

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

**CRN 322/07, 323/07, 772/07,
773/07, 771/07**

BETWEEN

THE POLICE

Plaintiff

AND

TEVITA VAKALALABURE

Defendant

Hearing: 5, 6 and 7 November 2008
Counsel: Mrs K Saunders and Ms M Henry for Police
Mr K Vuataki for Defendant
Judgment: 27 November 2008 (New Zealand time)

JUDGMENT OF WESTON J

The charges

- [1] The defendant has been charged with five offences in relation to various provisions in the Transport Act 1966. Each of these charges arises out of an incident that occurred in the early hours of Saturday 23 June 2007. The charges are in the alternative. First, the defendant is charged with two offences of drunken driving causing injury in terms of section 25, Transport Act. There are two charges because there were two persons injured as a result of the incident. First, Georgina Matutu who had been driving a motorcycle. Secondly, Jerry Varinava (whose name is spelled Verinava in the Informations) who had been driving a car. Both of the injured persons gave evidence, although Georgina Matutu's evidence was taken as read.
- [2] In terms of section 25 of the Act counsel are in agreement that there are five elements of the offence (identification of the driver being the first). Section 25(2) of the Act provides:

“Every person commits an offence who, while under the influence of drink or a drug to such an extent as to be incapable of having proper conduct of the vehicle, is in charge of a motor vehicle and by an act or omission in relation thereto causes bodily injury to or the death of any person.”

- [3] The second and alternative charges arise out of section 26, Transport Act. The defendant is charged with two offences of careless use causing injury to the same two victims. Section 26(1) provides that it is an offence to cause, *“bodily injury to or the death of any person by carelessly using a motor vehicle”*.
- [4] Thirdly, and as a final alternative, there is one charge of careless use of a motor vehicle in terms of section 30, Transport Act.
- [5] Mr Vakalalabure elected a Judge-alone trial. Originally, the matter was set down for two days but, in the event, it lasted almost three days in total. During the course of the first evening, and by agreement with counsel, I conducted a site inspection. I subsequently read my observations into the record the next morning.
- [6] It will be apparent from the above summary that there are three groups of offences – drunken driving causing injury, careless use causing injury, and careless use. In each case, the prosecution must prove that the defendant was the driver of the car. That is common across all of the alleged offences. The defence has put identity at the forefront of its case.

Identification put in dispute

- [7] Mr Vuataki described the identification of the defendant by Sergeant Matapo (the principal prosecution witness) as *“fleeting and slender”*. It was argued that although various prosecution witnesses identified the defendant as the driver of the car they were all mistaken. By contrast, the Police submitted that the defence evidence was essentially a fabrication.
- [8] The key identification of the defendant is that of Sergeant Matapo (promoted shortly prior to the trial to Acting Senior Sergeant but I will refer to her former rank in this Judgment). Her evidence of identification focused on and about the moment of impact. She gave evidence that she was approximately five metres away from the oncoming vehicle at the point of impact and saw the

defendant driving it. But, as I will discuss, it would be artificial to restrict the question of identification to that point alone. It must be seen in context. Events both before and after the impact provide the necessary context. This is not a case where the identification was of a person in a passing train, seen only for a moment, before the train vanished into the night.

- [9] Consequently, I believe it is necessary to look at the events leading up to the impact as well as those immediately afterwards. Indeed, that reflects how both the prosecution and the defence presented their cases.
- [10] The cases put forward by the prosecution and the defence are so starkly different in key respects that the only explanation can be that one or the other has fabricated those aspects of its case. Each of the prosecution and the defence called a number of witnesses who gave evidence consistent with each other (in the main) but fundamentally inconsistent with that called on behalf of the other party. I do not believe it is possible to characterise the difference between the two cases as one of mistaken identification.
- [11] In these circumstances I need to make an assessment of credibility. In doing so I will take into account my observations of the witnesses, particularly under cross examination, but also by comparing the internal consistency of the evidence presented.

The core facts

- [12] The essential facts are not in dispute and I find them to be as follows. Equally, where items are in dispute I will note that and reserve them for subsequent analysis.
- [13] The Police set up a checkpoint in the early hours of Saturday morning, 23 June 2007, to check for drivers affected by drink or drugs. The checkpoint was in place on the main road passing in front of the Bond Store, Avatiu and on that half of the road leading away from town in the direction of the airport. The checkpoint was located at the point the double lane terminates into a single lane. The Police had closed off the right-hand lane with reflectorised cones. This configuration forced on-coming traffic into the left-hand lane where each driver (whether of a car, motorcycle or otherwise) was assessed. During the course of the checkpoint some 40 to 50 vehicles passed through it.

