EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2017-070-004795
[2019] NZDC 4408

THE QUEEN

v

KARZON DUPONT HUNUHUNU
ANZAC JOACHIM POUWHARE
GEORGE POUWHARE

Hearing:	5 March 2019
Appearances:	H Wrigley for the Crown M Bates for Defendant K Hunuhunu W Nabney for Defendant A Pouwhare A Rickard-Simms for Defendant G Pouwhare
Judgment:	5 March 2019

SENTENCE INDICATION (HUNUHUNU) AND PRE-TRIAL RULINGS 3-8 (AND REASONS) OF JUDGE P G MABEY QC

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[1] On 5 March 2019 I heard a range of pre-trial applications for determination in advance of a trial before a Judge and Jury scheduled to commence on 13 March 2019.

Sentence Indication - Hunuhunu

[2] The matters for determination included an application for Sentence Indication by Mr Hunuhunu. He faces a charge (Charge 6) together with Mr Anzac Pouwhare alleging causing grievous bodily harm with intent to cause grievous bodily harm. He also faces associated firearm charges.

[3] A sentence indication was given on the basis of a start point for the wounding charge of nine years, with an uplift for nine months for the firearms charges. If a guilty plea was entered, 10 per cent credit would be awarded and there would be a 50 per cent minimum period of imprisonment imposed. Any other credits that might be established at sentencing would be considered in reduction of sentence.

[4] It was left on the basis that Mr Bates would inform the Crown and Court by 2 pm on Friday, 8 March 2019 if the indication was accepted or declined. No appearance of counsel or defendant was needed. If Mr Hunuhunu accepted the indication that would resolve all of his charges and the trial would proceed against the Pouwhare brothers only.

Mode of Evidence – [complainant Z]

[5] The Crown sought a ruling that this complainant give evidence by use of a screen. This application was granted by consent of all counsel.

Mode Application - [complainant Y]

[6] The Crown sought a ruling that this complainant give evidence by use of a screen at the pre-trial hearing where she was to give evidence on a challenge to her visual identification of the defendants' Pouwhare and also at trial. This application was granted by consent of all counsel.

Mode Application - [witness A]

[7] The Crown sought a ruling that this witness give evidence through the use of a screen. This application was granted by consent of counsel.

Mode Application - [witness B]

[8] An application that [witness B], a police officer, give evidence remotely from Manila was withdrawn as the presentation of his evidence had been resolved by use

of s 9 Evidence Act 2006. That was subject to a challenge by Mr Nabney to the inclusion of a reference to a methamphetamine pipe found in the possession of Mr Nabney's client, Anzac Pouwhare. That issue was to be resolved by a ruling to be made by me. Mr Nabney indicated that whether the ruling was in his favour or not the detective's intended evidence could be embodied in a s 9 admission.

Methamphetamine Pipe – Anzac Pouwhare

[9] I resolved this issue by excluding it from the s 9 admission to encompass the issues addressed by [witness B].

[10] Mrs Wrigley submitted that the possession of the pipe by Anzac Pouwhare was relevant as he is charged with an alleged "standover" of the complainants [complainant X] and [complainant Y] who are both involved in methamphetamine production and distribution – or at least [complainant X] is. Evidence would be given at trial of [complainant X]'s convictions for methamphetamine manufacture and supply. Mrs Wrigley said that the possession of the pipe was relevant as it connected Anzac Pouwhare to methamphetamine, if only on the basis that he might be a user. As I understood her submission his connection with methamphetamine, even as a user, may render him more likely to be aware of those in the community that manufacture and supply methamphetamine and who may have cash and drugs. It is alleged that Anzac Pouwhare and his brother in their "standover" made repeated demands, with violence, for cash and drugs.

[11] Mr Nabney submitted that the relevance of the pipe is marginal to say the least and there is a risk that its minimal probative value may be outweighed by illegitimate prejudice in the sense that jurors may infer much more than they could legitimately do from Anzac Pouwhare's possession of the methamphetamine pipe. Mr Nabney's submission is that the jury should focus upon the evidence relevant to the charges of aggravated burglary, kidnapping, wounding and aggravated robbery which relates to the complaints by [complainant X] and [complainant Y], pointing out that in fact there was no charge for possession of the pipe.

