IN THE SUPREME COURT OF NEW ZEALAND SC 64/2010

[2011] NZSC Trans 21

JUSTIN LEIGH HARNEY

v

NEW ZEALAND POLICE

Hearing:	17 August 2011
Coram:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	A J Bailey and K H Cook for the Appellant C L Mander and B J Fenton for the Respondent

---

CRIMINAL APPEAL

MR BAILEY:

May it please the Court, counsel's name is Bailey. I appear for the appellant, along with my friend, Mr Cook.

ELIAS CJ:

Thank you, Mr Bailey and Mr Cook.

MR MANDER:

May it please the Court, Mander for the Crown, together with my learned friend, Ms Fenton.

ELIAS CJ:

Thank you, Mr Mander, Ms Fenton. Yes, Mr Bailey. First of all, I should say thank you very much, counsel, for accommodating us and moving the fixture forward. I hope Christchurch airport wasn't too much of a problem, Mr Bailey?

MR BAILEY:

No, it was no problem for either of us.

Your Honours, both grounds for appeal – on which the appellant's been given leave – concern identification evidence, which this Court previously hasn't looked at. Identification evidence still remains a leading cause of miscarriages of justice in both this country and elsewhere, and essentially the primary difference between the appellant's and respondent's advocated position concerns the level of precaution which identification evidence should be made subject to for it to be admissible in a criminal proceeding, and that's whether it's before a judge alone or a judge and jury.

In the appellant's submission, given the inherent problems and frailties of identification evidence, this Court should and must ensure that the threshold for admissibility is as high as reasonably applicable in an attempt to minimise the miscarriages.

In the appellant's submission, if the respondent's position was to be accepted by this Court it would set the admissibility threshold significantly too low and not achieve the objectives that s 45 of the Evidence Act was enacted to address, namely reducing the likelihood of a mistaken identification being admitted into evidence and then relied upon by the trier of fact.

On behalf of the appellant, I intend to address the Court in relation to the first approved ground of appeal and Mr Cook will address the Court on the second ground of appeal, which concerns the circumstances in which an identification was made. He also may touch upon any areas that I miss out concerning the first ground.

Turning to the first ground of appeal, the broad submission of the appellant – and it should be apparent from the written submissions – is that there should be a level of familiarity between a witness and an alleged offender that means there is a good reason to not hold a formal identification procedure, and that's really more of common sense.

The level which the appellant submits should be required to excuse a formal procedure is, as the English Courts have required, such that the witness and accused are very well known or, at the very least, well known. There are, however, two important qualifications to that broad submission which, the appellant submits, should be required in order to constitute a good reason in any case. Firstly, it is submitted that the claimed familiarity between witness and alleged accused should be required to be based on recent contact or association at the time of the alleged offence, rather than past contact or association, and I'll elaborate on that further shortly. Secondly, in the appellant's submission, it should have to be accepted by the accused that such familiarity has, in fact, existed prior to the time in which a formal procedure should otherwise have taken place or, alternatively, the familiarity between witness and alleged offender can be independently proved.

ELIAS CJ:

Sorry, should either be accepted or should be proved?

MR BAILEY:

Independently of the witness saying –

ELIAS CJ:

Yes.

MR BAILEY:

– "I know that –

ELIAS CJ:

Giving an opinion.

MR BAILEY:

Yes. The reason for that, in the appellant's submission, is because if an accused subsequently denies having seen, denies knowing the witness well or the witness

knowing the accused well, that can, potentially at least, also be explored by the holding of a formal procedure. In other words, whether they're telling the truth that they know the witness may be able to be established by the holding of formal procedure. If it turns they do know the witness, the formal procedure will help to establish whether the identification was correct.

That position is similar to the English position, and I refer the Court to tab 15 of the appellant's bundle of authorities under 3.1, 3.12, and they talk about when a – this is near the bottom of the page – when an identification procedure should be held, and they say, "For example, when it is not disputed that the suspect is already well known to the witness who claims to have seen them commit the crime."

ELIAS CJ:

Sorry, I've lost the place.

MR BAILEY:

Tab 15 of our bundle of authorities.

ELIAS CJ:

Right, I'm sorry. Thank you, yes.

ANDERSON J:

In this case, the appellant didn't dispute identity at any time before the hearing.

MR BAILEY:

No, and –

ANDERSON J:

So how could you hold a formal identification procedure in those circumstances?

MR BAILEY:

Well, he didn't accept it, and I think the first thing he was asked when he was arrested was whether he wanted to make a statement, and he said, "No."

ANDERSON J:

Actually, no, I think he instructed the constable in vernacular terms to depart.

MR BAILEY:

Yes, he did, and also saying, "Not guilty," which one would then, should assume, that identification –

ANDERSON J:

Just – I don't want to deflect you from your argument, but I would like to clarify something. Is it your case that the person claiming to identify by recognition must have had personal interaction with the defendant?

MR BAILEY:

In this case of course that was what Constable Vallender was saying had taken place on two occasions –

ANDERSON J:

Yes, I know, but we're trying to ascertain a principle –

MR BAILEY:

– more broadly –

ANDERSON J:

– and I wonder whether the more elementary issue is the purported identifier's ability to identify somehow. So, for example, there may be tens of thousands of people who have never personally met a well-known television personality but would recognise them if they saw them.

MR BAILEY:

Yes.

ANDERSON J:

So it's ability to recognise for some reason.

MR BAILEY:

Yes, and I guess I'd say but based either on personal contact or –

ANDERSON J:

In this case it was personal –

MR BAILEY:

– potentially on –

ELIAS CJ:

Suppose a law enforcement officer has seen, you know, there'd been "wanted" posters, and has memorised the features and says, "I believe it was that person," could that be used?

MR BAILEY:

I think that could be used.

ELIAS CJ:

But it would have to be proved that, if not admitted, that, by reference to the photo that he had, or something like that.

MR BAILEY:

Yes, yes.

TIPPING J:

Is the ultimate criterion well known, how you establish well known, may be many, there may be various ways of establishing that.

MR BAILEY:

Yes.

ELIAS CJ:

Yes, yes, that's what – yes, that's right.

MR BAILEY:

The reason, in my submission, that it should be made subject to a condition that it's either accepted that the familiarity exists or it can be independently proved, is because the Evidence Act requires, in the event a formal procedure should take place, that it be held immediately, as soon as, basically, as soon as it can take place, and that's s 45, subs (3)(a). Now, there would be a risk if, for example, the police say, "Well, we initially believed through our witness that this witness knew the accused well, therefore we had good reason not to hold a formal procedure." It can only be assessed at one stage, in my submission, you can't have good reason

changing throughout an investigation. So, in my example, if it turned out that the witness, for whatever reason, didn't know an offender well, then you can't go back on that under the Evidence Act, because a formal procedure should have either been held at the time, at that time, or not.

TIPPING J:

Is it inherent in this action that he who claims to have identified has the onus of satisfying the well known criterion, if that be the criterion?

MR BAILEY:

Sorry, Sir, can you say that again?

TIPPING J:

Is it inherent in the section that here the Crown, that claims to rely on this identification, has the onus of establishing –

MR BAILEY:

Yes.

TIPPING J:

– the well known?

MR BAILEY:

I say they do, yes.

TIPPING J:

And they may have to call evidence, either on a voir dire or, if it's in front of judge alone, technically on a voir dire, but it's seldom separated out for that purpose.

MR BAILEY:

That's why I think it's easier to approach it, or the police should approach it, from the assumption that if identification will be an issue, then –

TIPPING J:

Well, unless it's conceded, it's obviously an issue.

MR BAILEY:

Yes, and then if it's an issue they should conduct a formal procedure, and then the defence will have nothing to come back and complain about later on because a formal procedure would have taken place.

ELIAS CJ:

Yes, you can't turn subsection (4)(d) into a requirement of notice that identification is in issue because it's expressed the other way around, that the officer couldn't reasonably anticipate, so really you have to run it unless you've got some reasonable cause for believing it's not an issue.