- [14] The quality of the lighting at the checkpoint area was put in issue and will be discussed in more detail below. I have been assisted in reaching my conclusions by the site visit I made to this area and which I have mentioned above. I also note that Georgina Matutu's deposition contained uncontroverted evidence that the lighting was good in the area.
- [15] The incident which has resulted in the various charges involved four motor vehicles in total: two motorcycles and two cars. At approximately 2am Sergeant Matapo, who was operating as points-man, flagged down the two motorcyclists. One of these was Georgina Matutu, one of the victims. The other motorcyclist was Amy Auora (she did not give evidence at the trial). Police officers spoke to both of the motorcyclists who were then allowed to proceed on their way. In the meantime, a black Honda driven by Jerry Varinava had stopped behind the motorcycles. The Police beckoned him forward and he started to move his car towards the Police Officers.
- [16] As he did so, the car driven by Mr Varinava was hit from behind by a green Nissan convertible. The Police allege the defendant was driving this car. The defence case is that the defendant's wife (Lavenia Rokoika) was the driver. The prosecution case is that she was a passenger in the rear seat of the car at the time of impact.
- [17] The evidence establishes that the green Nissan was travelling at approximately 40kmh shortly prior to the impact. It may have braked at the last minute but the speed of impact was still reasonably substantial. Photos put in evidence showed the damage to both the green Nissan and the black Honda. In each case, it was reasonably significant.
- [18] Following the collision, the black car shot forward, ultimately stopping some 20 or 30 metres further on beside a lamp-post beyond the Bond Store. Mr Varinava said that the shock of the impact resulted in him putting his foot on the accelerator so that the car shot forward. The black car knocked over the two motor cyclists.
- [19] All evidence, except that of the defendant, was consistent with the black car shooting forward in this way. The defendant said that following the impact the green Nissan stopped in its tracks and all occupants of the car got out. Some seconds later the black car then accelerated away and ended up by the lamp-post beyond the Bond Store. While other defence witnesses supported his evidence that the occupants of the green car got out of it

following the impact, Mr Vakalalabure was the only one to say there was a period of time following the collision before the black car shot forward. I return to this below.

- [20] Although the defence witnesses said that the occupants of the green car got out of it immediately following the collision, the Police witnesses gave evidence to different effect. With some minor inconsistencies, which I will discuss below, the Police witnesses said that the occupants of the green car remained in it until the defendant was directed to drive it off the road and on to the shoulder beside the Bond Store. It is common ground that the defendant drove the car at that point but the charges do not relate to that act of driving. Rather, they focus on the driver at the time of impact.
- [21] Once the collision had occurred, and the green car was driven to the side of the road, Sergeant Matapo approached Ms Rokoika to speak to her. Sergeant Matapo gave evidence that Ms Rokoika did not say anything. Sergeant Matapo said that Ms Rokoika was sitting in the rear seat of the green car at that time. Constable Makara said the same.
- [22] The defendant was then taken back to the Police Station in Avarua and charged with drunken driving as a holding charge. This charge was subsequently withdrawn and replaced by the five charges mentioned at the outset of this Judgment. Ms Rokoika and a Mr Naibalu (who had been a passenger in the green car) then walked back to the Police Station and waited in its foyer for the defendant to be processed and released on bail.

Identification: the law

- [23] At the conclusion of the Police case, the defence moved that there was no case to answer in terms of section 111, Criminal Procedure Act. This provision is the Cook Islands equivalent of section 347, Crimes Act (New Zealand). I dismissed that application in a separate ruling. I do not need to repeat that here. However, in now setting out the relevant law as to identification, I draw on the submissions made by counsel as part of that application.
- [24] Both counsel agreed that the decision of the English Court of Appeal in *R v Turnbull* [1976] 3 WLR 445 would guide the Court's approach to identification issues. Although this case was intended to provide guidance to first instance Judges in directing juries, the approach stipulated for by the Court would

equally apply to Judge-alone trials. The Chief Justice, in delivering the decision of the Court, identified a number of factors which needed to be addressed. I summarise these as follows:

- care needs to be taken when a case against an accused depends wholly or substantially on the correctness of an identification which the defence alleges to be mistaken;
- a mistaken witness can be a convincing witness and a number of such witnesses can all be mistaken;
- the Judge needs to ask a number of questions including how long the witness was under observation, from what distance and in what light. Was the observation impeded in any way?
- while it may be highly material that a witness knows the accused, it remains the case that mistakes can be made even in relation to close relatives and friends.

