IDENTIFICATION EVIDENCE IN CRIMINAL TRIALS

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Some basic principles

Mistakes as to the identification of accused persons are not uncommon, and where identification is in issue in a criminal trial, the judge must warn the jury to exercise caution.

Section 116 of the *Evidence Act* 2001 provides that if identification evidence has been admitted, the judge is to inform the jury that there is a special need for caution before accepting identification evidence, and must inform the jury of the reasons for that need for caution, both generally and in the circumstances of the case. It is not necessary that a particular form of words be used in directing the jury.

There is, however, no mandatory requirement to warn a jury in relation to identification evidence in every case. The *Evidence Act*, s 116, like the common law as stated in *Domican v The Queen* (1992) 173 CLR 555, contains the obvious implicit qualification that the warning only has to be given where the reliability of the identification evidence is in dispute on the trial. The authority for that proposition is *Dhanhoa v The Queen* (2003) 217 CLR 1 (per Gleeson CJ and Hayne J at [19], per McHugh and Gummow JJ at [53] and Callinan J at [90]-[91]).

In *Domican* Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ held, at 561, that where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. 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 insufficient. The jury's attention should be drawn to any weaknesses in the identification evidence. Reference to counsels' arguments is insufficient. The judge should isolate and identify any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence.

At 565 their Honours held that a trial judge is not absolved from the duty to give general and specific warnings concerning the danger of convicting on identification evidence simply because there is other evidence which, if accepted, is sufficient to convict the accused. The judge must direct the jury on the assumption that the jury may decide to convict solely on the basis of the identification evidence.

Unless a court of criminal appeal can conclude that the jury must inevitably have convicted the accused independently of the identification evidence, the inadequacy of or lack of a

warning constitutes a miscarriage of justice, even though the other evidence made a strong case against the accused.

It is from this standpoint that all forms of identification evidence must be approached. At a fundamental level a witness as to identification, and subsequently the members of the jury, are likely to have a natural instinct to assume that a photograph or a voice recording, shown or played to them, is probably that of a suspect or the accused in the dock. That is the very reason why dock identifications are regarded as of very little weight and can be sufficiently prejudicial as to require exclusion.

There is also the danger of what was described by Stephen J in *Alexander v The Queen* (1981) 145 CLR 395 at 409 as the "displacement effect", where a witness, having been shown a photograph, may retain the memory of it more clearly than the memory of the original sighting of the offender, and thus the memory of the photograph may displace that original memory.

Counsel in criminal trials have long needed to be aware of all of these things in the context of evidence of identification parades and photo-boards, but slightly different issues arise these days in the case of Facebook profile picture identifications (as well as admissions made in Facebook posts), and in the case of voice identifications and CCTV images. By way of an aside, the latest consideration by the High Court of unfair prejudice in a case where police conveyed to the victim that the photograph of the suspect would be on the photo-board the victim was shown, is *R v Dickman* [2017] HCA 24 (21 June 2017).

Facebook

Facebook can be a mine of information. In a recent trial of mine the State wished to adduce hearsay evidence on the basis that a witness was unavailable, having left Australia for the United States of America, and known only to be living somewhere in Texas. Some contact had been made with him through Messenger, but he had ceased responding to the State's requests to speak with him. Counsel had no objection to me viewing his Facebook page, and when I did it transpired that the witness was living in a city in Texas with a population of about 100,000, approximately the same size as the City of Launceston. His Facebook profile upon which he was posting larger than life photographs of himself that would clearly have assisted in locating him, was public and had no privacy settings activated. Moreover he had over 200 Facebook friends whose identities were public on his page and from whom no doubt inquiries as to his address could have been made.

The main issue I wish to deal with as to Facebook is often considered the most difficult. In truth it is pure simplicity. How do you prove a document which comprises a screenshot or a photograph of a Facebook post or page? You tender it.

In a pre-trial ruling in a criminal case in 2012, which is unreported, and which was published to the parties only, Porter J, having carefully considered the matter, was not satisfied that a Facebook post self-authenticated to the extent necessary, and on the basis only that it was

sought to be tendered in its own right and without more, his Honour ruled that it was inadmissible.

On the day following the hearing of that matter Perram J published his reasons for judgment in *Australian Competition and Consumer Commission v Air New Zealand Ltd* (*No 1*) [2012] FCA 1355. The case was not concerned with Facebook posts but with business records. However his Honour's decision at [92]-[93] is, with respect, a masterpiece of judicial logic.

