NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES MS K AND MS R, PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA71/2021
[2022] NZCA 306

BETWEEN	ALLAN JAMES PINK Appellant
AND	THE QUEEN Respondent

Hearing:	2 May 2022
Court:	French, Venning and Moore JJ
Counsel:	N P Chisnall and L A Elborough for Appellant S C Baker for Respondent
Judgment:	12 July 2022 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Pink was convicted of wounding with intent to cause grievous bodily harm[1] following a jury trial in the District Court.[2]

[2] The presiding Judge, Judge Spear, sentenced Mr Pink to a term of imprisonment of seven years and four months.[3]

[3] Mr Pink now appeals both his conviction and sentence.

Background

[4] In the early afternoon of 8 August 2018, a Mr Coker was subjected to a vicious attack by a group of men in the main street of Ngāruawāhia. He was knocked to the ground, punched and kicked and hit with a claw hammer and an axe. He sustained very serious injuries to both his knees and left ankle requiring surgery. There was a compound fracture of the ankle while the wounds on the knees were found to have extended down to the bone. In the case of the right knee the wound went down as far as the patellar tendon and into the knee joint. He also received a fracture to his right thumb.

[5] Mr Coker was a patched member of the Tribal Huk gang. There was a conflict in the evidence whether all of the men who attacked him were also gang members but it was common ground that at least some were. According to the Crown, Mr Coker was being punished because he had gone rogue and was refusing to return his gang patch.

[6] The appellant Mr Pink has been the President of the Tribal Huks for twenty years. He has a very high profile in the local community and has attracted nationwide publicity. This has been due in part to his leadership of a gang programme providing lunches for under privileged school children as well as a campaign to run methamphetamine dealers out of Ngāruawāhia. The Crown alleged that Mr Pink

---

1 Crimes Act 1961, s 188(1).

2 Mr Pink had also been charged with participating in an organised criminal group under s 98A of the Crimes Act but the Judge removed that charge from the jury prior to his summing up.

3 *R v Pink* [2020] NZDC 26021 at [30] [Sentencing notes].

participated in the attack on Mr Coker, and that his participation included attacking Mr Coker's legs with the blunt end of a long handled axe while Mr Coker lay on the ground.

The trial

[7] The trial commenced on 14 September 2020. The evidence concluded on 15 September, with closing addresses and the Judge's summing up on 16 September 2020. The jury returned its verdict the same day 16 September.

[8] It was common ground that Mr Pink was present at the scene of the attack. The main trial issue was whether he had assaulted Mr Coker with a weapon.

[9] In support of its allegations, the Crown adduced evidence of CCTV footage showing a convoy of three vehicles heading to the main street prior to the attack. The lead vehicle was a distinctive black ute belonging to Mr Pink and well known locally. The same vehicle was parked on the main street facing Mr Coker's parked vehicle at the time of the attack. After the attack as the black ute left the scene, occupants of other vehicles were seen saluting it.

[10] Mr Coker himself did not give evidence. The attack was however witnessed by a number of passers-by whose evidence was generally to the effect that the assault began in the gap between the two vehicles on or near the footpath. The Crown invited the jury to infer that the black ute had been parked facing the wrong way so as to block off Mr Coker's car and prevent him from escaping. There was also evidence of Mr Coker's own car — a red vehicle — being smashed.

[11] Three of the civilian witnesses called by the Crown said they knew Mr Pink and saw him at the scene. One saw him standing on the footpath, the other two a mother and daughter said they saw him swinging an axe and bringing it down using the blunt end on the man lying on the ground. The evidence of the mother and daughter — a Ms K and a Ms R — is at the centre of the appeal and we address their evidence in more detail later in the judgment.

[12] In addition to the evidence of bystanders, evidence was adduced of two out of court statements made by Mr Pink in interviews with police officers.

[13] The first interview took place about a month after the attack on 13 September 2018. The officer had arranged to meet Mr Pink at a bar the latter frequented. Under caution, Mr Pink told the officer several times that he had not been in Ngāruawāhia on the day of the attack. The officer recorded Mr Pink's statements in a notebook and at the end of the interview gave Mr Pink an opportunity to read what he had written down, read it out to him and asked Mr Pink to sign it as true and correct which Mr Pink did.

[14] The second interview took place on 6 December 2018 following a warranted search of Mr Pink's black ute and the discovery of a gang patch, a hammer and an axe. Mr Pink was arrested and underwent a videoed interview at the police station. We pause here to interpolate there was no forensic evidence linking either the hammer or the axe to the attack.

[15] During the second interview, Mr Pink told police he was in town on the day of the attack having a coffee and sandwich at a local café. He heard a commotion and went out to investigate. He saw a large number of people milling around but whatever had happened was ending and people were leaving. He didn't see the attack and didn't recognise anyone. Police and ambulance were arriving and so he left too in his ute which he had parked by an old garage. He only found out about the attack the following day. The patch was given to him later when the others retrieved it from Mr Coker's car a few days later. Police had however searched Mr Coker's car the day of the incident and had not seen any patch.

[16] Mr Pink confirmed he was driving his truck that day. He also said he was not the only person who drives the vehicle. It was a club vehicle and he leaves the keys in the truck. When told about the CCTV footage of the convoy, he said it was not him driving the vehicle and denied being responsible for parking it on the main street.