[25] The Chief Justice noted that if the prosecution believes there is a material discrepancy between identification witnesses then they should supply the accused with details of the various descriptions given by the various witnesses.

[26] The Chief Justice said that if the identification depends "*solely on a fleeting glance or on a longer observation made in difficult conditions...*" then the Judge should withdraw the case from the jury unless there is other evidence which supports the correctness of the identification. Put in these terms, the Court's conclusion sounds more prescriptive than I believe the Chief Justice intended. This can be seen by the Court's actual approach to the first of the three appeals addressed in this single judgment. In relation to the first appeal (Turnbull/Camelo) the Chief Justice noted that the identification case relied primarily upon the evidence of one Police Officer. But, in that case, the Officer knew Turnbull, "*and that his was more recognition than mere identification*". As the Chief Justice noted in the same paragraph of the Court's judgment, other facts also supported the identification which was then upheld on appeal.

- [27] The prosecution referred me to section 344A, Crimes Act (NZ) (now section 126, Evidence Act 2006) which codifies the *Turnbull* approach in the New Zealand Courts.
- [28] In the present case, there is no doubt that the primary act of identification by Sergeant Matapo could be described as fleeting. The identification occurred at night. But, to put it in those terms alone, would not fairly summarise the evidence given by Sergeant Matapo. It was common ground that she and the defendant knew each other. She is a Senior Police Officer and he is a practicing lawyer who frequently appears as counsel. Sergeant Matapo was not identifying a stranger but someone well known to her. This is a case primarily of recognition rather than identity. I accept Sergeant Matapo's evidence that she has been a Police Officer for some sixteen years and has considerable experience in identifying persons under less than ideal circumstances. She gave her evidence in clear and compelling terms and, although subject to vigorous cross examination, did not waver or falter in her identification of the defendant. In saying that, I do not mean that she responded consistently to cross examination as if by rote. Rather, she gave careful and nuanced responses to the questions put to her while consistently identifying the defendant as the driver.
- [29] The defence put in various photos of the scene taken at night. These are very dark and grainy, and I find them to be of no assistance whatsoever in identifying the amount of lighting at the relevant time.
- [30] On that preliminary assessment, then, considerable weight can be given to Sergeant Matapo's identification. But, and following *Turnbull*, I need to assess that identification not only in its own terms but also in the context of all the evidence relevant to identification of the defendant. I now address that.

The identification evidence

- [31] As already noted, both the prosecution and the defence called evidence relevant to identification which covered a discrete period of time. The earliest relevant point could be said to be when the green car departed the Banana Court (a night club/bar in Avarua) before heading towards the checkpoint. The latest relevant point would be at the Police Station after the

collision. While there was considerable agreement as to what occurred, there were disputes on the following four topics:

- whether the green car parked in the CITC car park prior to heading towards the checkpoint (Mr Varinava said this occurred; the defence said it did not);
- whether the occupants of the green car got out of it immediately after the accident (the defence says they did; the prosecution to the contrary);
- whether the black car shot forward immediately after the impact or some time afterwards;
- what the defendant said to Sergeant Matapo following the collision and while at the Police Station.

[32] The Police did not call affirmative evidence as to what happened inside the Banana Court. But the defence did, and I base the following findings on that evidence. I find that the defendant arrived there at approximately 7.30pm and from that time until leaving at approximately 2am consumed at least 15 cans of Lion Red beer. During the course of that evening he drank with two others being Tomasi Vuli and Bill Naibalu. All three could, in colloquial terms, be called drunk by the time they left at approximately 2am.

[33] The defendant's wife, Ms Rokoika, arrived at the Banana Court sometime later than the defendant. Although it seems surprising, the defendant says he was not aware of her presence at the Banana Court until approximately 1.30am. He explained this on the basis he was drinking with his friends and enjoying himself. There was then an incident where Ms Rokoika threw a can of beer at him. Ms Rokoika was ushered from the premises by Ms Nitz, the Manager of the Banana Court. The defendant and his two friends joined them shortly afterwards. Ms Nitz gave clear and compelling evidence that she saw them get into the green Nissan and that Ms Rokoika was in the driver's seat. However, she did not see them drive from the car park.