The passage is lengthy and repays careful reading, but in essence the position is this. There is no provision of the *Evidence Act* which requires that only *authentic* documents be admitted into evidence. The requirement for admissibility under the Act is that evidence be *relevant*, not that it be authentic. Indeed, on some occasions, the fact that a document is not authentic will be what makes it relevant, for example, in a forgery prosecution. And in answering the only question before the tribunal of law – relevance – the tribunal may examine the document to see what may be reasonably inferred from it (*Evidence Act* s 58(1)). It may also examine other material (s 58(2).

The tribunal of law - the trial judge - does not find that the document is authentic. He or she finds that there is, or there is not, a reasonable inference to that effect, and hence that the document is, or is not, relevant. If there is a reasonable inference that the receipt of the document will rationally affect the probability of a finding of fact, then the matter may to go to the tribunal of fact - the jury - which will then determine, as part of its deliberations, whether the document is authentic and whether the relevant fact is proved.

So, at no time does the trial judge determine that the document is or is not authentic because this is not a question for him or her. He or she may, however, determine that no reasonable inference to that effect is open, and thereby conclude that it is not relevant. In a jury context, that will involve taking the question of authenticity away from the jury.

In a nutshell when you tender the Facebook screenshot no question as to its authenticity arises as a threshold question. The only question is relevance. At no time does the trial judge in a jury trial determine that the document is or is not authentic because this is not a question for him or her.

He or she may, however, determine that on examining the document no reasonable inference as to authenticity is open, and may thereby conclude that it is not *relevant*. For example if the asserted Facebook post on its face resembled a page from a family photo album or an online newspaper.

In deciding relevance, that is, in deciding whether the tribunal of fact could reasonably infer that the otherwise relevant document was authentic, the trial judge is explicitly authorised by s 58(1) to ask what inferences as to authenticity are available from the face of the document itself. If it looks like a duck and it walks like a duck and it quacks like a duck, then it is sufficiently authentic to be relevant and thus admissible as a duck.

If the affected party in his or her evidence denies that the photograph or the post is his or hers and is not genuine, then the issue will play out like any other issue of fact. If the person denies that he or she posted it, then that claim will be tested by cross-examination. Who had access to your account? How was your account hacked? Who knew your password? When was it hacked? What about the posts either side of that post? The jury will be told to consider the question of the respective weight of the competing evidence.

Voice identification

I turn then to evidence of voice identification.

Often a witness, usually a police officer, will be called to identify a voice recorded during the commission of a crime, perhaps on a mobile phone or, more usually, in a recording of a lawfully intercepted telephone call. Often the objection will be that the provisions of s 137 of the *Evidence Act* should apply and that admission of the evidence should be refused as its probative value is outweighed by the danger of unfair prejudice to the defendant. Alternatively the objection might be that the evidence proposed is opinion evidence under s 79 of the *Evidence Act* to which the exception under s 78 of the Act as to lay opinion evidence does not apply.

The first objection in many cases will fail because the only issue as to the evidence of the voice identification of the accused is likely to be one of weight, and that is so whichever basis of admissibility is the correct one. As was said by Crawford CJ and Evans and Blow JJ in *Braslin v Tasmania* [2011] TASCCA 14 at [28] and following, voice identification evidence falls within the definition of "identification evidence" in the *Evidence Act*, s 3(1), and there are two provisions of that Act that are relevant – ss 116 and 165. Those sections recognise the unreliability of identification evidence and require that the jury be warned as to its use. The underlying reasons are explained in *Domican v The Queen* (above) and *Dhanhoa v The Queen* (above). Once the required warnings are given, no question of unfair prejudice within the meaning of s 137 of the *Evidence Act* is likely to be discernible.

As to the correct basis of admissibility, it seems to me that from the perspective of a trial judge that such evidence is admissible evidence on the basis that it is either;

a. factual evidence of a commonplace of human experience (*R v Phan* [2017] SASCFC 70, per Hinton J at [59], with whom Kelly and Nicholson JJ agreed);

b. lay opinion, pursuant to s 78 of the *Evidence Act* (*Kheir v The Queen* (2014) 244 A Crim R 231 at [65]);

c. evidence of an ad hoc expert under s 79 of the *Evidence Act* (*Nguyen v The Queen* [2017] NSWCCA 4, per Hulme J at [81] and Schmidt J at [105]).