[17] He described the people who claimed to have seen him swinging the axe down onto Mr Coker as "dreaming". He didn't know who had ordered the attack on

Mr Coker but said a lot of people — not just gang members — were angry with Mr Coker. He himself was also angry with Mr Coker and had been trying to de-patch him for two years because Mr Coker was using methamphetamine and making the club "look real bad".[4] Mr Coker was, Mr Pink said, out of control. Mr Pink also told the officer that the usual penalty for not handing in your patch is a broken jaw.

[18] When asked about his previous statements to the police officer at the bar, Mr Pink vehemently denied ever telling the officer he was not in town on the day of the attack.

[19] Mr Pink gave evidence at the trial and also called a witness. That he would be giving evidence had been signalled to the jury by defence counsel in his opening address. Defence counsel told the jury that at no stage did Mr Pink use an axe. All that was meant to happen was the removal of the patch but others went too far. It was Mr Pink who stopped the attack and prevented it from going any further.

[20] In his evidence Mr Pink said that Mr Coker was like a son to him and although he wanted his patch back, he did not want to harm him.

[21] Mr Pink testified that on the day of the attack he was in a nearby café. There were a lot of angry people around looking for Mr Coker. Someone took Mr Pink's truck and they all rushed off. He asked them what were they doing and where they were going but had lost control. By the time he got there on foot, Mr Coker was getting really bashed up and someone was already hammering him with a claw hammer. Mr Pink said he knew he had to stop it. He took an axe off someone and just threw it onto the ground. That put an end to the attack. He did not know what happened to the axe after that.

[22] Mr Pink did not identify the person who had been using the axe. Nor did he say what the person had been doing with the axe.

---

[4] Mr Pink later testified that Mr Coker was jeopardising the gang's "sandwich in schools" programme.

[23] Mr Pink also testified that on arrival at the scene, Mr Coker's car was already damaged but that more damage was done after he had arrived. He estimated that he was only there for 30 or 40 seconds. He retrieved his truck and returned to Hamilton. He said he was annoyed that someone had taken his truck.

[24] As for the witnesses who saw him using the axe to attack Mr Coker, Mr Pink suggested in cross-examination that they only had a split second and could easily have mistaken his grabbing of the axe for him wielding it and using it.

[25] When asked about his previous statements to police, he said the first interview in the bar should never have taken place there. It was noisy and he couldn't hear. He only signed the notebook entries to hurry things along and to be helpful. He acknowledged he had never told the officer that he had stopped the attack but said he would have done so had the interview taken place at a police station. He had not however mentioned confiscating the axe during the evidential interview at the police station either but would have done so had the right questions been asked.

[26] Mr Pink further claimed that his previous statement about driving away in his truck which had been parked around the corner rather than on the main street was a misinterpretation.

[27] He was also questioned about the route he had taken from the café to the scene of the attack, it being put to him that it was not the most obvious route and that unlike the obvious route it did not have CCTV cameras that would have been able to capture him walking or running that way if his story were true. Mr Pink disputed this and while acknowledging that his chosen route involved him climbing a six foot high fence said the route he took was the fastest route.

[28] Evidence was also given for the defence by a Ms Morgan. She was driving her car down the main street at the time of the attack and looked to see if she could see Mr Pink whom she knew. She told the jury that she saw him coming up behind a Māori guy and removing a bat from him. She confirmed she was familiar with Mr Pink's black ute but didn't recall seeing it there. She did recall seeing Mr Coker's red car but there was nothing about it that stood out in her mind. At the time she drove

past, Mr Coker was standing up surrounded by a group of men. That was when she saw that somebody had a stick or bat in their hand.

[29] The jury found Mr Pink guilty of wounding with intent to cause grievous bodily harm.

Grounds of appeal against conviction

[30] In support of the appeal, counsel Mr Chisnall advanced two main grounds of appeal:[5]

(a) inadequacies in the Judge's direction on identification under s 126 of the Evidence Act 2006 (the Act) and his treatment of the identification evidence generally; and

(b) the Judge's failure to give a lies direction under s 124 of the Act.

The Identification Evidence

[31] The focus of this ground of appeal was on the evidence of the mother and daughter, Ms K and Ms R.

Ms K's evidence

[32] Prior to trial, Ms K took part on 6 September 2018 in a formal identification procedure under s 45 of the Act. She identified Mr Pink from a photo montage as the person she saw swinging the axe during the bashing.

[33] At trial, Ms K said she and her daughter were in a car driving down the main street when they saw "heaps" of Tribal Huks in town and a man getting beaten on the footpath by five men. She was driving and said that because the car in front of them had slowed right down to see what was happening, she too slowed down, "just about stopp[ed]". Of the five attackers, she only recognised one and that was Mr Pink. She

---

5 A third ground advanced in written submissions that one of the identification witnesses Ms R should not have been declared hostile was not pursued at the hearing.

knew him because of the sandwiches in school programme and from seeing him on TV.

[34] She saw him smashing a wood splitter down on the man's legs. Mr Pink was swinging it above his head and then down using the blunt end. She saw him to do that more than once, "easily" twice.

[35] In cross-examination, Ms K said she was very sure it was Mr Pink. He stood out with his blond hair. He was facing the road and definitely not taking the axe off someone else. She said although her car never came to a complete stop, it was long enough to know what she saw. It was a clear sunny day and she had a good view. She rejected the suggestion that she had just seen Mr Pink and so assumed he was involved. When asked what the other men were doing when she saw Mr Pink wielding the axe, she said mostly just standing. She agreed that she did not actually see the wood splitter hit Mr Coker's legs but that was the direction of the axe and given the injuries to Mr Coker which she later saw when they got out of the car to see if he needed help, it was obvious that was where it had hit. She described his legs as distorted.

