Identification

The issue of identification is one for you to decide as a question of fact.[1]

The case against the defendant depends to a significant degree on the correctness of one (or more) visual identification of the defendant, which the defendant alleges to be mistaken. I must therefore warn you of the special need for caution before convicting in reliance on the correctness of that identification.[2] **The reason for this is that it is quite possible for an honest witness to make a mistaken identification.**[3] **Notorious miscarriages of justice have sometimes occurred in such situations. A mistaken witness may nevertheless be convincing. Even a number of apparently convincing witnesses may all be mistaken.**[4]

You must examine carefully the circumstances in which the identification by the witness was made. How long did the witness have the person, said to be the defendant, under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the defendant before? If so, how often? If only occasionally, had the witness any special reason for remembering the defendant? What time elapsed between the original observation and the subsequent identification to the police?[5] **Was there any material discrepancy between the description given to the police by the witness when first seen and the evidence the witness has now given?**

The evidence of each individual witness, while important in itself, should not be regarded by you in isolation from the other evidence adduced at the trial. Other evidence tending to implicate the defendant may be highly relevant, and may

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1 See *R v Donnini* [1973] VR 67.

2 *Domican v The Queen* (1992) 173 CLR 555.

3 In *Amore v The Queen* [1994] 1 WLR 547 at 553 the Privy Council spoke of:

> "The importance of warning juries … of the danger that an honest witness, who is convinced of the correctness of his identification and gives his evidence in an impressive manner, may yet be mistaken." See also *Pattinson & Exley* [1996] 1 Cr App R 51, especially 54-55; *Reid (Junior)* [1990] 1 AC 363; and *Sainsbury* [1993] 1 Qd R 305, 308.

4 A possible addition is: **In general, the powers of observation, and of recollection of observation, are fallible. And the risk of mistake is especially great with fleeting encounters.**

5 *Winmar v W.A.* (2007) 35 WAR 159 at [109].

justify a conviction, while the evidence of identification, if it stood alone, would be insufficient.[6]

Where evidence is given by a stranger to the defendant or a casual acquaintance, you should treat the evidence of identification with care. You should be cautious about concluding that identification has been established in such a case, and scrupulous to be satisfied first that the identifying witness is not only honest in his evidence, but also accurate.[7]

An identification by one witness may support evidence of identification by another, but you must bear in mind that even a number of honest witnesses may be mistaken about such a matter.[8]

The evidence capable of supporting the visual identification of the defendant is:[9]

(set out matters)

However, I must remind you of the following specific weaknesses which appeared in that identification evidence:[10]

(set out matters) …

I now isolate and identify for your benefit, the following additional matters of significance which might reasonably, depending of course on your own view, be regarded as undermining the reliability of the identification evidence:[11]

1. General Principles

The principles to be applied when directing in relation to evidence of visual identification are set out in *Domican*.[12] At 561, the majority emphasised the need for particular directions:

> *"… the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that courts … have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue."*

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6 *R v Beble* [1979] Qd R 278, which was approved by the High Court in *Chamberlain* (1984) 153 CLR 521.

7 See *Sutton v The Queen* [1978] WAR 94 and *Domican*.

8 See *R v Weeder* (1980) 71 Cr App R 228 and *Chamberlain*.

9 See *Domican*.

10 See *Domican*.

11 See *Domican*.

12 This decision is now considered the leading case with respect to identification evidence, in place of *Turnbull*. It has been followed and applied several times by the Court of Appeal. For example, in *Renton* the Court of Appeal evaluated the adequacy of a trial judge's directions to the jury in relation to identification evidence according to the principles established by *Domican*. It referred to the "traditional factors" mentioned in *Turnbull*, but made clear that the directions must comply with *Domican*.

The relevant principles, sometimes called the "*Domican* requirements" (*Renton* [1997] QCA 441), may be summarised as follows:

1. "… 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 Court referring to *Turnbull* [1977] QB 224, 228 (*Domican*, 561).[13]

2. "The terms of the warning need not follow any particular formula … but it must be cogent and effective … it must be appropriate to the circumstances of the case" (*Domican,* 561-2).

3. "… 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'…" (*Domican*, 562).

4. "A warning in general terms is insufficient … The attention of the jury 'should be drawn to any weaknesses in the identification evidence' " (ibid).

5. "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" (ibid).

6. "… 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" (ibid).[14]

7. "… the adequacy of a warning in an identification case must be evaluated … by reference to the identification evidence and not the other evidence in the case" (*Domican*, 565).