[34] The above findings are, in the main, based upon the defence evidence, subject to such qualifications as were identified in cross examination. The Police case focused on what happened from this point onwards.

- [35] Mr Varinava gave evidence for the Police that he was called to the Banana Court early in the morning to pick up a work mate to drive him home. For religious reasons he is a non-drinker. He had not drunk alcohol that evening (or otherwise). He got into the work car (the black Honda) and went to pick up his friend. Having done so (plus two others), he was then driving along the main road when he saw the defendant's car in the CITC car park. He turned in to join the defendant who, he said, was standing outside the passenger's door of the car. He was the only person that he saw. Mr Varinava said there was a brief discussion before he rejoined the main road and drove towards Avatiu. The defendant categorically denied that this encounter occurred. Mr Naibalu was less categoric and accepted that if Mr Varinava had given this evidence he was not in a position to challenge it. However, he could not recall going into the car park. As I have noted, Mr Naibalu was drunk. That could easily explain his uncertainty on the point.
- [36] The difference between the defendant and Mr Varinava is stark. In one sense, it matters little because the green car was parked and it seems no one was in the drivers seat. But, on the other hand, it is potentially very important because, if Mr Varinava is correct, it suggests there was a break in the journey from the Banana Court to the checkpoint. Consequently, I believe I need to make a finding as to whether this event occurred. In doing so, I need to choose between the evidence of Mr Varinava on the one hand and the defendant on the other. I address the question of credibility in a separate section of this Judgment below.
- [37] I now move forward to the point of impact. It is common ground that the green Nissan drove into the back of the black Honda driven by Mr Varinava. The defence says Ms Rokoika was driving. The Police says it was Mr Vakalalabure. As already noted, Sergeant Matapo gave evidence that she positively identified Mr Vakalalabure as the driver. I find that the lighting in the area of the collision was sufficient for a witness to be able to identify another with certainty. It is common ground there were four relevant street lights – two before the Bond Store and two afterwards (with the second on the opposite side of the road). At the time of my site visit, the two street lights prior to the Bond Store were not working. There was evidence, however, that at the time of the collision all were operational. I accept that evidence. The night was otherwise clear and dry. Consequently, although

the identification occurred at night, and under the circumstances of a motor vehicle crash, I am satisfied that identification could properly be made.

- [38] Immediately following the collision, the green car stopped in the middle of the lane. Constable Teinangaro gave evidence that shortly after the collision she was beside the green car which was still in the middle of the road. She could see all of the occupants inside. She said that the defendant was in the driver's seat. Ms Rokoika was in the rear of the car. It was put to Constable Teinangaro that she had given inconsistent evidence in her written deposition made the previous year. In that statement she had said, "*I shone my torch at the driver who was the accused. I saw the accused getting out of the car through the driver's door*". In giving her evidence in chief the officer did not mention the defendant getting out of the car as she had in her deposition.
- [39] Under cross examination the Constable accepted that her oral evidence was inconsistent with what she said in her statement. Nevertheless, she did not resile from her evidence that the defendant was in the driver's seat. And the difference between the two accounts is not major. In her deposition, she said that the defendant was "*getting out of the car through the driver's door*". She did not say that all of the occupants of the car got out. Her oral evidence, and the written deposition, were entirely consistent as to the identity of the defendant as the driver and that the occupants of the car remained in it (with the possible exception of the defendant who was getting out and then got back in in order to drive the car to the side of the road).
- [40] There was some inconsistency between Sergeant Matapo and Constable Teinangaro as to the Sergeant's instructions to the Constable immediately after the collision. Indeed, there was some inconsistency as between the Constable's evidence in chief and cross examination on this topic. Again, though, I find the inconsistencies to be minor. Indeed, I would be surprised if such minor inconsistencies did not exist. Events happened fast. Some aspects of what occurred were more important than others. What is clear is that the Sergeant directed the Constable to go to the green car and get it taken off the road. Constable Teinangaro did that and it is common ground that the defendant drove the car to the side of the road.
- [41] Constable Makara was some distance from the point of impact and, following the collision, chased after the black car. Thus, he had the least opportunity,

of any of the Police witnesses, to observe the impact and to identify the driver of the green Nissan. Constable Makara gave evidence that there were three females in Mr Varinava's car. Mr Varinava said there were three passengers, only one of whom was a female. The inconsistency is there but does not appear to me to be very important. Again, this is a reasonably minor detail in the face of far more important matters.