Ms R's evidence

[36] On 22 August 2018, Ms R made a formal statement to police.

[37] Because the statement assumed some importance at trial and this appeal, it is necessary to set out the statement in full:

> On Wednesday the 08th of August 2018, I was in the passenger side of my mums car … we were heading toward Te ranga whawai marae on great south road ngaruawhaia [sic].
>
> I looked out of the window I saw a commotion on the side of the road near the old Pharo's by the indian restaurant.
>
> I saw a person I recognised as Pinky I know him as I did PD with him 4–5 years ago I also know him also as he delivers sandwiches to my kids school.
>
> He had an axe in his hand he rose it above his head and he was slamming it down. I saw he was hitting someone on the ground with it, he was using the blunt end not the sharp. I didn't recognise anyone else but there were 4–5 others involved all of them had gang patches on they were all yellow in colour and I recognise them as tribal huks patches.

> I could see pinkys ute it was parked on the side of the road directly where this was happening it is black although I don't know the rego it is a double cab.
>
> Pinky also had his tribal huks patch on.
>
> I had a clear view of what was happening as it was about 1230 hrs or something we had just had lunch at the local bakery it was broad daylight and the weather was fine.
>
> I rung the police I couldn't believe what I was seeing I rang 111 on my phone. … . My mum drove to the police station as I also wanted to report what I had seen, I had already told the call taker from the 111 line what I saw.
>
> I couldn't find anyone at the police station we saw pinky driving his ute on the road towards the Police station so I got mum to park up and I ran down to where I saw the guy getting beaten up.
>
> I spoke to him he said his name was Zion.
>
> He had injuries to his hands and his legs and his face was all swollen.
>
> I saw a car on the road side it was a ford falcon it was all smashed up. I asked him if he was ok.
>
> Zion would say what had happened but he couldn't move.
>
> When the incident first happened I saw a second person who I didn't recognise using a sledge hammer rising it above his head and bringing it down I don't know who that person is and I could not see the impact.
>
> I was shocked at what I saw right in the middle of the day on the main road.
>
> I was wearing a black ridge line top. That day I was wearing a red purple and black beanie.
>
> This is the first time I have spoken to a police person about this.
>
> I have checked my phone log and I rang the police on the 08.08.2018 it was at 1240 pm.
>
> I confirm the truth and accuracy of this statement. I make the statement with the knowledge that it is to be used in court proceedings. I am aware that it is an offence to make a statement that is known by me to be false or intended by me to mislead.

[38] At the trial, from the outset of her evidence in chief, Ms R claimed to have no memory of the incident. When shown her statement to refresh her memory, she declined to read it saying she didn't want to re-live it. She was stood down, while in the absence of the jury the Crown made an application to have her declared hostile. There was discussion with counsel in chambers. Defence counsel submitted it was premature to declare her hostile and submitted the starting point would be for the Judge

to himself ask her to read her statement to refresh her memory. The Judge agreed to do that and when court resumed the Judge made that request asking her to do it "for me please" but again Ms R refused. The Judge then gave the prosecutor leave to cross-examine her.

[39] Then followed a series of leading questions. Ms R remained un-cooperative. When responding to questions by saying she didn't remember, she was referred to her statement and the relevant extract read out. At several points she claimed not to be able to see the words that were being read out. She was then stood down again and other witnesses were interposed.

[40] The trial record shows that the Judge told Ms R in the absence of the jury that he did not believe she was telling the truth when she said she could not read the statement. He stood her down in custody and directed the Registrar to arrange for the duty solicitor to see her and explain her position. She was seen by both the duty solicitor and at the Judge's request a senior lawyer in charge of the duty solicitors. Subsequently the Judge confirmed with Ms R that she understood the requirement to give evidence and that she was prepared to continue.

[41] When Ms R's evidence resumed, the prosecutor took her through the key aspects of her formal statement regarding her recognition of "Pinky" as one of the attackers and his use of the axe. She confirmed that was what the statement said. And then she confirmed independently of the statement that it was correct that what she saw was Pinky using an axe on somebody who was lying on the ground.

[42] During questioning by defence counsel, she denied that she had to look past her mother to see the other side of the road. She said she could see what was happening from the front view of the car. She also denied they only got a brief look at the assault that was happening. She accepted they were driving at some speed but the period of time that they looked was more than seconds. She could not remember the numbers of men involved, nor the two parked cars, nor which way the person she described as Pinky was facing, nor was she able to remember whether she could be mistaken now. She agreed she had talked to her mother on the way home. At one point of the

cross-examination she also claimed that at the time the statement was taken she was drunk.

[43] In re-examination, she confirmed parts of her statement relating to the fact she had a clear view of what was happening, that it was broad daylight and the weather was fine, she rang the police as she could not believe what she was seeing and wanted to report what she had seen. Contrary to her formal statement and what she had said to defence counsel she said she had a brief view and that it was "not really" clear. She also stated that she had got out of the car and saw the injuries to the man who had been assaulted as well as seeing a red car that was all smashed up.

Was the Judge required to give an identification warning?

Discussion

[44] Section 126 of the Act provides that in a criminal jury trial where the case against the defendant "depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant", the judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification. The section then goes on to prescribe the contents of the warning.

