NOTE: INTERIM ORDER MADE IN THE DISTRICT COURT PROHIBITING THE PUBLICATION OF THE APPLICANT'S NAME REMAINS IN FORCE UNTIL FURTHER ORDER OF THE DISTRICT COURT.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 135/2024
[2025] NZSC 55

BETWEEN	J (SC 135/2024)
	Applicant
AND	THE KING
	Respondent

Court:	Glazebrook and Ellen France JJ
Counsel:	D P H Jones KC for Applicant J M Pridgeon for Respondent
Judgment:	20 May 2025

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1]   Mr J was convicted of one charge of money laundering. His appeal against conviction was dismissed by the Court of Appeal.[1] He now seeks leave to appeal to this Court.

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[1]   *[J] v R* [2024] NZCA 605 (Hinton, Brewer and Osborne JJ) [CA judgment].

Background

[2]   The charges against Mr J arose from a police investigation into an alleged drug syndicate which imported and distributed methamphetamine. The focus of the investigation was a used car dealership in New Lynn.

[3]   On 19 November 2018 at about 5.32 pm, an Asian man picked bags up from the dealership containing around $500,000 in cash (proceeds of the drug dealing). The car the man was driving was registered to Mr J.

[4]   The driver was videoed by police arriving and leaving the dealership. The jury were shown the video footage.

[5]   The police, through a production order, obtained data in relation to Mr J's mobile phone showing the phone receiving signal from a cell tower on Great North Road, New Lynn at 5.23 pm (some 300 m from the dealership). At 6.09 pm the phone was receiving signal from a cell tower in Takanini. Mr J lived in Karaka and the prosecution case was that Mr J was driving home.

[6]   Mr J was photographed when arrested. His height was recorded as 185 cm.

[7]   An agreed statement of facts essentially established that the money laundering offence had been committed by the driver of the car. The only substantive issue at trial therefore was whether the Crown had proved to the requisite standard that the driver was Mr J.

Summing up

[8]   The trial Judge told the jury that the principal question they needed to decide was whether the driver was Mr J. The Judge gave the following directions on the evidence and the respective contentions of the parties:

> [26]   Now, the evidence in support of the charge comes from the contextual background, the intercepted communications, the text data, the cellphone attribution, the cell tower polling, and the video surveillance, all of which, on the Crown case, paints a picture of a man in possession of the cash and intentionally engaging in a money laundering transaction, and that person, they submit, is [Mr J].

[27]   The defence accepts the majority of that detail and takes no issue with the fact that the Asian man was in possession of the cash and intentionally engaging in a money laundering transaction. However, they submit that it is not [Mr J], and more so, that the police have got the wrong man and have become somewhat blinkered in their approach to it.

…

[36]   The Crown say[s] that you can be sure from the evidence linking him to the cellphone, the car, the area at the relevant time, and [because] the [defendant's] general appearance is consistent with the Asian man seen in the video footage. The defence says the opposite. They submit that the police have focused on the wrong man and simply put, you cannot be sure, and as I say, that is the area of contest.

[9]   The Judge also gave the following warning on "identification":

[75]   I need to talk to you about identification. In this case you have the defendant before you, you have photographs taken of him at the time of his arrest and you have that video footage showing the Asian male getting out of the defendant's car and making the pickup. The Crown asks you to make that comparison and submits that, having done so, you can be sure that the Asian man and the defendant are one and the same. They also place reliance in reaching that conclusion on those same circumstantial factors in support of that conclusion, as I say.

[76]   The defence, on the other [hand], submits that this evidence is entirely speculative and, whilst acknowledging the car and the phone, submits that you cannot possibly identify the defendant from the video footage as the man photographed on arrest or sitting in court. Now, he cautions that you must be very careful in making that assessment and comparison, his fundamental submission being that you cannot be sure.

[77]   Now, evidence of identification is like all other evidence, and you will assess it accordingly. It is for you to determine if all of the evidence is sufficient for you to be sure that the Asian man in the video footage is [Mr J], noting, of course, that the view from that video footage is somewhat indistinct, distant and brief. However, I must warn you that in this regard there is a special need for caution before finding [Mr J] guilty based on the correctness of your identification made from all of that available material.

[78]   Now, the reason for that caution is that mistaken identification can result in a serious miscarriage of justice, and importantly, a general similarity is not the equivalent of the same. As we all know, identifying someone at a distance can be fraught, even if we know the person well. Here you are being asked to make that identification without that level of knowledge and at best from a comparison of the photograph taken on arrest and the general appearance of an Asian man wearing black-rimmed glasses, and as supported by the other circumstantial evidence, but those are all matters for you to properly assess.

Court of Appeal decision

[10] The Court described the Crown's evidence as to identity in the following terms:[2]

(a) a male of Asian appearance, who shared a similar hair cut to [Mr J] and had similar facial features to [Mr J], committed the offence;

(b) the male appeared to be tall against the SUV he was driving and truck he was standing next to, [Mr J] is 185 cm tall;

(c) the male drove [Mr J's] car; and

(d) [Mr J's] phone was in the area only for a brief period of time coinciding with the time that the bags were collected, before it travelled in the direction of [Mr J's] home.

[11] The Court of Appeal noted that this was a circumstantial evidence case and that the place of the surveillance video in the evidence was to show "that the man … in the video was consistent in appearance with [Mr J]".[3]

[12] The Court of Appeal said:

[21] Undoubtedly, the jury would have compared the surveillance video (and the still shots from it which were in the exhibits) with the photographs of [Mr J] taken at his arrest. The jury could also see [Mr J] in the dock. But because of the quality of the video, it was not suggested that the jury could be sure that the Asian man shown in the video was [Mr J] by making the comparison.