MR BAILEY:

Yes.

TIPPING J:

Which might be, for example, that it's conceded.

ELIAS CJ:

Yes.

MR BAILEY:

Yes.

TIPPING J:

And it would have to be conceded –

ELIAS CJ:

Yes.

TIPPING J:

– out of court, because the ID parade will obviously be done before the trial.

MR BAILEY:

Yes, and I think the most likely example would be following arrest in an interview on the same day.

ANDERSON J:

An ID parade wasn't really on here was it, given the attitude of your client?

MR BAILEY:

An ID parade in the physical sense but –

ANDERSON J:

A photo montage form could have been available?

MR BAILEY:

Yes, and it would have been available.

ANDERSON J:

It's not clear from the record what happened to the photo montage, it is referred to but seems to –

MR BAILEY:

It's accepted by the prosecutor that the formalities of section 45 hadn't been met.

ANDERSON J:

Right.

MR BAILEY:

And then they withdrew.

ANDERSON J:

The signatures and certifications and so forth.

MR BAILEY:

And I intended to raise the time issue because it wasn't held for, I think, four or five days after the event. But the prosecutor –

ELIAS CJ:

But there would be an issue with contamination wouldn't there with the – wasn't it the identifying officer who put together the montage?

MR BAILEY:

No, no it was a separate officer.

ELIAS CJ:

It wasn't, fine.

MR BAILEY:

If I can refer the Court to the *John v Trinidad and Tobago* [2009] UKPC 12 case and that's at tab 3 of the appellant's, sorry tab 4 of the Crown's bundle of authorities. And beginning at paragraph 14 on page 6. The Court in this case classified, listed three cri – different circumstances in terms of identification. The first one's outlined at paragraph 14 –

ANDERSON J:

Sorry I've got the wrong reference, what are we looking at?

MR BAILEY:

So it's tab 4 of the Crown's bundle of authorities.

ANDERSON J:

Yes I have that, thank you.

MR BAILEY:

And it begins five lines, five lines down from the beginning of paragraph 14: "Plainly an identification parade serves a useful purpose whenever the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw them commit the crime". Now that's obviously not the case here, but that's the first set of circumstances outlined by this Court.

Then at paragraph 15 there's a second set of circumstances: "At the opposite extreme lies a case where the suspect and the witness are well known to each other and neither of them disputes this". And in my submission, like I've said, the importance of that is that neither of them can dispute that, it's not something that should be left to the prosecution to presume for the reasons I've outlined.

And then the third situation which is more likely to arise in the New Zealand context, or should be presumed to arise, is at paragraph 16: "When the witness claims to know the suspect but the suspect denies this".

ANDERSON J:

There wasn't actually a denial in the present case was there?

MR BAILEY:

No, there just – that hadn't been accepted at any stage.

ANDERSON J:

Had there ever been an admission?

MR BAILEY:

No.

TIPPING J:

Well he must be taken to it to deny, I would have thought –

MR BAILEY:

Yes, that's –

TIPPING J:

– but putting it in issue in his plea.

MR BAILEY:

Yes. And then it would have been only one defence, as I put to the constable in this case, and that was that it wasn't him. I mean the driving was clearly bad enough that there'd be no defence that it wasn't dangerous, for example.

Similarly, support for my appellant submission comes from the *R v Forbes* [2001] 1 AC 473 (HL) decision which is tab 3 of our bundle of authorities, appellant's bundle at page 486. Just above half way down from that page at point number 4, and I don't need to read it but I rely on that paragraph beginning, "We cannot accept that the mandatory obligation to hold an identification parade does not apply if there has previously been a 'fully satisfactory' or 'actual and complete' or 'unequivocal'

identification", and again that's from the perspective of the police and reasons why are listed there.

And the last passage I rely on from the *R v Harris* [2003] EWCA Crim 174 decision which is the same booklet but tab 6, paragraph 28. Six lines down from the top of page, paragraph 28, "We are concerned with the first. In that respect, the words *where it is not in dispute* are plainly of importance." And then again it really brushes over the two purposes in that situation in which a formal procedure will be helpful, one to confirm whether or not they do actually know the person, and two, if so whether they can identify them from a montage.

TIPPING J:

There is in the English jurisprudence quite a studied distinction isn't there between identification and recognition which, I think, points out the contrast that one mustn't be subverted by a purportedly firm – an implication – the real issue is whether or not there was sufficient knowledge of the two to allow for recognition if you like –

MR BAILEY:

Yes.

TIPPING J:

– and that was also in that Privy Council case.

MR BAILEY:

Yes. The Australian cases that the Crown have provided, in my submission, aren't particularly helpful because there's a different statutory regime and the wording's significantly different. Not that the three cases cited by the Crown are entirely consistent with each other, but they talk about all the courts having decided that they have to determine when an identification has been made and some of the cases would say, well as soon as someone thinks they've seen someone that they know, then a complete identification's been made and the Act doesn't require a formal procedure to be held after that time. Now we don't, the New Zealand legislation doesn't have any equivalent provision in terms of drawing a line in the sand when an identification has been held, so in my submission, I don't intend to go over them in any great detail other than to say it's a case of not the Court saying what the law should be but rather how the legislation has to be properly interpreted according to the wording.

ELIAS CJ:

Sorry, are you criticising there a passage in the Court of Appeal decision?

MR BAILEY:

No. I did –

ELIAS CJ:

No, you're just making a submission?

MR BAILEY:

Yes.

ELIAS CJ:

Yes, sorry.

MR BAILEY:

Yes, these cases didn't – weren't raised in the Court of Appeal, they're just raised by the Crown, provided to the Court by the Crown for this appeal. I just don't think they provide a lot of assistance, given the difference in legislation, the wording of the legislation.

TIPPING J:

Is the key point in the case whether the well known test is right or puts it too high, because ultimately, never mind how you prove that concept, the question is whether that concept sufficiently or accurately reflects Parliament's wishes in the way it has framed the structure of s 45?

MR BAILEY:

Yes, that's – I'd agree with that, yes. And we say well known unless a witness, there is that well known criterion, a formal procedure will serve a useful purpose. It will serve a useful purpose if the witness picks the person that they believe was the person they saw because it will at least in part strengthen their identification, and of course if they don't it will help the defence.

TIPPING J:

Is it also perhaps arguably consistent with – just lost the – where do we find the section itself, sorry, perhaps I'll come back to that Mr Bailey when I find it.

MR BAILEY:

Sure. Just finishing on the Australian cases, there is the *Donald* decision, the *R v D* [2008] ACTSC 82; (2008) 2 ACTLR 225 (ACTSC) case, and then we've got *R v Taylor* [2008] ACTSC 52; (2008) 2 ACTLR 216, and *R v Taylor* comes to a different view on how the wording of, that's pretty much the same legislation, should be interpreted and that says even when an, a purported identification has been made and it's complete i.e. a person can be named, then you still have to carry out identification procedure. At paragraph –

ELIAS CJ:

Can I just ask you, s 45 is rather curiously worded? Maybe it's – when I first read it, it seemed to me that it was about the admissibility of the visual identification obtained on formal procedure. Is that all it's concerned with?

MR BAILEY:

Well I think it has the flow-on consequence that means a dock identification would be, an in Court identification becomes admissible as well if that formal procedure is being held.

ELIAS CJ:

But the in-court – does this prevent an in-court identification? It's just it's very curiously, it seems to me, curiously worded. Of course one would then almost certainly not be able to get to proof beyond reasonable doubt presumably. In other words is this directed at the bolstering effect of an out-of-court identification? I'm sorry, I've just never had to look at this provision until I was preparing for this case.