[45] As noted in *Fukofuka*, the section has its origins in a 1977 judgment of the English Court of Appeal *R v Turnbull*. Its wording is taken almost verbatim from a model direction contained in that case. The English Court considered a direction was required because of the number of cases in which mistaken identification evidence had led to wrongful convictions and there was a pressing need to reduce those numbers. [6]

[46] It is an error of law to fail to give a s 126 warning and such an error may necessitate a retrial.

[47] In the present case, the Judge did give an identification warning, the sufficiency of which is contested. But there is also a prior argument as to whether it was even

---

6 *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1 at [25]–[29], citing *R v Turnbull* [1977] QB 224 (CA) at 228.

needed in the first place. The Crown argues that in the particular circumstances of this case, s 126 was not engaged. Mr Chisnall for the appellant argues otherwise.

[48] Usually when lay people think of identification evidence, they think of the situation where the witness does not know the person they see but after viewing a photo montage selects the defendant as being that person. Identification evidence however also includes what is called "recognition evidence", that is to say the evidence of a witness who identifies the defendant as the person they saw because they already know him or her through prior acquaintance. It is well established that recognition evidence is a form of visual identification evidence for the purposes of s 126 and requires a warning even although such evidence may be more reliable than if the witness and the defendant were strangers.[7]

[49] Less straightforward are cases like the present one where the defendant admits to being present with others at the scene of the crime but denies any personal wrongdoing. The difficulty arises primarily because the phrase "visual identification evidence" which appears in s 126 is defined in the Act as:[8]

> (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
>
> (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a)

[50] In a 2009 decision *R v Turaki*, this Court held that where a defendant admitted being at the scene of a crime, a s 126 warning was not required. It said:[9]

> Where the accused accepts that he or she was present at or near the scene of the offending and the only issue in the trial is whether or not the accused participated in the offence, then identification will not be an issue at trial. It will only be the observation evidence of the witness (of the alleged actions of the accused) that is challenged.

---

7 *Uasi v R* [2009] NZCA 236, [2010] 1 NZLR 733 at [20]–[25]; *R v Turaki* [2009] NZCA 310 at [62] and [87]–[88]; and *Old v R* [2015] NZCA 252 at [27].

8 Evidence Act 2006, s 4(1).

9 *R v Turaki*, above n 7, at [93]. See also *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [42]–[44].

[51] Two months after the *Turaki* judgment was delivered, another division of this Court declined to follow it. It was held in *Peato v R* that an overdue focus on the statutory definition of visual identification evidence had led the earlier Court into error and that its conclusions were contrary to earlier authority and the underlying purpose of s 126.[10]

[52] In the view of the *Peato* Court, the definition of visual identification evidence had to be interpreted and applied in context, context meaning the purpose and policy of the legislation, its history and the consequences of a suggested interpretation.[11] Whether s 126 was engaged should not depend on the classification of evidence as either identification or observation evidence. The key issue was whether the defence rested on the possibility of a mistake.[12]

[53] Like the present case, *Peato* involved a group attack. The defendant was accused of attacking the complainant with a bottle. He admitted being present. He also admitted to punching the complainant but denied ever using a bottle. Two witnesses claimed to have seen the bottle attack and identified the perpetrator as the defendant. The Court considered that the risk of mistaken evidence identifying the defendant as the perpetrator was just as real as it would be if the defendant had not made the admission of being there.[13]

[54] Subsequently, in a 2010 decision in *E (CA113/2009) v R (No 2)*, the Court attempted to reconcile the apparent conflict between *Turaki* and *Peato*. It held that correctly understood the *Turaki* decision was not authority for the absolute proposition that identification can never be an issue when the accused accepts he or she was present. The question was said to be whether identification was in issue or merely the actions of the defendant.[14]

[55] The Court illustrated the distinction it was drawing by making reference to the two sexual offending charges under consideration. Both incidents were alleged to

---

10 *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788, at [17]–[23] and [43].
11 At [29].
12 At [22]–[23] and [35]–[36].
13 At [35].
14 *E (CA113/2009) v R (No 2)* [2010] NZCA 280 at [63]–[65].

have taken place at a gathering where it was common ground there were several males present including the defendant. In one charge, identification was considered at issue because it could have been someone else. In the other charge the defendant admitted meeting the complainant at the toilet, hugging her and both falling over but denied any sexual intercourse took place. In those circumstances, it was held no identification warning was necessary.[15]

[56] This Court had occasion to consider the issue again in 2011 in *Witehira v R* and agreed with the approach taken in *E (CA113/2019) v R (No 2)*.[16] *Witehira* concerned an alleged robbery. The complainant said there were three men present but only two of them carried out the robbery. The complainant alleged that the appellant was one of the two.

[57] The appellant did not dispute being present but contended that no robbery at all had taken place and that the complainant's story of a robbery was a fabrication. In light of that defence, the Crown argued that a s 126 warning was not required. The appellant was disputing evidence about his conduct, not on the basis the identification was mistaken or unreliable but on the basis it was a fabrication.

