

IN THE SUPREME COURT OF NEW ZEALAND

SC 114/2017
[2018] NZSC 12

BETWEEN BENJAMIN VAINU
Applicant

AND THE QUEEN
Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: H E Juran for Applicant
M L Wong for Respondent

9 February 2018

JUDGMENT OF THE COURT

The application for an extension of time to appeal is dismissed.

REASONS

Introduction

[1] On 12 August 2013 Mr Vainu was convicted of unlawfully taking a motor vehicle and aggravated robbery. He was alleged to have been the getaway driver in the armed robbery of a bank branch at Botany Town Centre on 13 April 2010. Two offenders entered the bank wearing disposable overalls and face masks. The getaway driver was similarly clad in overalls.

[2] Mr Vainu's appeal against conviction was dismissed by the Court of Appeal on 6 August 2014.¹ He now seeks an extension of time to apply for leave to appeal to this Court.

¹ *Vainu v R* [2014] NZCA 375 (Harrison, Goddard and Andrews JJ).

Background

[3] The application is made on the basis that identification evidence called by the Crown should not have been admitted. This identification evidence came from one of the co-offender's brothers (Mr Ese Tauaese). His evidence was that, when he went past his brother's room, he had seen Mr Vainu and some other men dressed in blue overalls around the time of the robbery. He knew Mr Vainu by the nickname "Unique" (which is acknowledged to be his nickname) and he had acknowledged Mr Vainu when he saw him.

[4] Other evidence against Mr Vainu consisted of text messages between the co-accused and Mr Vainu on the day of the robbery. Further, another brother of the co-offender said he had seen "Unique" at the family home but was unable to indicate the timing.

[5] Before Mr Ese Tauaese gave his statement about seeing Mr Vainu dressed in blue overalls, he was shown photographs of various people in order to identify associates of his brother. He identified Mr Vainu from his photograph as "Unique".

Grounds of application

[6] Mr Vainu argues that the Court of Appeal was wrong to conclude that the circumstances in which Mr Ese Tauaese's identification was obtained produced a reliable identification. In particular, he points to the fact that the prior acquaintance between Mr Vainu and Mr Ese Tauaese was slight.

Our assessment

[7] We accept that there could be an issue with Mr Ese Tauaese having been shown a photograph of Mr Vainu before he identified him as being one of the men at the house on the day of the robbery. However, despite the limited prior acquaintance, Mr Ese Tauaese clearly recognised Mr Vainu's photograph, identifying him by his nickname. He had also acknowledged Mr Vainu when he saw him. Further, the text messages showed Mr Vainu having been in contact with his co-accused on the day of the robbery.

[8] In these circumstances, we do not consider that there is a risk of a miscarriage of justice. In addition, the facts are very unusual and there is therefore no issue of public or general importance arising. Finally, the delay in seeking leave to appeal has been lengthy, with no adequate explanation for the delay.

Result

[9] The application for an extension of time to appeal is dismissed.

Solicitors: Crown Law, Wellington