of the accused about doing other armed robberies when he is released, but Mr Aho advanced this only as supporting evidence of odd coincidence following Turnbull [1977] 1 QB 234, at 230, and rightly he did not advance this evidence as able to support a conviction standing on its own. Mr Aho conceded again, rightly in my view, that should I rule that the identification evidence inadmissible, the prosecution could not succeed. I do so rule,

and I also rule that a prima facie case has not been established and the charge of armed robbery is dismissed.

C. B. Cato

DATED: 3 MAY 2017

J U D G E