MR BAILEY:

I think there's a Court of Appeal decision that discusses those sorts of matters that your Honour has raised, and I haven't got it here but I think strictly that the officer who conducted the formal procedure should give the evidence of the witness identifying the accused as it's likely to be from a photo montage. And then the parties can make –

ELIAS CJ:

Yes, but it's about the out-of-court visual identification. It doesn't say anything about an identification in-court. It doesn't prevent an identification in court. It just means you can't bring the bolstering evidence, you can't admit that in evidence. Is that right?

MR BAILEY:

Well, I was of the understanding that if the formal procedure hadn't been held and there wasn't a good reason for it not to be held, then an in-court identification wouldn't be admissible.

ELIAS CJ:

Yes, I suppose that follows from subs (2) that that evidence relates to any visual identification evidence to be given.

MR BAILEY:

Mmm.

ANDERSON J:

Some assistance is obtained, I think, from the definition clause. What a visual identification is.

ELIAS CJ:

Yes, it is. Yes, that's where I got to last night, but again looking at it, it is put around a very strange way.

MR BAILEY:

Yes.

ELIAS CJ:

And that reference to that evidence isn't entirely happy.

MR BAILEY:

Mmm.

ANDERSON J:

It's unlikely that if the only evidence in a case was dock identification a Judge would allow it to go forward these days, isn't it?

MR BAILEY:

Yes, that's fair.

ANDERSON J:

What happens in reality is, or used to happen, is that the police would make sure that the identifying witness somehow got a look at the accused at a preliminary hearing or something like that.

MR BAILEY:

Mmm.

ANDERSON J:

Yes, that's in there, and that's where the danger arises because there's no comparators and no formality. Recognition identification raises quite different issues.

MR BAILEY:

It does, Sir.

ANDERSON J:

If there's an ability to recognise then the focus has to be on the circumstances relating – indicating the cogency of the recognising occasion.

MR BAILEY:

Mmm.

ANDERSON J:

And it may be sufficiently cogent to be admissible but not sufficiently cogent to prove.

MR BAILEY:

Yes, well in terms of section 45(2) that's an issue that –

ANDERSON J:

Even before you get to section 45(2). Suppose you have good cause or good reason not to because the identifier says well I can recognise him, you know, he's quite well known to me, so the evidence is not excluded for absence of an identifying procedure.

MR BAILEY:

Yes.

ANDERSON J:

But then you have to look at the particular occasion to see whether the general ability can translate into a reliable identification on that occasion and it may then, which is not a s 45(2) analysis, although it's a very similar approach to it, and it may be sufficiently cogent to become admissible but not sufficiently cogent to prove beyond reasonable doubt at the end of the day. So you get a lot of interlocking analyses here.

MR BAILEY:

That certainly arises, as I say, under s 45(2).

ANDERSON J:

As well?

MR BAILEY:

Yes and there could be an argument, but I'll leave it for Mr Cook, whether the admissibility threshold is higher than the actual proving it substantively, but I'll just focus on s 45(1).

ELIAS CJ:

So you accept that s 45 governs assertions both out-of-court through participating in a formal procedure and any assertion in court. So the witness can't give evidence that it was the person?

MR BAILEY:

Unless the prerequisite is met.

ELIAS CJ:

Yes I see. Thank you.

TIPPING J:

The point that I was thinking of Mr Cook, just if I may while you're – it seems to me that although Parliament took out the "and no other" from subsection (4), implying that there could be other circumstances constituting good reason, the well known criteria could sensibly be said to be consistent with (4)(d), because if a witness says this person I'm identifying I recognise because they're well known to me, then no officer involved in the investigation in that situation could reasonably anticipate that identification would be an issue at the trial.

MR BAILEY:

That's, yes, what we've said in our submissions.

ANDERSON J:

Unless they know the person to be a liar, for example. I know him but I don't expect him to say that –

MR BAILEY:

Yes.

ANDERSON J:

– he knows me.

MR BAILEY:

And I guess that's why I'm saying that it should be the, it should have to be accepted or be able to be –

TIPPING J:

Well you can always voluntarily have an ID parade to bolster the case. We're contemplating circumstances where you don't have an ID parade or other formal procedure but nevertheless say you can give the evidence. So I think there is a consistency as you're – I'm sorry, I'd overlooked the fact that that was in your written submissions, that's probably where I got the idea from. It seems to me to be a point of some, some thought.

MR BAILEY:

Yes.

TIPPING J:

Because otherwise what are the circumstances in which the officer involved could reasonably anticipate. Well obviously if it's conceded but otherwise, I mean, what is this provision actually talking about?

McGRATH J:

Where a person is caught red-handed and taken into custody.

TIPPING J:

Yes, or taken straight away into custody, yes.

ELIAS CJ:

Yes, it would depend on the context, wouldn't it, because you might, it would depend if there was any other defence.

McGRATH J:

The assertion that a person is well known to me is something that has a value judgement contained into it. What is well known? Is it through having had a dealing five years previously for 10 minutes but I never forget a face sort of stuff, or is it something more than that? It seems to me that I'm not so sure that that type of case is always going to be covered by (d), but the red-handed case –

TIPPING J:

No, no, I don't think it necessarily will always be covered, but it's certainly consistent with and obviously the police officer might, before coming to the view, could reasonably anticipate et cetera, would have to make some further enquiry as to what was the substance of the claim for well known.

McGRATH J:

It seems to me that's what the Act is looking for. If the police officer eventually decides to give away a formal procedure, that's that. He better have made the right judgment.

TIPPING J:

Exactly. And we've got to remember too that the context of this is very much the concern about mistaken identification and that honest – all that sort of stuff.

MR BAILEY:

Yes. The issue whether the list in s 45(4) is exhaustive.

TIPPING J:

Well you're not arguing that it is exhaustive, and I think –

MR BAILEY:

We're not relying on it.

TIPPING J:

No, no, I'm just saying that this one could in certain circumstances fit quite comfortably with (d).

MR BAILEY:

Yes.

TIPPING J:

And is consistent with the, what you might call the point behind (d).

MR BAILEY:

Yes, I agree with that. The –

ELIAS CJ:

I'm not sure I would necessarily want to accept that that list is not exhaustive.

MR BAILEY:

That's the point I was –

ELIAS CJ:

But you aren't arguing it here?

MR BAILEY:

No. There's no, I accept it's been, the wording has been changed throughout the passage of the legislation. There's been no commentary or no, the select committee stage or, for example, I think that's where it's changed, it's just changed. There's been no report back and saying we think it should be changed, so it's unclear whether it is intended to be exhaustive or not.

TIPPING J:

But the very, well with respect, the very fact that it's been, the words have been removed for whatever reason would seem to be a pretty powerful indicator that Parliament didn't intend it to be exhaustive.

MR BAILEY:

Yes and we'd accept that, Sir.

TIPPING J:

I mean there may be an argument, we don't have to address that here.

MR BAILEY:

I'll just briefly address the Court on a submission at, or an observation that the Crown have made in their written submissions at paragraph 40 to 41, where Lord Hoffmann's been quoted twice at the top of page 16 of the Crown's written submissions. Particularly the second quote beginning in the middle of the second quote, "Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody". Now the Crown are relying on that quote as authority or support for their submission that if you can name someone you shouldn't, that's good reason by itself not to conduct a formal procedure.

Firstly I think that case needs to be, if it was intended to be relied upon by this Court, needs to be read in its entirety. But if I can refer this Court to a brief part of it and that's at page, that's the, it's not actually in the Crown's bundle of authorities, I think they omitted to attach it, so it's the individual case that they've provided subsequent – it's the *Goldson & McGlashan v R* (2000) 56 WIR 444 (PC) case, and if I can refer the Court to page 449 of the *Goldson* case.

McGRATH J:
Which is where, sorry?

MR BAILEY:
Page 449.

ELIAS CJ:
It's a separate hand-up.