[42] Constable Makara gave evidence that, having spoken to Mr Varinava, and taken him over to the Police van, he then went to the green car which had just been parked by the Bond Store. He gave evidence that Ms Rokoika was in the back seat.

[43] There is a stark difference between the Police evidence on this topic and that given by the defence witnesses. Both of Mr Vakalalabure and Mr Naibalu gave evidence that all of the occupants got out of the car immediately after the collision. Mr Vuli had been travelling behind the green car (indeed, there was a white car between him and the green car) on a motorcycle. He, too, supported this version of events. Consequently, there is another credibility dispute I need to address.

[44] Constable Teinangaro said she smelled alcohol on the defendant's breath. Sergeant Matapo gave evidence that, following the collision, the defendant was staggering and gave the impression of being drunk. Both at this time, and subsequently at the station, she said he was begging her not to charge him because he had an important case coming up in front of the Court. The defendant entirely denied this. Again, there is a stark credibility issue arising. And, once more, it appears to be an important issue. If the defendant, as a practising lawyer, was begging the Police not to charge him that plainly suggests he thought there were otherwise grounds to do so. It is common ground that at no stage did the defendant actually deny he was the driver (he first denied this in October 2007, some four months after the incident). Indeed, that is one of the curious factors in this case. At no stage, in the period immediately following the collision, did the defendant deny that he was the driver.

Credibility

[45] In the discussion above I have identified the key points where disputes on the evidence arise. I now say something about credibility. I start with the

Police. I have already set out my preliminary assessment of Sergeant Matapo's evidence. Taking all evidence into account, and also assessing the *Turnbull* factors set out in paragraph [24] above, I find her evidence of identification of the defendant to be credible. Constable Teinagnaro was a less impressive witness, no doubt reflecting her junior status and lack of experience. Nevertheless, I find her evidence to be credible as well. The minor inconsistencies I have already identified do not seem to me to raise credibility issues. Constable Makara's credibility is less in issue because he was not in a position to identify the defendant as the driver of the car. However, he did give evidence that Ms Rokoika was in the rear seat by the time the car was parked at the Bond Store. This evidence is inconsistent with the defence case. I have no reason to doubt Constable Makara's credibility. He gave his evidence in a straightforward way. He did not elaborate or embellish his evidence.

- [46] I turn to the defence. In doing so, I specifically exclude Ms Nitz from this assessment. I find her to be a credible witness. However, her evidence covered a very early part in the overall transaction which is not determinative.
- [47] Both of Messrs Vuli and Naibalu are Fijians. They are friends of the defendant. The defendant had been one of a group of persons who sponsored their migration from Fiji to the Cook Islands. Both of them had been employed by or on behalf of the defendant. Both of them had been drinking with the defendant that evening and all of them had consumed a considerable amount of alcohol. These circumstances, of themselves, raise a suspicion of partiality and, also, incapacity but, without more, are not sufficient to discount their evidence. However, they are plainly relevant factors that must be taken into account. I now discuss each witness.
- [48] Mr Vuli was a poor witness. He gave what appeared to be a well rehearsed story. He was reasonably fluent in his evidence in chief. However, the picture that emerged under cross examination was entirely different. His evidence was halting and uncertain. Whenever he was taken off the prepared material he appeared to be lost. In re-examination, defence counsel raised the possibility that this was due to language difficulties. I am satisfied that is not the case. When he needed to be, Mr Vuli was comparatively fluent in English. It was only when he was under pressure that a different picture emerged.