[12] I considered that the absence of such a charge was not relevant to the Crown's intention to include the pipe as part of the evidence against Mr Anzac Pouwhare but agreed with Mr Nabney that whilst relevant in the sense that it has a slight tendency to prove a fact in issue there is a risk that the jury may engage in speculative inferences from its presence. I agreed with Mr Nabney that they may well be diverted from a proper consideration of the evidence that the Crown can advance in support of the charges against his client. The result being that the s 9 admission addressing the [witness B] evidence would not include reference to a methamphetamine pipe found in the possession of Mr Anzac Pouwhare.

Severence – George Pouwhare

[13] Mr George Pouwhare is charged with theft of petrol. That charge came within the Crown Solicitor's purview when the police file came under her control. Mrs Wrigley advised that the Crown Solicitor did not wish to withdraw that charge and for that reason it remained within the Crown Prosecution notice and subsequent Crown Charge Notice and the only remedy was to formally severe it from the trial charges on the basis that it was not relevant to those charges. The application for severance was granted without opposition. Depending on the outcome of the trial the charge may ultimately be withdrawn.

Propensity – Firearm convictions – George Pouwhare

[14] A propensity ruling had already been made by me admitting the evidence of Mr George Pouwhare's conviction, and the facts relating to it, whilst living in Australia.

[15] Mr George Pouwhare has now pleaded guilty to two of the charges for trial being Charges 9 and 10. They allege careless use of a firearm at [location A] (Charge 9) and the unlawful possession of a firearm at [location B] (Charge 10). Mrs Wrigley gave notice that she intends to rely upon those convictions in order to prove the principal offence (Charge 9) in respect of which his co-defendants are charged as parties and proof of Mr George Pouwhare's knowledge and possession of the firearm (Charge 10) of which his co-defendants are charged as joint possessors.

[16] In addition Mrs Wrigley gave notice that should Mr Hunuhunu plead guilty to the charges he faces before trial, the Crown will rely upon the convictions that result to prove:-

(a) Proof of his involvement in the assault against the [complainant Z] (Charge 6) in respect of which Mr Anzac Pouwhare is charged as the principal offender. She says such evidence is relevant to the credibility and reliability of [complainant Z].

(b) Proof of Mr Hunuhunu's presence at the scene at [location A] (Charge 9). She says this is relevant to the identity of the other defendants allegedly present, in particular Anzac Pouwhare who was photographed at the scene.

(c) Proof of Mr Hunuhunu's knowledge and possession of the firearm (Charge 10) in respect of which his co-defendants are charged as joint possessors.

(d) Proof of his knowledge and possession of the firearm (Charge 11) in respect of which his co-defendants are charged as joint possessors.

Defence counsel were made aware of the Crown's intentions by Memorandum filed in advance by Mrs Wrigley and made no submissions or raised objections at the pre-trial hearing.

Admissibility of Visual Identification Evidence – [complainant Y]

[17] This application was the most significant and substantive application dealt with at the pre-trial hearing. [Complainant Y] had been asked to undertake formal procedures in relation to the possible identification of the offenders against her and [complainant X]. The admissibility of her visual identification evidence intended to be called by the Crown as a result of those procedures was challenged by the brothers Pouwhare. Both were identified by her.

[18] Pre-trial evidence was called from the officer who conducted the formal procedure, [Detective 1] and also [complainant Y].

[19] After hearing that evidence and submissions I ruled that [complainant Y]'s evidence can be admitted at trial in relation to both brothers. The Crown may lead evidence of the formal procedure conducted under s 45 of the Evidence Act 2006. I give my reasons.

[20] The Pouwhare brothers face charges that on [date of alleged offending deleted] 2017 at [location B] they committed aggravated burglary, kidnapping, wounding and aggravated robbery.

[21] The allegations are that at around 11.30pm on [the date of the alleged offending] they, together with an unknown third male, went to the address of [complainant X] and his partner [complainant Y] in a rural area outside [location B].