MR BAILEY:
Now at paragraph G, one of the cases relied on is the *Fergus* decision, which was essentially approved, and if I can just read from paragraph G, the other case is *R v Fergus*, in which there had been no identification parade although the witness claimed only to have seen the accused once and heard his name from someone else, and the Court went on to hold in that case that despite knowing his name, albeit from someone else, that an identification parade should have been held. Similarly, if I can refer to the *John* decision at tab 4 of the Crown's bundle of authorities, page 2, begins in the middle of paragraph 2, about eight or nine or 10 lines down, "That he had then driven the men back to Sea Lots where he had first picked them up, and that he had been in a position to describe the appellant to the police (sufficiently to enable the police to arrest the appellant on 6 December 2002) because for some months previously, one or twice a week whilst on his taxi run," and it continues.

Now the end conclusion in this case of the Privy Council was despite being able to name the person and having sufficient evidence for the police to arrest him, at the end a conclusion at paragraph 26 of that same decision, "The Board nevertheless concludes that the police here should have held an identification parade."

So while the Crown provided that quote from one of the cases there's several, at least two or three, of the cases that we've either cited or the Crown have cited that just because someone could name an alleged offender, didn't meant that that was good reason by itself to not hold a formal identification parade.

Similarly in the *Harris* decision, which is a decision in the appellant's bundle of authorities at tab 6, the detail again there the alleged offender was named by at least one of the witnesses. The details are set out at paragraph 6 and 7, this is the *Harris* decision at tab 6 of the appellant's bundle. The conclusion in that case, for reasons

obviously provided in the judgment, at para 33, is the conclusion and I think that quotes in the written submissions saying, well, the prosecution formed the view that a parade wouldn't have been helpful, but it approached things solely from their perspective rather than the accused's perspective.

ANDERSON J:

Now there's evidence that can be adduced on a voir dire, even at summary level, that would not be proper to adduce in the substantive trial.

MR BAILEY:

Yes.

ANDERSON J:

But there's nothing to stop a prosecutor, I would have thought, from asking the judge to hold a voir dire on evidence relating to ability to recognise so that otherwise inadmissible evidence could be brought in to show that ability. He's a well-known crook this –

MR BAILEY:

Yes.

ANDERSON J:

– I'm not talking about your client, but someone says a well-known crook, he's the talk of the constable's mess room, and there's photos of him everywhere and I've met him a couple of times and I'd never forget him. I think it's not the prosecutor asking for that.

MR BAILEY:

No, and I think that might have been touched upon in the President's judgment saying there's some circumstances, well it's prejudicial, it will be valuable for the substantive argument whether it's reliable –

ANDERSON J:

And it can't be used in the substantive argument. It was otherwise inadmissible.

MR BAILEY:

You're saying it couldn't be used?

ANDERSON J:

It couldn't be used substantively even though it might be admissible on the voir dire for a particular purpose.

MR BAILEY:

Yes, but it could, in some circumstances, it could be as well, I think the example given by the President was, and I think that is what your Honour was identifying, there's been some special reason to remember it because it was such a bad incident they attended or whatever –

TIPPING J:

If the circumstances giving rise to the well known are prejudicial to the accused, that doesn't necessarily mean it can't be given substantively.

MR BAILEY:

No.

TIPPING J:

There'd have to be a warning if it was in front of a jury.

MR BAILEY:

Yes, and they'll just –

ANDERSON J:

And could certainly be given on a voir dire. More formalised processes by way of voir dire are held in the summary jurisdiction than simply entertaining a submission at the end of the police case. It often used to arise in relation to allegations of subsequent convictions for driving whilst disqualified or drunk driving –

MR BAILEY:

Yes.

ANDERSON J:

– and then the District Court Judge or Magistrate, going back even further, would say okay we'll go back to the start again now and examine the case.

MR BAILEY:

Yes. Unfortunately I can't remember exactly what happened in this case with the steps, but the prosecution knew, because it was omitted from the brief, about the formal procedure hadn't been taking place, they knew that ID was an issue, and I know the President made some criticism about how things were done, but it wasn't quite done like that. As I say the police knew what the issue was going to be before the start of the fixture.

ANDERSON J:

I was thinking more in terms of generality of cases because there is much concern with general process and the specific features of the case and just, in respect of which, in case it might become relevant to any disposition orders by this Court what actually happened to your client?

MR BAILEY:

He was convicted and sentenced.

ANDERSON J:

Is he on bail?

MR BAILEY:

Yes, well he served his sentence for this matter.

ANDERSON J:

He served it?

MR BAILEY:

At the time of the fixture he was in custody and Judge Erber imposed a one-month cumulative term.

ANDERSON J:

So he's served his sentence for this?

MR BAILEY:

Yes, and he's living in Timaru. Again, I can't say this for certain but I think I likely flagged the issue of identification to the Judge. I know from experience that Judge Erber doesn't like holding voir dires, he likes just –

TIPPING J:

He likes to get on with it.

ELIAS CJ:

I think I'm with him. Well there's something a bit off about having a voir dire with yourself.

TIPPING J:

It comes to the same thing if it's in front of a judge alone.

MR BAILEY:

It does, and judges need to be relied upon to –

TIPPING J:

You don't sort of suddenly put a different sort of hat on or something because you're conducting a voir dire.

MR BAILEY:

Mmm.

ELIAS CJ:

And put your jury hat on afterwards.

MR BAILEY:

Paragraph 57 of the Crown's submission, I briefly want to touch upon that, 57 and 48. And I by and large accept what's written there. In, as I've noted, the *Forbes* decision – and this is based on the code as well that they're governed by – in the case where the police are called to an incident, they drive round and try and find the offender with the witness – that, as was held in *Forbes*, still requires a formal procedure to be held afterwards. Now I agree that it doesn't, if the same situation arose here under New Zealand law, section 45(4)(e) I think it is, covers the situation so my point from that is yes, New Zealand's departed in that respect in that situation, but the main point to take from it, in my submission, is that Parliament has made it clear, when they do want to depart from something, particularly the English courts – which has been the jurisdiction, in my submission, that's been relied upon in identification as a whole – they've made it clear, because the Crown go on to make the submission that when someone recognises, or says they recognise, a witness – an alleged offender –

then you do not require, you do not require – it's not required that a formal procedure is held, and in support of that they rely on this difference between the English legislation and s 45. But it would have been very easy for Parliament to insert a similar provision that if they purport to identify someone that they know, then you do not have to conduct a formal procedure, but it's not worded like that, and so in my submission it doesn't provide a lot of support for their argument.

Even putting aside the submissions regarding whether the familiarity, the claim of familiarity should have to be accepted by an accused or independently proved, in my submission even accepting Constable Vallender's evidence and exactly what he said, two recent encounters with Mr Harney, five to seven years previous, on any view doesn't mean, or doesn't equate to being, well known, or Mr Harney being well known to him.

ANDERSON J:
He doesn't expand, does he, on how he's able to recognise him, apart from those two incidents –

MR BAILEY:
Yes, I –

ANDERSON J:
– he doesn't say things like he's got a very recognisable hairstyle or whatever.

TIPPING J:
Or a scar on his left cheek.

ELIAS CJ:
A hairstyle wouldn't have done much good after seven years or five years.

ANDERSON J:
Might have always been a skinhead, I mean, a hypothetical person.

MR BAILEY:
Yes we just simply don't know. I still don't know what –

ANDERSON J:

And you, of course, quite understandably didn't want to press it.

MR BAILEY:

Yes, yes. So in my submission the fact that a witness may claim to name an offender is not the important or determinative factor, or shouldn't be. It's rather whether they can subsequently identify who they think the offender was from a photograph that accurately depicts that suspected offender at the time of the alleged offending, and not from, for example, a previous picture that was five or seven years ago when Constable Vallender may have seen him. None of the English cases have lowered the level of familiarity to a level which would have excused the holding of a formal procedure based on Constable Vallender's limited previous contact between him and the appellant.