- [49] I mention two other matters. First, Mr Vuli did not remain at the scene of the accident. Because he was on a motorbike, he was able to leave, and he did. He said he could see at a distance that his friends appeared to be uninjured. But he turned tail and left the scene. Secondly, Mr Vuli was some distance from the impact and separated from it by the white car.
- [50] In all of the circumstances mentioned above, I give very little weight to Mr Vuli's evidence.
- [51] Mr Naibalu was a more impressive witness than Mr Vuli. He gave his evidence in chief carefully, and many of his answers in cross examination were also careful and considered. He candidly accepted he had drunk too much to drive and he said the same of the defendant. Nevertheless, and during the course of cross examination, I gained the impression that he was sticking to a well prepared story. He was pressed as to why he did not tell the Police, either at the accident scene or later at the station, that the defendant was not the driver. He continued to retreat to the proposition that he did not do this because he was not asked. These answers were lame.
- [52] Mr Naibalu also said that he did not recognise the black car they had hit as being Mr Varinava's car. It is true that on his account (but inconsistently with that of the defendant) the black car had shot forward immediately after the impact and then was parked a small distance beyond the Bond Store. I do not find Mr Naibalu's evidence on this believable. First, the car was parked not far away. It would have been visible to him because it was right under a street light. Secondly, Mr Varinava was taken over to the Police truck which was directly opposite where the green car ended up. It must be remembered that Mr Naibalu knew Mr Varinava very well (they all worked together at the time) and, indeed, Mr Varinava had dropped him off at the Banana Court in the same black Honda earlier that evening.
- [53] For the reasons given above, while I attach more weight to the evidence of Mr Naibalu than I do to that of Mr Vuli, I still believe I can give it little weight.
- [54] I now turn to the evidence of the defendant. Mr Vakalalabure is an experienced lawyer who frequently appears before the High Court in criminal matters. He gave his evidence fluently and with very little prompting by his counsel. His evidence under cross examination was also fluently given. He appeared to have an answer for most questions. But, as with the previous two witnesses discussed, I began to gain the impression that he was telling a

well rehearsed story. Things were simply too precise. For example, he focused on details such as whether and how a passenger in the back seat of the green Nissan (a two door car) can move the front seat and get out the door. Evidence of this sort had an air of precision that suggested rationalisation after the event rather than accurate evidence of the event itself.

- [55] I regret to say that I find the defendant was fabricating his evidence in key respects. Three of the reasons for my conclusion seem particularly powerful (although there are additional grounds which I will discuss later). First, the defendant acknowledged he did not tell the Police he was not driving. He explained this by saying no one asked him. As with Mr Naibalu I find that an unsatisfactory explanation in these sort of circumstances (although I recognise there was no legal obligation on him to deny liability then or afterwards). But the matter did not end there. Mr Vakalalabure, in explaining why he did not deny he was the driver, said that by the time he was taken to the Police Station he had forgotten all about the accident and was flirting with Sergeant Matapo. Indeed, he said that twice in evidence. Moreover, he gave evidence that when Sergeant Matapo said she was going to charge him with drunken driving he said that was fine.
- [56] None of these propositions was put to Sergeant Matapo (which, of itself, raises a suspicion that this part of his evidence is an invention) so I do not know exactly what she would have to say about this evidence. Generally, though, these assertions of the defendant were inconsistent with the tenor of the evidence that she did give. In any event, the defendant's evidence seems to me inherently incredible. Mr Vakalalabure, on his own account, had just been in an accident which had caused injury to two people (as he knew). He knew his wife was in shock (he gave evidence of that) and he knew that he was back at the Station and was to be charged with an offence that assumed he was the driver. Yet, in the face of this, he said he had forgotten all about the incident and was flirting with the Sergeant. There is no ring of truth about this at all.
- [57] Secondly, Mr Vakalalabure said that the black car stayed still in the road for several seconds after the impact before speeding off. No one else supported his version of events. I find that the black car shot off as soon as it was hit because Mr Varinava's foot went onto the accelerator with the force of the collision. Other than the evidence given by Mr Vakalalabure, there is

no logical reason why the black car would have stayed still for a period and then shot forward, only to stop beyond the Bond Store. The defendant's evidence on this is inherently implausible. I accept Mr Varinava's evidence that immediately prior to the collision his car was moving slowly forward towards the Police Officer and he was starting to put his head out the window. In those circumstances it makes perfect sense that, following the impact, the car would shoot forward.

[58] Thirdly, the defendant gave evidence that after the collision, and having got out of the car, he was asked to move the car to the side of the road. He said he asked his wife for the keys. However, he also gave evidence that the car engine was still running (as a result of the keys being in the ignition). In answer to a question from me on this topic, the defendant said he could not hear the car running but I did not find his explanation particularly satisfactory.

[59] These three reasons appear to me to be good reasons why I should find the defence evidence in relation to the four disputed topics (see paragraph [31] above) to be a fabrication. But they are not the only reasons. I now give those additional reasons.

[60] In relation to whether the green Nissan stopped at the CITC car park or not, I accept the evidence given by Mr Varinava. He was entirely sober at the time. He was cross examined vigorously on this topic but did not waver in his evidence. I discerned no reason why he would give false evidence against the defendant. Most importantly, of itself, the incident is not of great importance. Viewed in the overall context, however, it has considerable importance. There was nothing to suggest that Mr Varinava, somehow appreciating the overall case, then fabricated his evidence to add a key component. It was put to Mr Varinava that he was mistaken in his evidence and that he had got mixed up with another occasion. He denied that. I accept his evidence. The meeting in the CITC car park took place only minutes before a collision in which the green Nissan crashed into the back of the car he was driving. That conjunction of events would, I find, have remained uppermost in his mind.