In *Phan* at [58] Hinton J said;

> "58. Before turning to consider *Solomon* it is to be noted that in *Bulejcik v The Queen* (1996) 185 CLR 375 *(Bulejcik)* the High Court was required to consider

> whether it was permissible for a trial Judge to invite a jury to compare the voice of the accused, recorded when he gave his unsworn statement in court, with voices on a recording made by police of out of court conversations in which the accused was, according to the police, a participant, in order that the jury might determine for itself whether the accused was in fact a participant in the out of court conversations. *Bulejcik* may be accepted as authority for the proposition that, subject to adequate direction and warning, a jury may compare voices recorded on recordings tendered in evidence for the purposes of determining for itself whether there is one or more speakers common to each recording. It does not settle, however, the question whether there is any special rule governing the admissibility of recordings of out of court statements or conversations admitted for, amongst other things, voice comparison purposes. Brennan CJ may be taken as concluding that there is no special rule and that the evidence is admissible if relevant to a fact in issue, subject to discretionary exclusion. McHugh and Gummow JJ may be taken as doubting but not deciding the question of whether there is a special rule, whilst Toohey and Gaudron JJ appeared to accept the existence of such rule without deciding the same"

His Honour then went on at [59] to extrapolate as follows:

> "59. If it is permissible for the jury to undertake voice comparison because '[r]ecognition of a speaker by the sound of the speaker's voice is a commonplace of human experience', it follows that evidence of voice comparison does not fall exclusively within the province of experts and expert opinion evidence. That said, the expert who satisfies the qualifying criteria for the admissibility of expert evidence may give expert evidence of voice comparison. It also follows that evidence of voice comparison lead from a non-expert will be inadmissible unless the non-expert enjoys an advantage over the jury. It is this last proposition with which *Solomon* deals." (Footnotes omitted)

In *Solomon* the appellant was convicted of drug offences proven in part by the tender of 120 intercepted telephone calls. A detective was permitted to give evidence that, having listened at length to the recordings of the calls, including for the purpose of preparing transcripts, he could identify a particular voice in a number of conversations as being the same person. Thereafter the prosecution proved the identity of the common speaker circumstantially. Hinton J justified *Solomon* as an application of the principle settled in *Butera* v *Director of Public Prosecutions (Vic)* (1987) 164 CLR 180 at 187-188.

In *Nguyen* (above) Schmidt J said at [103]-[105]:

> "103.The concept of an ad hoc expert, who can be called to give opinion evidence such as that sought to be called from the Senior Constable, has long been recognised (see *R v Butera* [1987] HCA 58; (1987) 164 CLR 180). In

> *Regina v Leung and Wong* (1999) 47 NSWLR 405; [1999] NSWCCA 287 it was held at [40] that s 79 is sufficiently wide to accommodate the idea of such an ad hoc expert.
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> 104. RA Hulme J has explained the experience on which the Crown's case that the Senior Constable had the expertise which rendered his evidence both relevant and admissible under s 79 rested. That section provides that the opinion rule does not apply to opinion evidence which is based on a person's specialised knowledge 'based on the person's training, study or experience', where the opinion 'is wholly or substantially based on that knowledge'.
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> 105. All that the Senior Constable had done, in the performance of his duties, which on the Crown's case resulted in his claimed specialised knowledge and the formation of the opinions about which he gave evidence, was not, as RA Hulme J has explained, able to be replicated by the jury. In the result, I too consider that his evidence was correctly admitted, as it was both relevant to what was in issue at the trial and admissible under s 79, given the experience on which his opinions rested."

That case involved the evidence of one of three officers who were assigned the task of monitoring intercepted telecommunications during the investigation. There were some 45,000 voice calls and text messages and mobile internet data. The constable estimated that he monitored 70 per cent of all intercepted material. In the course of carrying out this monitoring, the officer may have listened to calls a number of times; stopping, starting and restarting to listen again. He did this to ensure the accuracy of summaries he was required to prepare. He listened to the calls again after having heard the recording of the police interview.

Finally, as to *Kheir,* Pearce J observed in *Farhat* [2017] TASSC 66 (6 February 2017) at [31]:

> "In *Kheir v The Queen* [2014] VSCA 200 the Court of Appeal considered the evidence of a police officer who, after listening to approximately 1,000 telephone calls over about a month, said he was able to attribute the voices on the phone intercepts to the accused when he heard them speak following their arrest. The plurality stated at [62] that in Victoria 'identity evidence, whether visual or aural, had never been treated as a matter requiring proof of expertise, whether ad hoc or otherwise'. It continued at [65]:
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> 'In our view, the evidence of Sergeant Bray was more appropriately viewed as falling within s 78 than s 79. The "matter" of which Sergeant Bray had a 'perception' was the audio recordings of the telephone intercepts, the recordings of the applicant's record of interview and a comparison of the two. His perception of that comparison met the test of relevance because he was in a better position to make that comparison than the jurors were. Whether the voice heard in the intercepts was also that in the record of interview was a fact in issue, and the comparison could rationally affect the assessment of

> the probability of that fact. Sergeant Bray's opinion was based upon that comparison, and his opinion — that the voices on the two tapes were the same — was necessary to shed light upon the observations he made about the voices' similarities. [Footnotes omitted]".