The reason, just to give an example, in my submission, the fact that he named him or said he could name him at the time, is not particularly important is, to take an extreme example, if someone thought that they recognised someone that they had seen at primary school 35 years previously, they will probably be able to name that person but that's not important. They might look somewhat like how the person looked back at primary school but they might look – and one would expect would they may well – completely different, or have changed substantially, and that's why the holding of a formal procedure is so important, in my submission.

Further support – and this should wrap it off for me for s 45(1) – for such a requirement is found in the Law Commission's reports, and I refer the Court to tab 13 of the appellant's bundle. This is tab 13 of our bundle.

TIPPING J:

You're going beyond what you're citing in your submissions?

MR BAILEY:

Probably. I think I've quoted it actually, Sir, on reflection, so it's the part, at paragraph C, 220. Unless the Court has any further questions, those are my submissions for Crown 1.

ELIAS CJ:

Thank you. Yes, Mr Cook?

MR COOK:

Thank you. My aspect is the s 45(2), which is really the reliability assessment as I think the President called it in the Court of Appeal, and it's when there's an inexcusable failure to comply with the formal procedure preference. There's an ability to have the evidence admitted nonetheless, the evidence of the identification that is, if the circumstances in which the identification was made have produced reliable identification beyond a reasonable doubt. In my submission, the issues that are raised in this aspect of the appeal are 1. What is required by s 45(2); 2. What is meant by the phrase, "the circumstances in which the identification was made" – and I suggest that that's where we come back to what his Honour Justice Tipping called the context, which is all important in this case, and I'll touch on that – and within that second issue is whether the witness's confidence, or the impression of that confidence on the fact-finder, should be taken into account; and then the third broad issue is the disposition of this case, taking into account what's being said.

The first issue, what's required by s 45 subs (2), in my submission can be dealt with quite quickly. It's clear from our written submissions that we agree with the Court of Appeal in the *R v Edmonds* [2009] NZCA 303 decision, which is at tab 2 of our bundle, and it's at paragraph 105 that that's being discussed. This is where the Court was, the Court of Appeal, was deciding what is really required by s 45(2), because there'd been the omission from the commentary, rather, from the draft code, through to the actual legislation about, where there'd been omission of the words "were likely". So, the appellant's position is that we agree with what is said there, and that's at, as I said, at paragraph 105, which is whether the evidence is such that it would be legitimate for the jury or the fact-finder to rely upon it.

TIPPING J:

Or to even consider it.

MR COOK:

Yes, yes, and I agree with that, Sir. Quite why those words were taken out –

TIPPING J:

Yes.

MR COOK:

– I don't know, and your Honour was talking about other words that had been taken out. There are a few, with the greatest of respect to the legislature, and they're probably far enough away they can't hear me at the moment, but there are a few anomalies in the identification section, probably the most of which is the way that voice identification's treated with, but we're not dealing with that here.

Therefore, the judicial reliability assessment is a threshold inquiry, which is solely undertaken for the purpose of rendering the evidence admissible. And my submission is that – that deals with the first issue – that's very relevant when we're considering the second issue, which I outlined, which is what do those, what does the phrase, "The circumstances in which the identification was made," mean? The appellant's broad submission in relation to this is that it includes external and internal things, but cannot include a witness's confidence or the impression of that confidence formed by a judge, and we say that for three reasons. Firstly, we say that because it's inconsistent with the natural meaning of those words. Secondly, it usurps their assessment role when it's the witness's self-reported confidence, the assessment role of the judicial officer. And it also, thirdly – and this is probably the most controversial aspect – it ignores the traditional sentiment that a mistaken witness can nonetheless be convincing, and the New Zealand Law Commission's view that witness confidence is not an indicator of reliability, in *Edmonds*, and I'll touch on this in a moment, but in *Edmonds* some studies, scientific studies, are quoted by the Court of Appeal saying that, "Well, that was the view then, but there are some studies now," and I'll address that when I'm dealing with that third aspect of this.

ANDERSON J:

Whether something's a circumstance is principally a question of law, isn't it, not a matter of psychology?

MR COOK:

Yes. I can address that now if you'd like, Sir. The issue that the appellant has with that is, we've got a traditional view – actually, I might just take a step back and just deal with the context, because I think that's important here. The whole reason for this is, as I think his Honour Justice Tipping touched on earlier, is that there have been miscarriages of justice and there are some reliability issues around this type of evidence. So, s 45 is addressed at trying to get reliable evidence, and I don't think there's any disagreement between the respondent's position and our position on –

ANDERSON J:

Well, for my part, I have no difficulty accepting the submission that the self-confidence of the witness is not a relevant circumstance for the purposes of 45(2).

MR COOK:

Yes, and that's the point that we're trying to promote for the appellant at that point, because it was a circumstance taken into account in this case.

The President in the Court of Appeal at paragraph 52 says, "The circumstances in which the identification was made is plainly a reference to externalities." With the greatest of respect, our submission is that it must include external things, but also internal things to the witness. Now, by that I'm talking about eyesight and those sorts of things.

ANDERSON J:

It's all the sort of things that *Turnbull* warned about.

MR COOK:

It is, and it's even, it's all the things that the Devlin Committee – in that sort of respect, identification evidence hasn't changed over a significant period of time. *Turnbull's* still a good basis that counsel should look at when they're deciding how to cross-examine an identification witness.

ANDERSON J:

Well, again, I've got no difficulty being persuaded that a short-sighted person is a circumstance when that person's purporting to identify someone at a hundred metres.

MR COOK:

The reason that I'm addressing it, because in my submission the Court of Appeal in *Harney* – well, at least, the President – he's tied it down in saying that it's, "No, it's externalities".

TIPPING J:

I think perhaps he meant "externalities" not wholly literally, that it was matters other, objective matters other than the witness's self-assessment.

MR COOK:

Well, I have no problem with accepting that then.

TIPPING J:

I think that's probably what he meant.

ANDERSON J:

Must be so, mustn't it.

MR COOK:

Yes, he must have meant that, with respect to him because –

TIPPING J:

Yes.

MR COOK:

Now, this is where, when we're trying to assess what these words mean, s 10 of the Evidence Act comes into play. My understanding is – it's not in the bundles – it's really the issue, this is really where the Act tells us how to interpret the Act consistent with its purposes and things like that, it's a bit of common sense. And if the purpose of these sections is to make sure that only reliable evidence is place before the ultimate fact-finder, then, in my submission, that's where witness confidence falls into some difficulty, because a witness's personal assessment of the circumstances of the identification are relevant. So, they said, "Oh, I was this far away, the light was like this –

TIPPING J:

"I've got very good eyesight", that would be allowed.

MR COOK:

Yes.

TIPPING J:

It could be challenged.

MR COOK:

Yes, Sir. And you're able to challenge it, because you could call some other evidence that would bear upon that question – that statement, rather, but the conclusory statement of the reliability of that identification from that witness is not relevant and should not be admissible because, (a) it's not covered by that wording, it's not a circumstances in which the identification were made; and also it usurps the judicial officer who's attempting to decide that threshold question of assessing that very thing.

BLANCHARD J:

So you would take into account any expression of lack of confidence –

MR COOK:

Now, the way –

BLANCHARD J:

– but not an expression of confidence?

MR COOK:

The way, in my submission, that that's dealt with –

ELIAS CJ:

It's going to be difficult, because people will say, "How confident are you of that Mr So-and-so?" and he'll say, "very confident", and then it's in.

MR COOK:

Well, when a witness is not very confident of identification evidence, they're probably not saying, "I'm sure it's X," they're saying, "Well, it could have been X because it had one, two and three," you know, various points, I think we were talking about a scar on the nose before. That might run into some difficulty in terms of whether that's actually defined as visual identification evidence in s 4.

ANDERSON J:

It might have some value once the evidence is admitted.