[22] Nevertheless, there is nothing improper in a jury comparing video footage with other photographs, or the defendant in the dock, to decide the extent to which the video footage identifies the defendant. In *Keil v [New Zealand] Police*, this Court discussed the situations in which a witness, such as a police officer, could give evidence that they recognised a person shown on video footage as the defendant.[4] The Court held that if the circumstances put the jury in as good a position as the witness to make the comparison, then the witness cannot give such evidence because it would be irrelevant.[5]

[13] The Court held that jury were properly directed. The trial Judge "summarised the competing cases properly and the directions he gave as to the need for caution were appropriate to the circumstances".[6]

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2   At [23].
3   At [17].
4   *Keil v New Zealand Police* [2017] NZCA 430.
5   At [35].
6   CA judgment, above n 1, at [24].

[14]   The Court concluded:

> [25]   On the essential issue of whether, given the evidence, the jury could reasonably convict [Mr J], our answer is "yes". The evidence before the jury was sufficient in law, if accepted, to prove that [Mr J] was the money launderer shown in the surveillance video. It is not for us to speculate on the jury's reasoning, but there was no evidence, before it to give a counter-narrative to the Crown's case. All the defence could do was submit to the jury that the Crown's circumstantial evidence, piecemeal and taken together, should leave it with a reasonable doubt as to whether [Mr J] was the Asian man shown in the surveillance video. There is no weakness in the Crown's case sufficient to have it withdrawn from the jury. The outcome was classically a decision for the jury.

Grounds of proposed appeal

[15]   Mr J submits that the verdict was unreasonable: the evidence adduced at trial was insufficient to support a guilty verdict. In his submission, the lack of any evidence connecting Mr J to the syndicate militates against him being the Asian man involved in the transaction. Mr J submits that the Court of Appeal failed to consider the broader context of the case and balance the significant evidentiary void against the Crown's circumstantial evidence. There was no evidence as to who had possession of Mr J's phone during the relevant period. Nor was there evidence of who had possession of the vehicle registered to him.

[16]   Mr J also submits that the Court of Appeal erred in its consideration of the grounds of appeal by adopting the Crown's summary of the identification evidence in that two of the identifying factors (similar facial features and haircut) were not based on the evidence. His submission is that the Court of Appeal erroneously stated that the jury did not rely on the video footage to identify the applicant when it is plain that the jury did consider the video footage while deliberating. Given the video footage was described by the trial Judge as "indistinct, distant and brief", there should have been a clear and specific warning of the risk of a miscarriage of justice from mistaken identity. Mr J says that this was not done at trial and that the Court of Appeal did not properly address this submission.

[17]   The Crown opposes leave. It says that the Court of Appeal was correct to hold that the jury could reasonably find beyond reasonable doubt that Mr J was the driver. The evidence established a clear pathway to guilt—the money launderer bore a

physical resemblance to Mr J, drove Mr J's car and Mr J's mobile phone was polling just 300 m from the car yard minutes before the money exchange. No evidence was presented to suggest an alternative explanation, such as Mr J allowing someone to use his phone or vehicle. In the Crown's submission, the only reasonable conclusion on all the evidence was that Mr J was the money launderer.

[18]   The Crown says there was in fact evidence that the man in the video and Mr J had the same haircut and facial features: the video surveillance footage, the stills of that footage and the photographs of Mr J taken on his arrest. The Crown also submits that the trial Judge and the prosecutor appropriately cautioned the jury to be careful when making comparisons related to the video footage.

[19]   The Crown says, in relation to the alleged evidential gaps, that the jury's task was to assess the evidence before them and not speculate on what else could have been presented. It submits that the absence of electronic or surveillance evidence linking Mr J to other syndicate members is in any event not an evidential gap. Evidence at trial explained why such links might be missing. Some syndicate members used communication methods that the police could not intercept. The evidence at trial was that syndicate members were known to use multiple phones and undetectable communication methods.

Our assessment

[20]   Nothing raised by Mr J suggests that the Court of Appeal was wrong to conclude that the circumstantial evidence presented by the Crown (including the video surveillance evidence, telephone records and the use of a car registered to Mr J) was sufficient for the jury to come to the conclusion beyond reasonable doubt that Mr J was the money launderer.

[21]   We also accept the Crown's submission that the Court was correct to find that the jury were appropriately warned about the dangers of "identification" evidence by the trial Judge.[7]

[22]   There is therefore no risk of a miscarriage of justice.[8]

Result

[23]   The application for leave to appeal is dismissed.

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[7]   Mr J did not argue, either in the Courts below or before us, that the jury should only have been permitted to use the video in order to assess similarities to the photograph and height measurements taken of Mr J at his arrest (for instance, that both the driver and Mr J were Asian and tall) and should not have been allowed to use the video footage to decide if the Asian man in the video was in fact Mr J (sometimes called a dock identification). The argument for Mr J was rather that the "identification" warning was not strong enough. We do not rule out the possibility that there may be issues with dock identifications, particularly in cases where, unlike in this case, it is the only evidence going towards identification. In a future case this Court may decide issues with dock identification merit consideration. The issues would, however, need to have been raised in the courts below (probably supported by expert evidence) and considered by those courts. It would not be appropriate for them to be raised for the first time in a second appeal.

[8]   Senior Courts Act 2016, s 74(2)(b).