[58] It appears the Court would have accepted that submission but for the fact that although not part of the defence closing and opening, cross-examination of the complainant did lead the Judge and the prosecutor to apprehend that identification was an issue if they rejected his evidence no robbery had occurred. Once the jury decided a robbery had taken place, identification as the appellant as one of the two robbers was a live issue. A warning was thus required.[17]

[59] Drawing all these threads together. In our view, it can be safely concluded from the authorities that there is no bright line distinction between visual identification evidence in the strict sense and observation evidence. That is to say, it is wrong to suggest that an identification warning is only required when the defendant denies being at the scene. A warning may still be required where the defendant admits being

---

15 At [66]–[68].
16 *Witehira v R* [2011] NZCA 658 at [47].
17 At [38] and [47].

present and it is a live issue as to whether he or someone else present was the perpetrator.

[60] Turning then to the circumstances of this case. As will be apparent, it has some similarities with the facts in *Peato* with one potentially important distinction. The defendant in *Peato* never admitted holding the weapon, in that case a bottle.

[61] Mr Pink claimed in evidence he was only present at the scene for thirty or forty seconds. It was during that time that he held the axe. He only held the axe once. On that basis, it follows that if the two witnesses saw him holding the axe their only mistake was not as to his identity but as to his actions with the axe. Mr Pink expressly suggested that himself in evidence.

[62] If matters rested there, then we consider there is a very strong argument for saying no identification warning was required. However, rather like the situation in *Witehira*, there was also the possibility advanced implicitly by defence counsel in cross-examination and in closing that the two women may have come on the scene before Mr Pink confiscated the axe and seen someone else using it.

[63] We therefore conclude that s 126 was engaged.

Did the warning that was given comply with s 126?

[64] As mentioned, the contents of the warning are regulated by s 126(2). It states:

> (2) The warning need not be in any particular words but must—
>
> (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and
>
> (b) alert the jury to the possibility that a mistaken witness may be convincing; and
>
> (c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.

[65] In addition to these statutory requirements, it is also recognised as best practice for the trial judge to sum up on the strengths and weaknesses of the identification evidence.[18]

The direction given in this case

[66] What the Judge said to the jury was as follows:

> The issue of identification is raised by the defence and quite rightly so because this is a case that relies to some degree on identification evidence. The evidence primarily against the defendant is from Ms [R] and Mrs [K], her mother, identifying they say Pinky, the defendant, as the person who was "laying into" Zion Coker with an axe. So it is their evidence that it was the defendant and they referred to him as *Pinky.* When a case depends upon the correct identification of another person, I am required to tell you that you need to exercise special care before relying upon that identification evidence because case after case tells us that mistakes can be made with identification. You may well yourself have experienced situations where you're quite certain you've seen somebody you know but when you get closer, you suddenly realise that it is not the person you thought it was.
>
> So what is very important is that you exercise special care when you come to consider the evidence of both Ms [R] and her mother Mrs [K] because it would be of course quite wrong for you simply to say: "Well they identify Pinky, they've got it right." You must be left sure that they've got it right, that there is no room for mistake. In this respect, the Crown says you have two of them who both identified a person who's very prominent in the Ngāruawāhia community, a person who is prominent because of the Sandwiches in Schools programme that runs, that he fronts, that he has even been on national television about. Ms [R] said they provide sandwiches to the school that her children go to.
>
> Mr Boot says well they talked about somebody with blond hair. There were different accounts as to whether he was facing them or facing away, that they were over the other side of the road in a car travelling along the road, so they would have only had a brief glimpse at the person involved in the attack on Mr Coker. How can you be left sure that they have correctly identified the person wielding the axe being the defendant? It's a matter entirely for you but I ask you to exercise special care when relying upon identification evidence of this nature.

Analysis

[67] Mr Chisnall submits the direction given by the Judge was deficient in several respects. It failed to comply with all three statutory requirements and contrary to best practice the Judge did not himself identify the strengths and weaknesses of the

---

[18] *Fukofuka v R*, above n 6, at [27] and [35].

evidence. Instead he just summarised counsel's arguments. Even then, Mr Chisnall says, there were notable omissions as a result of which the Judge over-stated the strength of the identification evidence.

[68] Turning then to the first statutory requirement — must warn that a mistaken identification can result in a serious miscarriage of justice — we acknowledge that nowhere in the direction does the Judge use the phrase "serious miscarriage of justice".

[69] However, the section also provides that the warning need not be in any particular words. If one examines the words the Judge did use, then we consider that what was conveyed was that the jury needed to exercise special care when relying on the identification evidence, that mistakes can be made with identification, that mistakes have actually been made in many cases ("case after case") where the case depended as this one does on the correct identification of another person. A mistake made about identification in a case that depended on the correctness of that identification can only mean a wrongful conviction and would be so understood by the jury. It would have been very clear that as required by the authorities the Judge was telling the jury that mistakes leading to wrongful convictions were not just a theoretical possibility but had actually happened.

[70] We are therefore not persuaded that omission of the phrase "serious miscarriage of justice" means the direction did not comply with s 126(2)(a).

[71] The second requirement under s 126(2) is that the jury be alerted to the possibility that a mistaken witness may be convincing. The Judge did not say that to the jury in so many words. But he did say that as they know from their own experience, it is possible to be quite certain that you have seen somebody you know only to discover that as you get closer it is not the person you thought it was. That comment was made of course in the context of a case where the two identification witnesses were not up close to the man they said they recognised. In the factual context of the case, we consider the jury were alerted that even if Ms K and Ms R were convincing, there was still the possibility of a mistake.