MR COOK:

In terms of the overall assessment about –

ANDERSON J:

Yes because, if it's, once it's admitted it may have some bearing on what weight the trier of fact gives to that person's observation, but I have difficulty seeing how it can be relevant to the question of admissibility.

MR COOK:

Yes, and that's probably one of the points that I'm trying to push. I accept that, your Honour, and I found myself attracted to, I think it's Justice Wood in the *R v Bardales* [1995] 101 CCC (3d) (BCCA) case, which was cited by the respondents, which is a Canadian case, talking about, and I think one of them mentioned it before, that identification evidence is really opinion evidence, and recognition evidence is really opinion evidence when you're entitled to rely on that opinion a bit more, because they're a bit more qualified to give it, and when the ability to rely on one's opinion when they're not that confident about it themselves is, in my submission, a relevant factor.

McGRATH J:

Mr Cook, is one way of looking at your concern here that clearly the policy of the law, you've refereed to s 10, is a protective policy. It recognises the likelihood, and indeed the existence, of past mistakes in identification evidence, and if that policy is to be given effect your concern really is that factors such as confidence and that sort of thing just simply can't be given too much, or can't play too much in the admissibility stage for a start. But if that is recognised by the Court, and that the need to remember closely the policy of the Act in this regard, there may still be some scope for legitimate taking these, giving these matters some consideration. I'm not sure about that. I mean to some extent I see the force of your argument, that you, which is really you've got to keep them out or you'll just erode the protective purpose so it's never given effect, but –

MR COOK:

Yes, and probably the Court of Appeal in *Edmonds* was saying, some science now is showing that they're a little bit more reliable as an indicator of reliability, to use a very circular way of describing it, but now – my submission on that, and this is not in our submissions, my submission on that is that the Evidence Act, well some might say it's a strange creature, has got a very handy section, which is s 202, which permits periodic review of the operation of that Act and whether anything should be retained, repealed or amended, and if we're going to have these great leaps in scientific

knowledge isn't that the better place for those to be tested, rather than, a supremely well-qualified Court in other matters, but we're not presenting two different sides of a scientific argument here, and it's really going much further than, and I submit, we should when you go back to what the general purpose of this whole thing was, which was to have reliable evidence. The safest way is to say no, let's keep it out.

McGRATH J:

What I think you're really saying is the confidence of witnesses has been given a lot of weight in the past, and a lot of public concern arises over the consequences of that, and this section has got to be interpreted as ameliorating, of fixing that problem –

MR COOK:

Yes.

McGRATH J:

– and if too much inference is allowed for concepts such as witness confidence, that's simply not going to happen?

MR COOK:

Yes, Sir.

ELIAS CJ:

I wonder, though, whether it really is an admissibility question? It's not very good evidence, it's really on stilts, isn't it, with the identification. It's just – but whether it really should be –

MR COOK:

Just a weight point rather –

ELIAS CJ:

Yes. Or a warning point, or –

MR COOK:

The warning is there, and they'll be given that warning pursuant to s 126, but if the weight is so little then why should it – in my submission it shouldn't be admissible and that's –

ELIAS CJ:

But it may have weight in a particular context.

BLANCHARD J:

I'm not sure how you keep it out ultimately.

ELIAS CJ:

Yes.

BLANCHARD J:

If a witness is not allowed at the trial to express confidence, if that's going to be ruled out all the time, it's going to be very difficult to establish the credibility of that witness. I think we've got to be realistic about it.

MR COOK:

I don't want the Court to avoid any realism at all, and I take your Honour's point.

BLANCHARD J:

I mean it may be that depending upon the case the judge will need to remind the jury that people can appear confident yet still be mistaken.

MR COOK:

Yes.

BLANCHARD J:

But I don't see how you can expunge from the evidence all assertions of confidence.

TIPPING J:

I don't think you're arguing, are you, that when it's in, the witness can't express a degree of confidence. All you're arguing is that it shouldn't be in for the purposes of the threshold question.

MR COOK:

Yes.

ANDERSON J:

But it's not a circumstance in terms of –

MR COOK:

No it's not, it doesn't –

ANDERSON J:

– subs (2)?

MR COOK:

– come under s 45(2).

ELIAS CJ:

I see, yes of course.

TIPPING J:

There could still be issues as to whether or not it should be totally excluded at the admissibility stage.

MR COOK:

Yes, and that's the point I think his Honour Justice Blanchard is making there, and it may not be necessary for me to respond to it in the context of this particular factual scenario in Mr Harney's case.

TIPPING J:

Well the question, surely, is whether it is a "circumstance of" – whatever that phrase is.

MR COOK:

Yes, and in my submission it's clearly not. You've got the words of the phrase and you've also once you take those words of the phrase into account it just, it's really pulling oneself up by its bootstraps to try and get it in by saying, oh look, I was fairly sure of this so it must be reliable.

ANDERSON J:

It's just a conclusion by the witness.

MR COOK:

It is, it's conclusionary evidence.

BLANCHARD J:

I think it's something one has to be wary of, but I think it's unrealistic to try to rub it out even at the admissibility stage. I mean, there may be, for example, a situation where somebody else is able to report that the witness, simultaneously with the event, made the identification and said very strongly, "I know that's so and so."

TIPPING J:

That could qualify as a circumstance if there was a contemporaneous statement, either by the identifier or –

BLANCHARD J:

But it's an expression of confidence.

TIPPING J:

It is, but it's part of the res gestae, and –

McGRATH J:

It's an objective indicator rather than a subjective indicator.

TIPPING J:

Exactly.

ANDERSON J:

It's an event, not just a feeling.

MR COOK:

The objective –

BLANCHARD J:

We are talking about confidence at the time of the identification. I just don't think it's very realistic to try to say you can't use that at all, but I certainly agree that one has to be cautious.

MR COOK:

The objective indicator at the time, just grasping that example of the contemporaneous potentially res gestae utterance, the objective value of that is that

they've associated the suspect with that person. That they've done it immediately. In my submission it's the value of them saying "oh, it's X and I'm sure" –

TIPPING J:

Surely if you say at the time, oh crumbs, that's it, that is a circumstance of – the contemporaneity is a circumstance of the –

MR COOK:

Yes.

TIPPING J:

– but if you come along later and say, well I'm pretty sure it was X, there is a – but like my brother Blanchard, I'm a bit anxious that we don't get too sort of precious about this.

ANDERSON J:

Well the answer might be that even though it's not a circumstance it may be part of the proof, because subs (2) is concerned with proof as well as proof of circumstances, so it may bear on the proof of the circumstances.

TIPPING J:

Does the Court of Appeal say anything about this in *Edmonds* or – obviously there is an issue because presumably the Court of Appeal has said that it is a circumstance, have they, this feeling of confidence?

MR COOK:

Yes, Sir.

BLANCHARD J:

I mean, questions of confidence may come in where there has been an identification parade. So it's coming in under (1) as well.

TIPPING J:

He pointed unhesitatingly to number 4. But that of course presupposes that it's in before the jury –

MR COOK:

Yes.

TIPPING J:

– because you wouldn't be saying that in a, because if there is an ID parade the question, revelation doesn't arise.

MR COOK:

Yes.

BLANCHARD J:

Ah, no, because the defendant still has the ability to prove on the balance of probabilities that the evidence is unreliable.

MR COOK:

Again, that would be a threshold issue of admissibility.

TIPPING J:

Well yes, one would need to think this through, but I think we're getting a little bit diverted, Mr Cook.

MR COOK:

Yes, we are.

TIPPING J:

You're not being diverted, we're diverting you.

MR COOK:

Yes. It's probably not relevant to the disposition of this appeal, so I'll just move on.

TIPPING J:

Well, you've made the submission.

MR COOK:

Yes, I've made the submission relevant to this, but the other points that have been raised – now, those are really the points that I wanted to make just in relation to how things are dealt with generally. If I could just, and I can deal with it rather quickly, the

circumstances of this case, though we're in the Supreme Court this is a, it was summary hearing and the matters were dealt with, and I can just outline very –

ELIAS CJ:

What's the submission you're making to us?