[61] I now address the defence evidence that, immediately following the impact, all persons in the green Nissan (Mr Vakalalabure, Ms Rokoika and Mr Naibalu) got out of it. As I have already said, the Police evidence was to contrary effect (with the possible exception of Constable Teinagnaro). I find

that the occupants of the car did not get out of it immediately following the impact. I have already discussed the competing contentions above. I find it inherently unlikely that all of the persons would have immediately got out of the car without Sergeant Matapo having noticed that. Moreover, if that had happened the question of identification could hardly have been put in issue. The evidence established that she was only metres away from the point of impact. If the green Nissan had stopped at that point, and the driver got out of the car, that would have been immediately obvious to her.

[62] I accept Sergeant Matapo's evidence that the defendant was begging her not to arrest him. I find that Mr Vakalalabure was seriously affected by alcohol (see below). In any contest between him and the Sergeant, I believe that her memory would be more accurate than would his.

[63] In summary, those are the reasons why I believe that key aspects of the defence case that Mr Vakalalabure was not the driver (see the four factors listed in paragraph [31] above) were fabricated. That, of itself, does not mean that it has been proved, beyond reasonable doubt, that the defendant was the driver. The fact that a defendant may not tell the truth does not mean that the prosecution case is necessarily proved. Here, I observe that the fabrication of the defence case could have one purpose only and that was to challenge what was otherwise a strong prosecution case on identification. Out of an abundance of caution I do not rely on the defence fabrication as positive proof of identification. I simply reject the defence evidence. There is nothing, then, to contradict the Police case. No issue of Police credibility was raised by the defence (who argued that their identification was mistaken). I have already found the identification evidence given by the Police to be credible. For all of the reasons set out above I find that the defendant was the driver of the car at the time of the collision. The Police have proved beyond reasonable doubt that the defendant was the driver at the point of impact.

The role of Ms Rokoika

[64] As already noted, Ms Rokoika did not give evidence. I was told there were two bases for this. First, reliance was placed on section 75(2), Criminal Procedure Act. This provides that where a defendant refrains from calling his wife as a witness no adverse comment can be made about that. Secondly, it was said that if she was to give evidence she would incriminate

herself (not as to identification but as to the other elements of drink driving/careless use).

- [65] I was given copies of correspondence relevant to this topic as well as an interview undertaken by Sergeant Matapo of Ms Rokoika. In a letter written to the Police, and also in the statement, Ms Rokoika said she was the driver of the car on the night in question. The letter was sent on 25 August 2008, more than a year after the incident. In that letter, Ms Rokoika said:

"I note that you have charged Tevita Tangaroa Vakalalabure with regard to the accident that occurred to at the Bond Store on the above date. As an Officer of the Court, I am obligated to inform you that I was the driver of the vehicle in question."

- [66] It may immediately be noted that the letter is somewhat ambiguous in that it does not state that Ms Rokoika was the driver of the car at the time of the collision.

- [67] In the subsequent Police interview which took place on 11 September 2008 Ms Rokoika was more specific. She said she was the driver at the time of impact. In question 10 she was asked why she had not offered that explanation on the night of the accident. She said she did not think she was asked the question that night or subsequently.

- [68] Mr Vuataki, for the defence, accepted that these documents were not evidence as to the truth of their contents. Indeed, he raised them in a bid to impugn the Police investigation. He was highly critical of the Police for not interviewing either of Ms Rokoika or Mr Naibalu.

- [69] He also argued that Mr Vakalalabure's letter of 30 October 2007 was an alibi notice. That letter said:

"Further note, that we will be producing three defence witnesses, one of which is the driver whom you have failed to charge and therefore wrongfully concluding that I was the driver on that occasion."

- [70] This letter asserted, for the first time, that Mr Vakalalabure was not the driver of the car. The letter did not name the driver. The letter was written shortly after the prosecution had disclosed the various witness statements to the defence.