[72] The third requirement of s 126(2) is that in a case where there is more than one identification witness, the Judge must refer to the possibility that all of them may be mistaken. In this case there were of course two identification witnesses. Again, the Judge did not use the exact words in the section, but he did tell the jury that they must exercise special care when they came to consider the evidence of *both* mother and daughter and that it would be quite wrong for them to say "[w]ell *they* identify Pinky, *they've* got it right".[19] He again referred to the witnesses in the plural when he went on to say that the jury must be left sure the two witnesses got it right, that there is no room for mistake.

[73] We are satisfied that the Judge's direction complied with the essence of the requirement in s 126(2)(c).

[74] Finally there is the criticism that the Judge did not himself identify the strengths and weaknesses of the identification evidence. He simply summarised the competing submissions from the lawyers regarding the quality of the evidence. However, in *Fukofuka*, the Supreme Court said if done succinctly and in an orderly way, that approach may suffice.[20]

[75] The Supreme Court found that the paraphrasing by the Judge in *Fukofuka* was neither succinct nor orderly because he did not deal with the competing arguments together. Instead he interposed a discussion about the appellant's evidence between his review of the Crown and defence submissions as to its identification. This was distracting because it interrupted what should have been a coherent analysis of the quality of the identification evidence. There was also the conflation of two different discussions.[21]

[76] In contrast in this case, the Judge did deal with the competing arguments on identification together and they immediately followed his emphatic instructions about the need to take special care and the reasons why. The summary was succinct. There were no factual errors and it captured the key points. It did not traverse every point

---

19 Emphasis added.
20 *Fukofuka v R*, above n 6, at [35].
21 At [35].

that had been made but criticism on that score needs to be tempered with the fact this was a short trial and all of the evidence would have been very fresh in the minds of the jury.

[77] It should also be noted that the Judge returned to the question of identification in the course of a general summary of the Crown and defence cases. In relation to the Crown case, the Judge said it was as follows:

> … he was identified by mother and daughter, both adults, and they had no difficulty at all saying that it was Pinky, the man they know as Pinky, who they saw involved in the attack on Coker swinging an axe, or as Mrs K put it, a wood splitter, using the back edge of the axe head hitting down onto Coker. That this was an attack that so horrified Mrs K and her daughter that they drove straight around to the police station. As I've explained, when dealing with identification, they were in no doubt at all that the person they saw wielding the axe on Coker was the defendant Pinky.

[78] And in relation to the defence case:

> [Defence counsel] took issue with the identification of the defendant as the man beating up Coker from mother and daughter across the other side of the road, that they only had at best a fleeting glimpse of what was happening and their knowledge of him was not someone whom they had dealt with themselves but just someone they knew of around the community from different publicity. [Defence counsel] contended that you cannot be left sure that it was the defendant who was wielding the axe …

[79] In contending that the Judge over-stated the strength of the Crown's identification evidence, Mr Chisnall was particularly critical of the Judge's failure to distinguish between the evidence of Ms K and Ms R. In Mr Chisnall's submission the Judge should have directed the jury about the inherent difficulties in Ms R's evidence and also directed them not to speculate about the reason for her reluctance to give evidence. Instead the Judge treated the two witnesses uniformly and wrongly claimed in the passage quoted above that they were both in no doubt at all. Mr Chisnall even went so far as to say Ms R should have been treated as a witness who was unavailable and her evidence excluded under s 8 of the Act applying the principles in *Morgan*.[22] This was he said a situation where her hostility meant there was no opportunity for realistic cross-examination.

---

[22] *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [39]–[42].

[80] In our view, the problems with Ms R's testimony and the fact she did not want to be giving evidence were plain for the jury to see for themselves and would have been very memorable. We are not persuaded that any useful purpose would have been served by a judicial direction including a direction not to speculate about the reason for her reluctance. Both parties had chosen not to address that issue, no doubt because it suited their respective purposes.

[81] The Crown did not dwell on Ms R's conduct in the courtroom. All that was said was that Ms R was "reluctant to even say Mr Pink's name as it appeared in her statement. She did not want to be here but on the day she was moved to report what she saw".

[82] For the defence, the cross-examination was difficult but not impossible and answers were extracted that defence counsel was able to highlight in closing as casting doubt on the reliability of the identification evidence.

[83] In our view, exclusion of Ms R's evidence would have been quite wrong, particularly in circumstances where the defendant himself admitted he had held the axe. Apart from saying she was drunk, she did not ever resile from her formal statement and the key allegation that she recognised Mr Pink as the person using the axe as a weapon. In these circumstances, contrary to a further submission, we do not consider that a discrete reliability warning under s 122 of the Act was necessary.

[84] To summarise, our conclusions on this ground of appeal are that:

(a) a s 126 warning was required;

(b) the warning given was sufficient;

(c) exclusion of Ms R's evidence would not have been justified; and

(d) the Judge did not err in failing to direct the jury about Ms R's hostility in the witness box.

The failure to give a lies direction

[85] This part of Mr Pink's appeal was argued by Mr Elborough.

[86] As mentioned, the Crown adduced evidence of two out of court statements made by Mr Pink to police. The inconsistencies between the two statements and the inconsistences between the statements and Mr Pink's evidence were highlighted by the Crown in closing. The prosecutor suggested that Mr Pink had lied in his statements and in his evidence and was offering ludicrous explanations for the various inconsistencies.

[87] In those circumstances, Mr Elborough submitted a lies warning under s 124 of the Act should have been given. He further submitted that the failure to give one has created the risk of a miscarriage.