MR COOK:

The submission is that if there were not good reasons for carrying out a formal procedure, then I'm dealing with the circumstances of this – and I'm talking about this particular case, Mr Harney's identification – were not such that the prosecution proved that they were reliable beyond a reasonable doubt. It's really the factual disposition of this case.

TIPPING J:

Well, it's just that these two things are previous, purported recognitions aren't enough, that's really the essence of the argument, isn't it, it's just not well known?

MR COOK:

Yes, and just in terms of the circumstances in which he identified him. But your Honours probably –

ANDERSON J:

Turning cars, and 15 metres at the closest, and head and shoulders only, and –

ELIAS CJ:

Is there anything you want to add to your witness submissions on this or emphasise?

MR COOK:

Just one thing to add, nothing really to emphasise, it's just been said quite well, is that there was another passenger in the case, that's noted in the notes of evidence. That passenger hasn't come –

ANDERSON J:

In the police car, yes.

MR COOK:

– in terms of the police car, sorry. That passenger hasn't come forward and said, "This person looked like X, Y, Z", and look, it's not, it's not the great point that's going to win the entire case, but those points –

ELIAS CJ:

Well, that person may not have been able to identify him.

MR COOK:

Yes.

TIPPING J:

Or describe him. He might have been –

ELIAS CJ:

Well, yes.

TIPPING J:

– asleep or sneezing or –

ANDERSON J:

Another point, another issue that was raised was that there's an inherent risk in a case where someone is expecting to see someone –

MR COOK:

Yes.

ANDERSON J:

– because it's, obviously there was RT information going out –

MR COOK:

Yes.

ANDERSON J:

– which could have affected the perception.

MR COOK:

And that was raised in a direct question on that point. But there's really nothing further that I can add to those points, unless there's any particular –

ANDERSON J:

The eye sees what it expects to see.

MR COOK:

It does, and this Court dealt with cases where the ear hears what it's primed to hear.

ANDERSON J:

The whole –

BLANCHARD J:

Are you referring to the judges?

ANDERSON J:

The whole art of conjuring is based on expectation.

TIPPING J:

I think you should sit down, Mr Cook, before you – it's very good though.

ELIAS CJ:

Thank you, Mr Cook. Yes, thank you, Mr Mander.

MR MANDER:

Yes, may it please the Court. The fundamental submission that the Crown makes is that the issue of whether or not a formal identification procedure was required was whether or not the identification procedure in the circumstances of this case was of any utility or provided any useful purpose in being carried out. And, in the Crown's submission, where the circumstances of the case are such that a formal identification procedure will not assist, in terms of evaluating the reliability of the identification, then that provides a good reason for not following a formal procedure. And, in this case, the Crown submits that familiarity on the part of the witness with the person purported to be identified by that witness is an example of where a subsequent formal identification procedure may not be of any utility.

BLANCHARD J:

The problem is we don't know a lot about the familiarity.

MR MANDER:

The question of the level of familiarity on the part of the witness will obviously range from none at all to being potentially a close relation, so it's across a spectrum.

ELIAS CJ:

Isn't that why the section has the default position that you do have a formal identification procedure?

MR MANDER:

It does, in the normal circumstances. In most cases, I would suggest, the eyewitness will not have seen the person before, the suspect will be a stranger to the witness. But from that starting point, where clearly a formal procedure will be required, there would be no good reason for not undertaking one, one proceeds from that point along a continuum of potential level of familiarity with the suspect, such that one reaches a point where the formal identification procedure is of no utility, because all the person would be identifying as a result of the formal procedure is the person who is familiar to the witness, not necessarily the person that they've actually identified. In other words, it won't ameliorate the mistake that potentially lies in a person thinking that they have identified a person or recognised a person accurately that they know.

TIPPING J:

But the greater the familiarity, the less room – in practical terms at least, if not logic – for mistakes. Isn't that the –

MR MANDER:

Yes indeed.

TIPPING J:

– underpinning thesis?

MR MANDER:

Indeed, it does.

TIPPING J:

And that's what the Law Commission was saying, and that's why the Law Commission said it had to be at quite a high level before you could treat this as a reason for dispensing with what is the presumptive approach.

MR MANDER:

Well, in my submission, what is the correct level will always be a matter which is going to depend upon the particular circumstances of the case. In this case, we're dealing with a police officer who, he's giving evidence that he's dealt with this person on two previous occasions and has given evidence on oath that he would recognise that person if he saw him again.

ELIAS CJ:

Why did the police start to put together a montage, if that level of confidence had been reached?

MR MANDER:

That is something of a mystery, it's something that has attempted to be investigated.

ELIAS CJ:

But, you see, against that more contemporaneous assessment, we've really just got an assertion that seeing this fellow on two previous occasions, seven years and maybe five years ago, was arresting enough to be sufficient.

MR MANDER:

You've got some level of detail as to the occasions, he remembers the incidents, he remembers one was at a hotel at a particular place, and he has given evidence about the location of the other identification. So you've got those details.

BLANCHARD J:

What did he say about the location of the first one?

ANDERSON J:

Named the place it occurred.

MR MANDER:

That's correct.

BLANCHARD J:

Which was?

MR MANDER:

An incident in Waimate.

McGRATH J:

Waimate, that's right.

MR MANDER:

And he speaks of two years later in a hotel.

McGRATH J:

Is this in his brief, is it, at –

MR MANDER:

It's at page 13 of the case on appeal, Sir.

BLANCHARD J:

We don't know anything about the incident at Waimate?

MR MANDER:

We don't on the record, Sir, no.

TIPPING J:

Well, do we know anything about what was going on in the hotel?

BLANCHARD J:

What do you imagine –

TIPPING J:

Rather than what one might naturally infer.

BLANCHARD J:

Can you take judicial notice of what goes on in hotels?

TIPPING J:

What was relevantly going on in the hotel.

ANDERSON J:

It's stretching the imagination too far, Judge.

TIPPING J:

No, no, what I mean is, what brought this man allegedly to attention in the hotel? We don't know, do we, it was just – and, understandably, he wasn't led to expand, and I'm not criticising the defence on that at all, it'd be crazy to have, for the defence to have ventilated these.

MR MANDER:

No, well that's, that's right, I'm sure the defence didn't want to elicit any further information than was necessary. And, indeed, this was elicited in cross-examination, the evidence-in-chief rather blandly just made reference to page 7 of the case on appeal, the statement of recognition – it's about three-quarters of the way down the page – recognised him as Justin Leigh Harney, "whom I have dealt with before."

BLANCHARD J:

That sounds as though it was an official contact, doesn't it?

ELIAS CJ:

"Dealt with", yes.

TIPPING J:

Yes, or I would infer that the hotel had some officialdom about it.

MR MANDER:

Yes.

TIPPING J:

Not just a –

BLANCHARD J:

Well...

MR MANDER:

Well…

TIPPING J:

Well, in the light of what, of that statement.

MR MANDER:

And, indeed, that's such –

TIPPING J:

But it's how memorable the encounter was, is what we're really feeling for, there's nothing.

MR MANDER:

Yes. Well, there is, there's no further information beyond that.

TIPPING J:

No.

MR MANDER:

Page 9 of the case on appeal, there is again a reference at line 21 –

BLANCHARD J:

"Dealt with him".

MR MANDER:

– on two occasion before, which would suggest some sort of official interaction.

ANDERSON J:

I thought it used to be not uncommon for police to say, "I have dealt with him before," to convey that, whether or not it was so.

MR MANDER:

The record doesn't capture the accent, Sir.

ANDERSON J:

No. Anyway, it was a written brief in the evidence-in-chief.

MR MANDER:

It was.

ANDERSON J:

Yes.