8. "… the adequacy of the warning has to be evaluated by reference to":

   (a) "the nature of the relationship between the witness and the person identified";[15]

   (b) "the opportunity to observe the person subsequently identified";[16]

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[13] The majority of the Court of Appeal in *B* [1999] QCA 105 rejected submissions that a failure to adopt particular expressions used in *Domican*, such as "dangers" or "warning", renders a judge's summing-up inadequate. McPherson JA pointed out, [13], that the High Court in *Domican* "observed that the terms of the warning 'need not follow any particular formula'". His Honour then referred to *R v Zullo* [1993] 2 Qd R 572 where it was stated, 578, that *Domican*, "should not be applied as if what the High Court said were a statute"; cf *Pattinson & Exley* [1996] 1 Cr App R 51, 53, where similar observations were made about *Turnbull.*

[14] In *B*, the majority of the Court of Appeal found that, in the circumstances of the case, had the trial judge singled out particular matters that "may reasonably be regarded as undermining the reliability of the identification evidence" it would have been inappropriate, as it would have intruded on the "function of the jury in deciding whether [a particular witness] should be accepted as a witness of truth, and, if so, which parts of the identification evidence should be accepted as reliable rather than mistaken". In the circumstances, the majority held that a direction which isolated "the potential problems of reliable identification in the prosecution case, and then [stated] the rival contentions about them" was acceptable, [19].

[15] For example, where visual identification involves recognition of a person, the jury should be reminded that mistakes in the recognition, even of close relatives and friends, are sometimes made.

[16] For example, in *Weeder* it was emphasised that what mattered was the quality of the visual identification rather than its volume - that:

> "The identification can be poor, even though it is given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions. ... Where the quality of the identification evidence is such that the jury can be safely

(c) "the length of time between the incident and the identification";[17] and

(d) "the nature and circumstances of the first identification".[18]

9. "A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused" (ibid).

10. "The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence" (ibid).

On appeal, a miscarriage of justice will ordinarily be found and a new trial ordered if an adequate warning has not been given regarding identification evidence, even if there is other compelling evidence pointing to conviction. Only in exceptional circumstances, where "… the other evidence in the case [is] so compelling that a court of criminal appeal [would] conclude that the jury must have convicted on that evidence independently of the identification evidence …", might the verdict be left intact, the omission being classified a legal error, not a miscarriage of justice (ibid).

In *R v Rhaajesh Subramaniam* [1999] QCA 108 the Court of Appeal confirmed that, in accordance with *Domican*, a detailed warning with respect to identification evidence is not required where "… the identifications made by the various witnesses … could scarcely be considered a 'significant' part of the proof of the guilt of the appellant" (*Subramaniam* [15]).

2. Identification by Photographs or Photo Boards

In *Alexander v The Queen* (1981) 145 CLR 395, the High Court confirmed that evidence of identification by reference to photographs may be admitted. However, there are problems peculiar to this sort of identification, which were summarised by Stephen J in *Alexander*, 409:

> *"When identification is attempted with the aid of photographs, there are introduced peculiar difficulties, due to the various ways in which photographic representations differ from nature: their two dimensional and static quality, the fact that they are often in black and white and the clear and well lit picture of the subject which they usually provide."*

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left to assess its value, even though there is no other evidence to support it, then the trial Judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification by another, *provided* that he warns them in clear terms that even a number of honest witnesses can all be mistaken" (*Weeder*, 231).

This principle was confirmed by the High Court in *Chamberlain* stating, 535 that "… the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness 'separately in, so as to speak, a hermetically sealed compartment'; they should consider the accumulation of the evidence".

[17] For example, in *R v Redshaw* [1997] QCA 483 the Court of Appeal considered whether a nine week delay between the offence and identification by photoboard was admissible. In those circumstances it was held open to the trial judge to have received the evidence as the witness had observed the defendant for "up to three to four minutes at close quarters". There were other issues because the identification was by police photographs, which are mentioned later, but in a case such as this very clear warnings need to be given to the jury.

[18] For example, in the case of visual identification, the danger is that the appearance of the person identified will alter the memory of the appearance of the subject, so that any subsequent identification will be based on the contaminated memory: *Davies & Cody v The King* (1937) 57 CLR 170 at 181-182. See also *R v Akgul* (2002) 5 VR 537, wherein there is discussion of the danger of the displacement effect, where a memory is contaminated by a later image.

Although such evidence is admissible, judges should bear the above matters in mind when directing the jury.

Judges also exercise their discretion to exclude identification evidence if, "… the strict rules of admissibility operate unfairly against the accused … in any case in which the judge [is of the] opinion that the evidence [has] little weight but [is] likely to be gravely prejudicial to the accused" (*Alexander*, 402-3); cf *Stott* (2000) 116 A Crim R 15 [17]-[18].

Redshaw (supra) provides an example. In that case there was a nine week delay between the commission of the offence and the identification by photo board. Whilst that may of itself suggest the evidence was prejudicial to the defendant, the fact that the witness had observed the defendant for "up to three to four minutes and at close quarters" meant that the evidence was "not evidence of little weight". The Court of Appeal, applying *Alexander*, accordingly did not interfere with the judge's decision not to exclude the evidence.