[88] Section 124 of the Act relevantly provides:

> (2) If evidence of a defendant's lie is offered in a criminal proceeding tried with a jury, the Judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence.
>
> (3) Despite subsection (2), if, in a criminal proceeding tried with a jury, the Judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests, the Judge must warn the jury that—
>
> (a) the jury must be satisfied before using the evidence that the defendant did lie; and
>
> (b) people lie for various reasons; and
>
> (c) the jury should not necessarily conclude that, just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.

[89] There is no doubt that in this case evidence was offered suggesting that Mr Pink had lied.

[90] However, as s 124 makes clear, there is no requirement to give a lies direction unless the defendant requests a direction or the Judge is of the opinion that the jury may place undue weight on the evidence of a lie. If either of those two circumstances applies, then a warning in terms of s 124(3) is mandatory.

[91] It is common ground that Mr Pink's trial counsel did not request a lies direction. Although Mr Elborough submitted that "if ever a case called for a lies direction, it was this one", the appeal was not argued as trial counsel error. It is therefore reasonable to assume that trial counsel held a different view regarding the benefit of such a direction to the defence. In this regard it is noteworthy that defence counsel's closing address did not mention the out of court statements, no doubt concerned to downplay their significance. To have them highlighted by the Judge in a direction may have been considered counterproductive.

[92] A factor which is also likely to have influenced trial counsel to adopt that view is that the Crown did not in fact at any stage invite the jury to treat the out of court lies as evidencing a consciousness of guilt. That is to say, the Crown did not suggest the lies were probative of guilt, something it would have been entitled to do. Rather, the submission was that the jury should treat all of Mr Pink's exculpatory accounts including those made out of court as lacking credibility and put them aside and instead focus on the other evidence. In effect the Crown bundled the out of court statements into the standard tripartite direction regarding a defendant's testimony, a direction which the Judge gave. The Judge also reiterated this was the Crown's approach when summing up the respective cases.

[93] Given the Crown's approach, it is hardly surprising the Judge did not give a lies warning. The risk of the jury placing undue weight on the evidence of the lies and thereby drawing inferences that were not warranted was low because the Crown had advised the jury it did not want them to put any weight at all on that evidence but to ignore it completely. For the Judge to then give a direction about using the evidence in assessing guilt would likely have been detrimental to the defence.

[94] Even if we are wrong on that, we would also point out that this was only a three day trial. Mr Pink had provided explanations for his out of court statements and denied ever lying. He said he had never made the statements attributed to him at the pub but had been misheard and his account at the police station was a product of the questioning. In those circumstances it would have been obvious to the jury that before using the evidence, they had to first reject those explanations. They had also been instructed the case largely turned on their assessment of the identification evidence,

something which also reduced the risk of them putting undue weight on the evidence of lies.

[95] For all those reasons we reject the submission it was an error for the Judge not to give a lies warning.

Outcome of the appeal against conviction

[96] We are satisfied that neither of the two grounds of appeal has merit. The appeal against conviction is dismissed.

The appeal against sentence

The sentencing in the District Court

[97] As the Judge recognised, sentencing for grievous bodily harm offending is governed by this Court's guidelines decision in *R v Taueki*.[23] The central issue in the appeal is how the Judge applied *Taueki* to Mr Pink's offending and accordingly it is necessary first to provide a brief summary of *Taueki* itself.

[98] In *Taueki*, this Court identified 14 aggravating features of grievous bodily harm offending[24] and then set out three sentencing bands with a range of starting points for each. Which band any particular case falls into was held to depend on the number and nature of aggravating factors present. The aggravating factors listed include such matters as extreme violence, premeditation, serious injury, use of a weapon, attacking the head, vulnerability of the victim, gang warfare and multiple attackers.[25]

[99] Band two which has a starting point of five to ten years' imprisonment is for offending that features two or three of the listed aggravating features.[26] Band three which has a starting point of nine to 14 years' imprisonment was held to encompass serious offending which has three or more aggravating factors, where their combination is particularly grave.[27]

---

23 Sentencing notes, above n 3, at [18], citing *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.
24 At [31].
25 At [34]–[41].
26 At [38].
27 At [40].

[100] Significantly for present purposes, the Court in *Taueki* provided a description of what a band two and band three concerted street attack would look like.

[101] A band two "concerted street attack" was described as a:[28]

> ... street attack in which a victim is set upon by a group of attackers in an attack involving the use of weapons found at the scene, a starting point at the lower end of band 2 would be indicated. If the attack involves blows to the head or other serious injuries are caused, or there is premeditation, then a starting point higher in the band two spectrum would be required.

[102] A band three "serious concerted street attack" was:[29]

> … [a]n episode of street violence where multiple victims set upon a victim in a premeditated attack using weapons which they have brought to the scene for that purpose, and where serious and lasting injuries are inflicted on the victim will call for a starting point in the lower to middle range of band 3. Where the victim is particularly vulnerable, or the attack has "hate crime" aspects to it, a higher starting point would be required. Where the victim is left with injuries which will have an ongoing impact on his or her enjoyment of life, a starting point at the top end of band 3 will be called for.