Kheir was recently affirmed in Victoria in *Tran v The Queen; Chang v The Queen* [2016] VSCA 79.

In *Farhat* Pearce J expressed the view that he preferred the approach adopted by the Victorian Court of Appeal in *Kheir* and in *Tran,* but would have admitted the evidence on the facts of the case even if it was opinion evidence. His Honour's ruling in *Farhat* was delivered prior to the decision of the South Australian Full Court in *Phan* which was handed down on 23 June 2017. The New South Wales Court of Criminal Appeal decision in *Nguyen* was not decided at the time of the legal argument in *Farhat* and was handed down just four days before *Farhat* was.

In my view, therefore, it is likely to be unnecessary for a trial judge to devote too much time to an analysis of the authorities, as in most cases the evidence will be admissible via each of the current three differing pathways. There is even a fourth pathway as was articulated by Basten J in *Nguyen* at [27], and as might be seen as underpinning *Kheir,* namely that there is a general law principle which continues to operate by virtue of s 9 of the *Evidence Act* with respect to the admissibility of voice recognition and voice identification evidence, subject to exclusion pursuant to ss 135 and 137 of the Act, and subject to necessary warnings based on unreliability (ss 116 and 165). No doubt the question will be settled by the High Court at some stage as foreshadowed in *Honeysett* at [2014] HCA 29 [48]. In this regard it is perhaps of interest to note that in 2015, faced with inconsistent approaches to voice identification evidence, the *Criminal Practice Directions* for England and Wales were revised to require that there be a *sufficiently reliable scientific basis* for the evidence to be admitted. That will, it seems, involve forensic voice comparison evidence involving empirical testing. (See [2018] Crim LR 20.)

CCTV identification

Finally, I would like to say a word about expert evidence of the anatomical features of accused persons filmed on CCTV.

In *Honeysett v The Queen,* the appellant was convicted of the armed robbery of an employee of a suburban hotel, following a trial before a jury. The robbery was recorded on CCTV and at the trial, over objection, the prosecution adduced evidence from an anatomist, Professor Henneberg, of anatomical characteristics that were common to the appellant and to one of the robbers. His opinion was based on viewing the CCTV images of the robbery, and images of the appellant taken while he was in custody. The High Court concluded that Professor Henneberg's opinion was not based on specialised knowledge.

In a joint judgment at [18] the Court set out the professor's methodology as follows:

> "Professor Henneberg's method of 'forensic identification' can be shortly described. Professor Henneberg looks at an image of a person and forms an opinion of the person's physical characteristics. His opinion is not based on anthropometric measurement or statistical analysis. Professor Henneberg stated that statistical analysis may yield reliable results when anthropometric measurements can be taken or the photographs are taken at the same angle and in prescribed body positions. Surveillance images and standard police photographs are not of this standard. He explained that his examination of images does not differ from that of a lay observer save that he is an experienced anatomist and he has a good understanding of the shape and proportions of details of the human body."

In holding that the professor brought an unwarranted appearance of science to the prosecution case, the Court said at [43] that his opinion was not based on his undoubted knowledge of anatomy:

> "Professor Henneberg's knowledge as an anatomist, that the human population includes individuals who have oval shaped heads and individuals who have round shaped heads (when viewed from above), did not form the basis of his conclusion that Offender One and the appellant each have oval shaped heads. That conclusion was based on Professor Henneberg's subjective impression of what he saw when he looked at the images."

It should be noted however that the respondent acknowledged that the professor had not examined the CCTV footage over a lengthy period before forming his opinion, and thus did not maintain a submission that his opinion was admissible as that of an ad hoc expert (cf *Butera v Director of Public Prosecutions (Vic)* (above) per Mason CJ, Brennan and Deane JJ, citing Cooke J in *R v Menzies* [1982] 1 NZLR 40 at 49, and cf *Nguyen* (above)).

I would predict that since the decisions in *Nguyen* and *Phan* such evidence could often be admitted as factual evidence of visual observations or as ad hoc opinion evidence, but it would be admitted, if at all, subject to argument as to prejudice where it merely brought an unwarranted appearance of science to a task the jury itself could perform, and would always be admitted, I would think, with strong directions as to weight and reliability.

Justice S P Estcourt