- [71] It was suggested that Ms Rokoika's letter, written some ten months later, was to be read in conjunction with the defendant's earlier letter. I do not accept that Mr Vakalalabure's letter is an alibi notice. Even if I am wrong as to this, nothing seems to turn on the characterisation. An alibi notice is a procedural step designed to give the prosecution adequate notice of an alibi. In the present case, the prosecution was not prejudiced and did not suggest it was.
- [72] I reject the defence criticisms of the Police investigation. I have already found that Sergeant Matapo made a firm identification and I have upheld that. Her identification was supported by other evidence. Sergeant Matapo was entitled to take the view that identification was established for the purposes of the prosecution. The Police are not required, automatically, to interview every possible witness. Moreover, I accept Sergeant Matapo's evidence that she asked Ms Rokoika, at the crash site, what had happened, and Ms Rokoika did not answer her. In those circumstances, she could reasonably assume that any formal request for an interview would be met in the same way. It is true that Mr Naibalu was not interviewed by the Police but the defence had complete access to such evidence as he could give and it has presented that to the Court. I have substantially rejected it.
- [73] I have dealt with these issues at the conclusion of my assessment of the factual evidence and credibility. I want to make it clear that the absence of Ms Rokoika as a witness had no part to play in my decision to uphold the prosecution case of identification. Rather, and to the probable advantage of the defence, I have been mindful of the fact that there are untested assertions by Ms Rokoika that she was the driver rather than the defendant. Even so, and as set out above, I have upheld the Police case on identification.

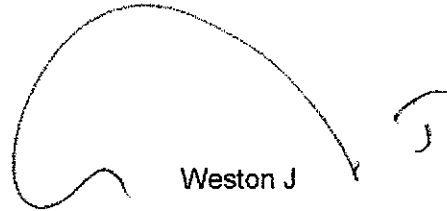
Other relevant elements of the offence

- [74] As noted at the outset, Counsel accepted there were five elements that needed to be proved before the offence of drunken driving causing injury was established. The identity of the driver was the first one. I have already found that that element has been proved. I now turn to the other four elements. I note that none of these elements was seriously contested by the defence.

- [75] The second element requires that the defendant was driving while under the influence of drink or drugs. Something about this has already been said above. On the evidence before me, I have found that over a period of some six hours the defendant consumed 15 cans of beer. I uphold Sergeant Matapo's evidence that his walking was unsteady, his eyes were bloodshot and his speech was slurred. She gave evidence about recognising drunkenness and her experience in doing so which I accept. I find this element is made out.
- [76] Thirdly, the defendant while under the influence of drink must have been incapable of having "*proper control*" of the vehicle. The Police argued that this was satisfied essentially on the same basis as carelessness. That is, the prosecution must prove beyond reasonable doubt that the defendant did not meet the requisite standard of care and attention that a reasonable and prudent driver would exercise in the circumstances. In *Stratford v MOT* [1992] 1 NZLR 486 the Chief Justice, at page 490, referred to the civil law doctrine of *res ipsa loquitur* as providing an analogous thought-process. That is, an inference might be drawn from proved facts which are so strong as to admit of no other conclusion. In the present case, I am satisfied this third element has been met. There was plenty of evidence from witnesses before the Court that the checkpoint was well lit and highly visible. I can draw an inference from the fact that some 40 or 50 vehicles passed through it that night, all without collision (except for the defendant), as evidence of that. The black car had its red tail lights on. The Police truck had flashing lights. The Police were in reflectorised vests and the cones also had reflector patches on them. The only conclusion in all the circumstances was that the defendant was so incapacitated that he did not see what was in front of the car. I find the defendant was incapable of properly controlling the green Nissan car. Thus, the third element is proved.
- [77] The fourth element is that the defendant did or failed to do something. In this case, the defendant failed to stop the car prior to the checkpoint. This element is made out.
- [78] The fifth element is that the defendant caused injury to someone. Here, there is no doubt that two people were injured, albeit not badly. The first was Mr Varinava who was in the black car which was directly hit by the green car. The second was Georgina Matutu who was knocked over by the black car as it shot ahead following the collision. I am satisfied there is sufficient causal

relationship between the other elements of the offence and their injuries. I uphold this fifth element as well.

- [79] As a consequence, I find all five elements of the charge of drunken driving causing injury in breach of section 25(2), Transport Act to be made out. Consequently, I find the defendant guilty of those offences charged in CRN 322/07 and 323/07. The other charges are all alternatives and, on the basis of my findings as above, I dismiss those other charges.

A handwritten signature in black ink, consisting of a large, sweeping arch over the name "Weston J" and a small flourish to the right.

Weston J