[22] It is said that they arrived with firearms and confronted both complainants demanding money and drugs. [Complainant X] was hit on the side of the head with a rifle butt at which point [complainant Y] locked herself inside a shipping container converted for residential use.

[23] She was threatened with shooting if she did not open the door. She did open the door and came into proximity with two of the assailants.

[24] Demands for money were made. She offered her car. She was forced into the passenger seat of the car with two of the three assailants, one driving and one in the back seat. [Complainant X] was put into the boot. Matters progressed from there when [complainant X] was further injured. No money was found and the assailants eventually departed with [complainant X]'s motor vehicle.

[25] In issue at trial will be the identification of two of the assailants. The Crown alleges that they were Anzac Pouwhare and his brother George Pouwhare. The third assailant has not been identified and has not been charged. [Complainant Y] was

interviewed on the night. She described two of the men by their clothing, body size and shape and with some identifying features.

[26] One man she identified as having a black and white hoodie. The Crown says that he is Anzac Pouwhare.

[27] She said that he had a tattoo on his neck and hands and freckles on his face. In the beginning he had his face covered by a cloth but after a number of attempts to replace it when it fell down he gave up and thereafter his face was exposed although the hood continued to be in place over his head. She said he was 5.7 tall and was 28 – 30 years of age and of average build.

[28] The second man she described as having a camouflaged jacket. The Crown says this is George Pouwhare. He is described as having blue jeans, a jacket and hood and at all times had a black covering over his face. She said he was 5.11 tall and skinny.

[29] By 7 November 2017 the police had identified Mr Anzac Pouwhare's fingerprint on [complainant Y]'s car. Until then they were unaware of who any of the assailants might be.

[30] [Detective 1] therefore prepared a montage of photographs and at [complainant Y]'s home undertook a formal identification procedure. He completed the necessary forms in compliance with s 45 of the Evidence Act noting that [complainant Y] in answer to the question "do you see anyone you recognise" she replied "maybe number 8". The person in photograph number eight is not Anzac Pouwhare.

[31] Twenty three days later on 30 November 2017 the police had sufficient information to suspect George Pouwhare as one of the assailants. [Detective 1] therefore prepared a further montage which was shown to [complainant Y]. She pointed to photograph number four and in the forms completed by [Detective 1] and in answer to the question "do you see anyone you recognise". She answered "number 4". The man depicted in number four is George Pouwhare.

[32] At the time this formal procedure was being conducted the detective had with him the montage shown to [complainant Y] on 7 November and the documents that he completed that day. He had overlooked getting her signature to the documents and it was his intention to have her sign them and confirm that the contents accurately recorded what she said to him on 7 November.

[33] In the course of doing this [complainant Y] asked the detective if she could review the montage she saw on 7 November. In response to that request he gave her the montage. She considered the photographs in the montage again and said that, contrary to her impression on 7 November, one of the men present at her property on [the date of the alleged offending] may in fact have been the man in photograph number seven. The detective thus extended her answer to the question "do you see anyone you recognise" to "maybe number 8 or 7?". He dated that amendment 30 November 2017.

[34] The detective also recorded further comments made by [complainant Y] at this time when she said, "it looks more like number 7" and further "I'm pretty sure it's number 7 because of the mole on his face."

[35] Both of those additional remarks were initialled by [complainant Y] when they were included in the documents on 30 November 2017.

[36] The man depicted in photographs seven in the montage is Anzac Pouwhare.

[37] The end result of the identification procedures is that [complainant Y] had identified the Pouwhare brothers as being present at her property when the offences were allegedly committed against her and [complainant X].

[38] On behalf of Anzac Pouwhare Mr Nabney says that what occurred on 30 November 2017 when the montage was reviewed by [complainant Y] was not a formal procedure and that there was no good reason for the detective to not follow the formal procedure requirements. He thus says that it is for the Crown to prove beyond reasonable doubt in the circumstances that the identification of his client on 30 November 2017 is reliable. Mr Rickard-Simms makes no challenge as to the formal

procedure requirements but says that on the balance of probabilities the identification of George Pouwhare is unreliable and thus inadmissible.