[103] At Mr Pink's sentencing, the Judge expressed concern that Mr Pink had felt able in the small community of Ngāruawāhia to carry out such a brazen attack on the main street in broad daylight, no doubt believing that no one would have the will to give evidence against him. The Judge said it could not be allowed to go unchecked and that a stern sentence was required so as to send a clear message that the community will not tolerate this level of violence.[30]

[104] The Judge held that the offending came within band three of *Taueki*, warranting a starting point of ten years' imprisonment.[31] He then uplifted the starting point by six months on account of Mr Pink's criminal history[32] before adjusting it downwards by 30 per cent because of personal mitigating factors. Those personal mitigating factors related to Mr Pink's disadvantaged background as well as the positive things he had done in the community. The adjustments resulted in an end sentence of seven years and four months' imprisonment.[33]

---

28 At [39(a)].
29 At [41(a)].
30 Sentencing notes, above n 3, at [18] and [30].
31 At [20].
32 At [23].
33 At [29]–[30].

[105] The Judge concluded by saying that although a minimum period of imprisonment would normally be imposed for violence of this nature, he had decided not to impose one. That was in recognition of the good Mr Pink had done in the community and because a minimum period was not sought by the Crown.[34]

Arguments on appeal

[106] Mr Elborough contended the sentence was manifestly excessive and out of kilter with comparator cases.[35] He submitted that correctly analysed the offending fell within band 2 of *Taueki*, not band 3, and that the appropriate starting point was seven and a half to eight years' imprisonment, not ten years. In addition to the Judge's starting point being too high, he also argued there should not have been a six month uplift for previous convictions. That was disproportionate and unwarranted. No issue was taken with the extent of the discount for personal mitigating factors.

[107] Developing these central contentions further, Mr Elborough submitted that the Judge had fallen into error by "searching for aggravating factors to boost band standing" and had also erred by finding that "virtually every one" of the *Taueki* aggravating factors was present. In Mr Elborough's submission, the degree of violence and the seriousness of injuries should have been treated as inherent in the offending and not aggravating features. It was also wrong to characterise the violence as extreme. There were, he argued, only two key aggravating features, use of a weapon and premeditation with premeditation being present only to a low degree.

Analysis

[108] We do not accept these submissions.

[109] What the Judge said was that "virtually every one of the aggravating features that have been identified as applicable are established".[36]

---

34 At [31].
35 Citing *R v Kirkwood* [2021] NZHC 2202; *Garrett-Phillips v R* [2015] NZCA 563; *Kreegher v R* [2021] NZCA 22; and *Kara v R* [2013] NZCA 527.
36 Sentencing notes, above n 3, at [18].

[110] If the Judge meant features that have been identified in *Taueki*, that was plainly wrong. The list of aggravating features in *Taueki* include features that patently have no application whatsoever to this case, like home invasion, perverting the course of justice, and public official victim. However, we consider it much more likely the Judge was referring to the *Taueki* culpability factors that had been identified by the Crown in its sentencing submissions as applicable; namely extreme violence, premeditation, use of weapons, vulnerability, victim impact, serious injury, multiple attackers and gang warfare.

[111] We acknowledge there is the potential for double counting as between extreme violence and serious injuries, serious injuries and victim impact, and between multiple attackers and victim vulnerability.

[112] However, even allowing for those qualifications, we are not persuaded the Judge fell into error in placing the offending at the lower end of band three.

[113] In our view, the *Taueki* description of a band three serious concerted street attack is a better fit for this case than the description of a band two concerted street attack. Contrary to a submission made by Mr Elborough, it was not a single blow with the axe. There was in fact evidence of repeated blows. Nor do we consider the fact the blunt end was used in any way undermines the characterisation of the violence as extreme. The injuries were undoubtedly on any view of it very serious. The axe must have been brought to the scene rather than found there and there was an element of premeditation. Finally, we note that although this was not gang warfare, the fact attackers are wearing gang regalia and on gang business to punish one of their own has been held by this Court in *Simon v R* to be a "very serious further aggravating factor".[37]

[114] There were thus in our assessment at least three significant aggravating factors in this case which when viewed in combination amounted to particularly grave offending. We therefore consider a starting point of ten years was available.

---

[37] *Simon v R* [2016] NZCA 449 at [31].

[115] In coming to that conclusion, we have not overlooked the four comparator cases relied on by Mr Elborough. However, we would not place the weight on them that he would have us do. Only three of the cases were decisions of this Court and of those three, one involved a single attacker.[38] It is noteworthy too that what was said in *Kara v R*,[39] was that the sentencing Judge's nine-year starting point was "clearly within range".[40] A finding that nine years was held to be well within range does not mean that nine years is the only available starting point. We acknowledge that the offending in *Kara* was more serious than the offending in this case. However there is a strong suggestion in the decision that because the offending "fell well" within band three and that ten years is the top of band two that the sentencing Judge in that case would have been justified in adopting a higher starting point than the very bottom of band 3.

[116] As for the six-month uplift for previous convictions, we note that Mr Pink has 84 previous convictions in total, with 25 of them being violence related offences. While some judges may not have imposed an uplift, we are not persuaded it was an error warranting appellate intervention.

[117] It is of course well established that the primary focus of an appellate court is in any event on the end sentence, rather than the sentencer's methodology.[41] In our view, having regard to the circumstances of this serious offending and the offender, a prison term of seven years and four months was not manifestly excessive.

[118] The appeal against sentence is accordingly also dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

---

38 *Garrett-Phillips v R*, above n 35; and *Kreegher v R*, above n 35.
39 *Kara v R*, above n 35.
40 At [18].
41 *Kumar v R* [2015] NZCA 460 at [81].