Evidence of identification through the use of photo boards involve additional considerations that may need to be brought to the jury's attention. Thus, where the composition of a photo board is capable of suggesting a particular identification, the jury should be warned that such evidence should be approached with particular caution: *R v Gould* (2014) 243 A Crim R 205; [2014] QCA 164 at [35]. Otherwise, the following observations from *Pitkin v The Queen* (1995) 130 ALR 35; 69 ALJR 612 at [12] should be considered in the formulation of any directions:

> *"The use of photographs of suspects by law enforcement agencies for the purpose of identifying an offender is a necessary and justifiable step in the course of efficient criminal investigation. Nonetheless, it is attended by some danger of consequential and unfair prejudice to an accused. One such danger is that identification through a photograph is likely to be less reliable than direct personal identification since differences in appearance between the offender and a suspect may be less noticeable when a photograph of the suspect is used. In that regard, once there has been purported identification through a photograph, any subsequent direct identification may be less reliable by reason of the subconscious effect of the photograph upon the witness's recollection of the actual appearance of the offender. Another such danger is that a witness who is shown photographs by investigating police will ordinarily be desirous of assisting the police and will be likely to assume that the photographs shown to her by the police are photographs of likely offenders. In that context, and in an environment where the ultimate accused will necessarily be absent and unrepresented, there may be subconscious pressure upon the witness to pick out any photograph of a 'suspect' who 'looks like' the offender notwithstanding that the witness cannot, and does not purport to, positively identify the subject of the photograph as the offender. Yet another danger from the point of view of an accused is that a witness's evidence that she identified a photograph of the accused which was in the possession of the police may suggest to the jury that the accused either has a criminal record involving the relevant kind of crime or is otherwise unfavourably known to the police as a person likely to commit that kind of crime. That danger of prejudice is likely to be increased in a case, such as the present, where the police have produced a number of different photographs of the accused taken at different times."*

3. Voice identification

As to the warnings required where the jury is asked to compare recordings of voices to decide whether or not the voice on one recording is the same as the voice on another with a view to concluding that the defendant is the speaker in both: see *Bulejcik v The Queen* (1996) 185 CLR 375, 384, 397; *D. Ormerod*, "Sounds Familiar? – Voice Identification Evidence", [2001] Crim L R 595, 619; *R v Soloman* (2005) 92 SASR 331, 344-349. The trial judge should isolate and identify for the benefit of the jury any particular matter that might undermine the reliability of a conclusion based on the comparison they are asked to make and any particular factors that call for consideration. Such factors could include the quality of the recordings, differences in acoustics, the different contexts and locations in which tapings took place, the difficulties involved in distinguishing two voices both speaking in a particular manner with which the jury were unfamiliar, the danger of confusing voices speaking in a foreign accent and the limited opportunity for the jury to become familiar with the recorded voice or voices in question: *R v Evan, Robu and Bivolaru* (2006) 175 A Crim R 1.

See *Neville v The Queen* (2004) 145 A Crim R 108 as to the admissibility of evidence of persons who have familiarity with the voice which is to be identified and the appropriateness of a direction that the jury must be informed that, although there was evidence to assist them on the issue, it remained ultimately their decision and a decision which they can make, having regard to their own views on the matter from the material available in the court, irrespective of the opinion or identification evidence which may have been adduced by the prosecution.

4. Identification of things

See *R v Clout* (1995) 41 NSWLR 312.

5. Dock Identification[19]

One (or more) witnesses have pointed to the defendant and said that he was the person who assaulted him.

I must caution you very strongly about the use of that form of identification. It is a dangerous form of identification and has very limited value.

Even total strangers to court proceedings quickly realise that the defendant, in the position he is seated in court, is the person alleged to have committed the offence or offences being tried.

When a witness identifies the defendant in court, consider whether the witness might have been influenced by seeing the defendant in that position, in this Court.[20]

In cases in which there is a dock identification, it is necessary for a trial judge to give directions of the kind identified in *Domican v The Queen*[21] (see 51.3).

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[19] *R v Negus*, CA No 57 of 1997, 1 July 1997; *R v Tyler* [1994] 1 Qd R 675; *Pollitt* (1990) 51 A Crim R 227, 234; *Saxon* [1998] 1 VR 503, 513.

[20] Add, where appropriate, "or in the Magistrates Court during the committal hearings".

6. Circumstantial Evidence of Identification

The need for a trial judge to give a *Domican* direction where the identification evidence did not directly implicate the defendant as the person committing the crime was considered in *Festa v The Queen* (2001) 208 CLR 593. On occasions a *Domican* direction will be required. *Finlay v The Queen* (2007) 178 A Crim R 373 is an example of a case where the identification was of such a nature that the *Domican* direction was not required. See also *R v Main and Fauid* [2012] QCA 80. Where the case relies wholly or substantially on such evidence, a direction on circumstantial evidence will be necessary.

[21] *R v Franicevic* [2010] QCA 36.