[39] Section 45 of the Evidence Act 2006 says:

> **45 Admissibility of visual identification evidence**
>
> (1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.
>
> (2) If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, 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.
>
> (3) For the purposes of this section, a formal procedure is a procedure for obtaining visual identification evidence—
>
> (a) that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency; and
>
> (b) in which the person to be identified is compared to no fewer than 7 other persons who are similar in appearance to the **[**suspect**]**; and
>
> (c) in which no indication is given to the person making the identification as to who among the persons in the procedure is the **[**suspect**]**; and
>
> (d) in which the person making the identification is informed that the **[**suspect**]** may or may not be among the persons in the procedure; and
>
> (e) that is the subject of a written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
>
> (f) that is the subject of a pictorial record of what the witness looked at that is prepared and certified to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and

(g) that complies with any further requirements provided for in regulations made under section 201.

(4) The circumstances referred to in the following paragraphs are good reasons for not following a formal procedure:

(a) a refusal of the **[**suspect**]** to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or a video record that shows a true likeness of that person):

(b) the singular appearance of the **[**suspect**]** (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared):

(c) a substantial change in the appearance of the **[**suspect**]** after the alleged offence occurred and before it was practical to hold a formal procedure:

(d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant:

(e) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence **[**occurred**]** and in the course of that officer's initial investigation:

(f) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a chance meeting between the person who made the identification and the person alleged to have committed the offence.

[40] If Mr Nabney is correct in what he says as to the deficiencies in what occurred on 30 November 2017 it will be for the Crown to establish beyond reasonable doubt that the visual identification evidence of this client is reliable.

[41] The issue on this point is thus whether what occurred on that day meets the requirements of s 45(3) for a formal procedure for obtaining visual identification evidence. If so the onus falls to Mr Nabney. If not it is on the Crown.

[42] Mr Nabney takes no issue with what occurred on 7 November 2017. He does not submit that there was non-compliance with s 45(3) that day. The procedure was appropriate. His client was not identified.

[43] Ms Wrigley says that what occurred 23 days later when [complainant Y] reviewed the montage was no more than a continuation of the earlier formal procedure on 7 November.

[44] Mr Nabney submits that there can be no basis for a segmented single procedure, separated by 23 days, and that upon receiving the request from [complainant Y] to review the montage the detective should have created a fresh montage of new photographs of different men or at least have "scrambled" the order of the original montage so it was distinctly different from that seen on 7 November. He says that the requirements of s 45(3) could only have been met by the detective freshly embarking upon a completely new procedure with a separate montage.

[45] I did not accept Mr Nabney's submission. Notwithstanding the gap of 23 days between [complainant Y]'s viewing of the montage, what occurred was really no different than an interrupted procedure on the original day.

[46] A witness may view a montage of photographs and identify an individual. The witness's words of identification may be recorded in the forms completed in compliance with s 45. That having been completed the detective may embark upon further discussion either informally or in a formal interview, the witness may ask to leave the room for the toilet, a cigarette, fresh air or simply have break.

[47] If after any of those events the witness asks to look again at the montage that would not in my view call for a fresh procedure to be undertaken with a different set of montage photographs. If after such a break the witness changes his or her mind and identifies another person in the montage that can be recorded and the evidence given should the Crown wish to call it. Issues as to whether the witness changed position after separate viewings of the montage are matters for cross-examination before the jury but that is a separate matter. They do not affect the admissibility of the procedure.

[48] The fact that a witness after a number of days might wish to review the original montage is not in my view any different. The original procedure commenced on 7 November and continued on 30 November 2017.

[49] In evidence [complainant Y] said that her reason for wishing to review the montage was because on 7 November she was still sufficiently upset and shattered as to what had occurred on [the date of the alleged offending] that she was "picking pretty much anyone" and was not thinking straight. She was still afraid and gave the impression that she was reluctant to become involved. She said she feared for herself and [complainant X].

[50] She said, however, that by 30 November 2017 she was more composed and felt that as she had "not done a proper job on 7 November 2017," she wished to see the montage again and pay closer attention to it in an attempt to identify anyone who may have been involved in the alleged offences against her and [complainant X].

