MLL218 – Criminal Procedure

Prescribed Cases for Each Topic

Topic 8 – Identification Evidence

R v Clune [1982] VR 1

Facts

Police arranged for Witness to:

- Identify C from array of photos
- Identify C from group of men sitting in room after C had been arrested
- Identify C while he was being taken to MMC with police escort
- Identify C while being charged at MMC
- Identify C from the dock at the trial

Held

- Police could not compel D to take part in I.D. parade
- Right not to take part in identification parade is not the same as right not to be identified
- Holding C specifically so that W could identify him in room was improper
- Police could arrange for W to identify suspect in circumstances that do not involve a misuse of detention eg journeys to/from ct, appearances in ct.
- In circumstances (stress, lighting, personal qualities of W, circumstances in which ID performed etc) directions from judge were inadequate (must give his weight to comments) (McGarvie: unfairness resulting from unlawfulness of police conduct in placing C in room would exclude that evidence)è appeal upheld, new trial

Craig v R (1933) CLR

Held

An honest witness who says "The prisoner is the man who drove the car" whilst appearing to affirm a simple, clear, and impressive proposition, is really asserting:

1. That he observed the driver (perception)
2. That the observation became impressed upon   his mind (stored in memory)
3. That he still retains the original impression (maintained in memory)
4. That such impression has not been affected, altered or replaced, by published portraits of the prisoner (not contaminated by post event information) and
5. Tthat the resemblance between the original impression and the prisoner is sufficient to base a judgement, not of resemblance, but of identity." (matching)

Domican v The Queen (1992)

Facts

- F was present when her husband was shot (eyewitness). About 30 shots fired. She eventually identified D as the shooter; D was charged with intent to murder.
- F identified accused from photographs 9 months after the shooting [picture identification evidence]; trial judge instructed jury on dangers of eyewitness id. D convicted. Defence disputed reliability of identification evidence and adequacy of judicial direction, appealed.

Held

High Ct: identified multiple problems in identification evidence of F:

- Accused was stranger to her
- I.D. was 9 months after crime
- By time F identified accused, he had already been identified on TV as a suspect
- Exposure was brief
- Exposure was in traumatic context (30 shots fired)
- F initially told police she could not identify shooter
- Also, other evidence of F proved unreliable*

Note: Identification evidence unreliable, appeal allowed. Instructions of trial judge not adequate.

Judge:

- The judge must warn the jury as to the dangers of convicting on eyewitness evidence *where its reliability is disputed.*
- Warning: no particular formula; must be cogent and effective, appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'.
- A warning in general terms is NOT sufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it è the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence (561-562).

R v Smith [1987]

Facts

- D charged with murder of V; alleged that D shot V at a school building in Craigieburn. D was identified by a number of eyewitnesses as the person who shot the deceased.
- Counsel for D sought to have an expert psychologist give evidence to the jury on the general fallibility of eyewitness testimony
- Vincent J:
- Doubtful that expert testimony re eyewitness identification generally will be more helpful in assisting a jury to determine whether or not it is safe to rely on evidence of a witness than full and accurate instruction by judge
- Such matters are within common knowledge of members of the jury

Held

- High Court held that evidence given by two police officers at the trial that D was the person depicted in security photographs had been improperly received.
- Majority said that because the police officers assertion of identity was founded on material no different from the material available to the jury for its own observation, that the witnesses assertion that they recognized the appellant was not evidence that could rationally affect the assessment by the jury of the question whether the evidence could rationally affect (directly or indirectly) the assessment by the jury of the probability of the existence of the facts in issue in the proceeding (ie evidence *not* relevant)

High Court: *The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury…*

Recall: Domican v The Queen (1992)

Facts

- F was present when her husband was shot (eyewitness). About 30 shots fired. She eventually identified D as the shooter; D was charged with intent to murder.
- F identified accused from photographs 9 months after the shooting [picture identification evidence]; trial judge instructed jury on dangers of eyewitness id. D convicted. Defence disputed reliability of identification evidence and adequacy of judicial direction, appealed.

Held (High Court)

Identified multiple problems in identification evidence of F:

- Accused was stranger to her
- I.D. was 9 months after crime
- By time F identified accused, he had already been identified on TV as a suspect
- F had impaired view of shooter (partly behind car..)
- Exposure was brief
- Exposure was in traumatic context (30 shots fired)
- F initially told police she could not identify shooter
- Also, other evidence of F proved unreliable*

Note: Identification evidence unreliable, appeal allowed. Instructions of trial judge not adequate.

Note: Look at Domican Warning (above).

R v Hentschel [1988]

Facts

- V of rape conversed with her assailant for over 2 hours. Assailant's voice varied between threats, apprehension and discussion of a variety of subjects.
- D arrested; refused to take part in ID parade. V identified D from photoboard of 10 photos. Police took V to foyer of Praharan Magistrate's Court when D attended for bail hearing; V identified D as her attacker.
- Police subsequently played a tape of ten voices (males, aged 20-23 years). Victim identified a voice as the voice of her assailant. The voice she chose was that of D.
- Evidence of voice identification (as well as other identification evidence) admitted at trial. Accused convicted. Appealed.

Held

1. Ct rejected view that voice recognition evidence required special, specific warning and had special limitations (cf *R v Smith* (EJ) [1984] 1 NSWLR 462)
2. Evidence of photofit identification admissible

R v Nguyen [2003]

Identified many problems in the identification evidence of W:

- Identified person was a stranger to W.
- 1st opportunity that W had to make an identification was 7 months after the crime.
- W was only 17 years of age at the time.
- W was undoubtedly in a highly emotional state at the time of his identification (victim of a savage attack just prior to the crime).
- W's capacity to observe affected by fact that just prior to crime, he had been punched in the eye
- Although W said that he was close to the gunman when he made his observation of him, little evidence to indicate whether his capacity to observe was affected. eg face on or side on to the shooter? length of time that W had to observe the gunman?
- W is the only person from 24 people at the scene to make an identification
- Despite being involved in the matter, W not charged with any offence. BUT he still remains in some jeopardy ➔ require warning to jury.
- W was initially suspected by police of being the gunman ➔ jury could conclude that W may have identified someone else in order to deflect attention away from himself ➔ warning to jury.

Note: More than half of that 2nd interview (extending to six typed pages) was devoted to questions pertaining solely to the identification of the accused. Although there still remained qualifications in his identification (by reason of the person's hair length and the absence of a hat), W was prepared to now express his degree of certainty as then being 100%. ***The witness' greater confidence in his ability to identify the man in the photo as being the gunman appears to have arisen directly as a result of that subsequent interview.***

Held: "It is reasonable to conclude, in all the circumstances, that the way in which the further interview was conducted and what occurred during it, has led to a distortion of the process of identification itself.