[51] She confirmed that she did not know Mr Anzac Pouwhare or what he looked like. She had been asked during the police enquiry, when his fingerprint was found on her car, if she knew a man by the name of Anzac Pouwhare but she told the police she did not.

[52] She said in the 23 day period between the viewing of the montages she had not seen a photograph of Mr Anzac Pouwhare, had not seen him in person and nor had she been given a description of him.

[53] In cross-examination Mr Nabney made a reference to the possibility of contamination during the 23 day period but stopped short of suggesting there was conclusion between herself and [complainant X] or others to ensure that Mr Anzac Pouwhare was properly identified. The implication of his questions was that the request to review the montage was because she was able to identify his client from the information that she had received in the interim period.

[54] She denied that and I found that there was no evidence at all of collusion or contamination and that the request to review the montage again was for the reason [complainant Y] gave in evidence.

[55] I thus concluded that as what occurred on 30 November was no more than a continuation of what commenced on 7 November the formal procedure requirements

had been complied with and there was thus no obligation on the Crown to prove the circumstances of the identification produced a reliable identification beyond reasonable doubt.

[56] For both brothers the onus was thus on them to prove on the balance of probabilities that the identification was unreliable and thus inadmissible.

[57] Determining if that burden has been discharged is a threshold test. If it is found that a jury may properly rely upon the visual identification of evidence it is their function to determine if the identification is accurate.

[58] As was noted by the Supreme Court in *Harney v Police:*[1]

> In carrying out an assessment under subs (1) the judge is able to take into account not only the circumstances in which the identification was made (the *Turnbull*-type factors) but also any other evidence in the case which supports or raises concerns about the accuracy of the identification.

[59] The *Turnbull* factors referred to are set out in [30]:

> How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

Anzac Pouwhare

[60] Ms Wrigley says that [complainant Y] was able to observe Anzac Pouwhare over a period exceeding an hour and that at times she did so in good light and from short distance. She adds that Mr Anzac Pouwhare's facial disguise was abandoned after he could not properly secure it.

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[1] *Harney v Police* [2011] NZSC 107 at [32].

[61] Ms Wrigley relies upon [complainant Y]'s pre-trial evidence that Mr Anzac Pouwhare was one of the men who burst into her shipping container and was with her in that container and outside effectively as her guard for over an hour. There was good lighting in the container and he came within 30 centimetres of her. He sat next to her when he drove her car. She was with him in the container for 2-5 minutes in good light and outside in moonlight.

[62] In addition Ms Wrigley points to further evidence which supports the identification of Anzac Pouwhare on 30 November 2017 as:

(i) The location of his fingerprint on [complainant Y]'s motor vehicle.

(ii) Her earlier description to the police as having freckles and tattoos, consistent with his actual appearance, and also an accurate description of his height.

(iii) Propensity evidence in support of separate charges (7 and 8) of aggravated robbery involving an alleged standover where money was demanded and bank cards were taken.

(iv) The location of firearms and a modified balaclava when Mr Anzac Pouwhare's address was searched on 27 November 2017.

[63] In pursuit of the burden he faces Mr Nabney pointed to the fact that on 7 November 2017 [complainant Y] did not identify his client and a change of mind after 23 days points directly to unreliability.

[64] He says that the mole on his client's left cheek was not referred to in the original description to the police on the night and there was a suggestion only that the man in the black and white hoodie had freckles on his face. He also raises concerns about identification by moonlight and that throughout the events of [the date of the alleged offending] [complainant Y] was on her own admission frightened, stressed and

anxious for her well-being and in particular the well-being of [complainant X] who she was aware was being beaten.

[65] It is correct that the original identification pointed to photograph number eight in the montage, not Anzac Pouwhare, and the witness had a change of mind but the fact remains that in the absence of any information obtained by [complainant Y] in the intervening 23 day period suggesting contamination of her mind, or collusion, on 30 November she did identify Anzac Pouwhare. She said that she was "pretty sure" of the identification and gives a reason why.

[66] In addition there are matters which the Crown can call in evidence which corroborate her identification. She was generally consistent in her description given to the police and most significantly in my view is that Mr Anzac Pouwhare's fingerprint was found on her car in circumstances which are consistent with her description as to what occurred on the night.

[67] I reached the view that Mr Anzac Pouwhare had not discharged the s 45(1) burden to satisfy me on balance that [complainant Y]'s identification was unreliable.

[68] There are certainly matters that counsel can raise before the jury to challenge the accuracy of her identification and it will be for the jury to assess that accuracy or otherwise. It will do so in the context of the entire case and judicial direction but I am quite satisfied that at a threshold level the evidence is such that it can be properly taken into account by the jury in its determination of the case against Mr Anzac Pouwhare.

George Pouwhare

[69] [Complainant Y]'s evidence is that the man in the camo jacket was also inside the shipping container with her for a period of between two and five minutes. He spoke to her demanding money and was at times within a metre of her. She said that his hood covered his head and he had a cloth across the bridge of his nose. She was able to see his eyes beyond his eyebrows and part of his forehead. She could see below his eyes to part way down the bridge of his nose. In short, she had a view of his eyes and little else.

[70] Ms Wrigley recognises that fact and acknowledges that unlike the man in the black and white hoodie [complainant Y] was not with the man in the camo jacket for a long period but says that the period of two to five minutes in the container when the lights were on enabled a clear view of what she could see of his face.

[71] She says that the most telling factor in favour of reliability is that when shown a montage containing Mr George Pouwhare's photograph she immediately picked him out. She adds also that the original description of the man in the camo jacket was consistent with the general description of Mr George Pouwhare as to height and body type and that the Crown can rely upon cogent propensity evidence in the form of the Australian conviction for aggravated burglary.

[72] That conviction and the facts which underlie it were ruled admissible on the basis that there are distinct similarities between what occurred in Australia with Mr George Pouwhare and what is now alleged against him in New Zealand.

[73] She says also that the jury can rely upon the association between Mr Pouwhare and his brother Anzac whose fingerprint was found on [complainant Y]'s car. I understood her submission in that regard to be directed at the fact that in charges 9, 10 and 11 there is evidence of the brothers associating [location B] in November 2017 where firearms were used and possessed and that the Crown will submit there is a cross-propensity basis for the jury to consider those charges in support of the charges concerning [complainant X] and [complainant Y].

[74] Mr Rickard-Simms acknowledges that the man in the camo jacket was at times in close proximity with [complainant Y] in circumstances where there was light in the container but says that the opportunity to identify was short, possibly as little as two minutes.

[75] He says that the circumstances which applied to her observation of that man involved her personal stress and distress as a result of what was happening to her and [complainant X] and he says most significantly all she could see were his eyes.

[76] He says also that there was a month between the alleged events and the identification procedure and that this is not a matter of recognition of someone that she knew but purported identification of a stranger.

[77] He thus says when those matters are all taken into account, and notwithstanding the other evidence the Crown can refer to such as the Australian conviction, the identification evidence is simply not strong enough to be placed before the jury. He says that reliability has been disproven on the balance of probabilities and that there is a real danger in allowing the jury to hear the visual identification evidence of his client. He says that evidence should be ruled inadmissible.

[78] I disagreed with Mr Rickard-Simms submissions. The matters that he raises are, in my view, matters that can be raised before the jury in determining if his client has in fact been accurately identified. However at a threshold level the evidence is sufficient to go to the jury. It cannot be overlooked that there was a positive identification of Mr George Pouwhare when the montage was shown to [complainant Y] on 30 November 2017 and that in addition there is other evidence which the jury can consider on the issue of identification.

[79] Mr Rickard-Simms did not raise any suggestion of contamination or collusion. He puts his money firmly on his assessment of the *Turnbull* factors which he says are in favour of exclusion and that the other evidence available to the Crown cannot overcome what he says is the weakness of visual identification. I disagreed.

[80] I thus ruled in relation to both challenges that the Crown may lead the visual identification evidence of [complainant Y].

P G Mabey QC
District Court Judge