MR MANDER:

I understand, I mean Mr Bailey was there, and I don't wish to attempt to second guess what the situation was. But, as I understand it, in his footnote he has recorded that he gave notice to the prosecution before the hearing commenced that identification was an issue, and it's clear then that the matter proceeded on that basis. It's unsure – I'm not sure if my learned friend can speak to this – but it's unclear as to whether the Court was place on notice that this was an issue

ELIAS CJ:

What happened to this very distinctive car that just disappeared?

MR MANDER:

Well, it was actually set on fire, Ma'am.

ANDERSON J:

But there was evidence adduced as to the registration number, and then it just withered on the vine, there was nothing to –

TIPPING J:

This is Timaru, after all.

ELIAS CJ:

Yes.

ANDERSON J:

There's nothing to say whether the relevance of the registration number was –

MR MANDER:

No. Just for the Court's information, because clearly the appellant has been dealt with on these matters and sentenced, but there are other charges in the indictable jurisdiction that are pending and have been waiting for some time, and they do relate to the same incident, and obviously the same issues arise in terms of identification.

TIPPING J:

Well, they'll probably do a better job next time.

ELIAS CJ:

Well, if they were contemporaneous, though, their identification is probably the same. I mean, there's no photo or montage or –

TIPPING J:

He can elaborate.

BLANCHARD J:

At another trial, you'd want –

TIPPING J:

He can elaborate on it.

BLANCHARD J:

– voir dire, and bring, and the police could bring out other matters.

ELIAS CJ:

Yes, yes. No, sorry, what I meant was it doesn't look as if there's an identification parade or photo montage.

MR MANDER:

No, although the photo montage –

McGRATH J:

No, there might be a lot more background, dealings –

ELIAS CJ:

Yes, yes.

ANDERSON J:

It's usually done by photo montage. In my experience, identification parades, at least in Auckland, went out with Bulldog Drummond.

BLANCHARD J:

Was he convicted?

ANDERSON J:

Well, it's the impracticality of trying to get together six people off the streets of Auckland who look, you know, like the person, and who are prepared to waste their time doing it voluntarily, so it's always done by photo montage.

TIPPING J:

Well, either will do.

ANDERSON J:

Yes, yes, there's no problem on it. But it does seem from the English cases that ID parades are pretty fashionable still.

BLANCHARD J:

Perhaps it's a more homogenous society.

ANDERSON J:

Anyway, there would be no, in this case there's be no problem preparing a photo montage, not only because one was prepared but because a look at his list shows there must have been plenty of mug shots on file. So there's no, there's no practical impediment to having carried it out here.

MR MANDER:

No, and it was carried out.

ANDERSON J:

Yes.

TIPPING J:

Yes.

MR MANDER:

And quite why –

TIPPING J:

Wasn't –

MR MANDER:

– it wasn't elicited in the evidence remains something of a mystery.

TIPPING J:

All they needed to do was to say, "Look, here's the montage, which is it? Do you recognise…", but it wasn't done.

ANDERSON J:

As Mr Bailey said, that they didn't comply with the formalities required under s 45.

MR MANDER:

No, although even non-compliance with the formalities, if the substance of the identification, the montage exercise, had been elicited in evidence, in my submission that could still go to the overall weight of the identification.

ANDERSON J:

Under s 45(2).

MR MANDER:

Yes.

ANDERSON J:

As part of the proof.

MR MANDER:

Yes.

ANDERSON J:

Yes, I understand.

ELIAS CJ:

There was no objection to the admissibility of this evidence, it was just a submission that there was no case to answer, using s 45 –

MR MANDER:

That's my –

ELIAS CJ:

– as part of the argument?

MR MANDER:

That's my understanding, at the end of the Crown case.

TIPPING J:

But there was nothing inherently inadmissible in the evidence that was called, it just didn't satisfy the requirements of the section. So you couldn't really have challenged the admissibility –

ELIAS CJ:

Well…

TIPPING J:

You would have simply said, "The consequence of all that has been called is that the section is not satisfied".

MR MANDER:

Well, in my submission the appropriate course would have been when the officer got to that point in his brief as he was reading it, purporting to identify, objection should have been taken.

TIPPING J:

Well, I'm not sure about that.

ELIAS CJ:

Because it's, well, it's very curious – it is a very peculiar section, because it does, am I right in thinking it does roll up both the evidence of the identification through the

formal process, so the out-of-court visual identification, and also the evidence given in court that, "He was the person I saw."

MR MANDER:

Well, the effect of the section, in my submission, is effectively to render identification evidence inadmissible –

ELIAS CJ:

Yes.

MR MANDER:

– unless –

ELIAS CJ:

Yes. But all identification evidence, but it permits you to call the evidence of the photo montage in addition to your identification in court if you've done it properly.

MR MANDER:

Yes.

ELIAS CJ:

Yes.

TIPPING J:

I don't think I can accept, Mr Mander, subject to anything further you might wish to put forward, that the defence should have objected. At what point would they object? That would just be a recipe for the thing to be supplemented orally.

MR MANDER:

Well, the evidence – in order for the issue to be explored, in my submission, on a proper basis, there would be a need to signal to the Court –

TIPPING J:

Identification is an issue. The Crown therefore had to call admissible evidence proving identity.

MR MANDER:

Indeed, and I am unsure as to the detail, and I am reluctant to be speculating as to what might have happened at the hearing when I wasn't there, but –

TIPPING J:

No, no, quite, but I just put you on notice that I don't think I personally would accept the proposition that, having put it in issue, they then had to object halfway through its evidence.

MR MANDER:

No, but my point is in terms of notice to the Court, because the prosecutor may have been betwixt and between here as to why was he calling evidence about all this person's previous convictions, and all what –

TIPPING J:

Well, he should have got himself familiar with s 45.

MR MANDER:

Well, he may have, but it should have been, in my submission, clearly signalled to the Judge, to the Court, that, "We have an issue here regarding whether or not you should be hearing, you should be accepting in evidence as a matter of determination of the facts, this evidence at all".

TIPPING J:

But you wouldn't know until the prosecution's witness had finished, whether he was going to lay a foundation or not.

McGRATH J:

And, in particular, as to whether there was a foundation based on good reason for not following the procedure.

TIPPING J:

Exactly, yes.

ANDERSON J:

It's not as though it's presumptively admissible, it's presumptively inadmissible.

MR MANDER:

It is.

ANDERSON J:

And therefore it's over to the Crown to show that it's admissible.

MR MANDER:

It is indeed.

ANDERSON J:

And, in the normal course of events, objection has to be taken if it's presumptively admissible but some point is taken admissibility by the defence, but the system reverses that situation.

MR MANDER:

It is, but in my submission the appropriate course here would have been – and I accept the prosecution didn't do it – but the prosecution should have said to the Court, "I am now going to be calling all this prejudicial evidence –

ANDERSON J:

And treated it on the voir dire.

MR MANDER:

Yes.

TIPPING J:

As if for a voir dire.

MR MANDER:

As if for a voir dire. It's irrelevant to the proof of the charge –

ANDERSON J:

Yes, I entirely agree, with respect, and the Judge would then have noted the record, "Following evidence on voir dire", just to formalise the record, and then when it came out of the voir dire, "Voir dire over", and then the rule.

MR MANDER:

Indeed, it needed that level of formality, in my submission. I wonder if I could perhaps just return to the more – I'm mindful of the time…

ELIAS CJ:

Now, I'm just wondering really where that submission goes, I'm just trying to think about the practicalities. I suppose you don't need to be concerned about them in this case – sorry, reflecting on what you just said, that the prosecutor should, the prosecutor should have flagged that he was going to qualify the witness to give identification evidence.

TIPPING J:

But, as I think one counsel for the appellant said, in most of the textbooks this is classified under opinion evidence –

MR MANDER:

Yes.

TIPPING J:

– therefore you have to qualify your witness to give the opinion and, in the statutory sense, you have to qualify him by having a sufficient degree of familiarity, if you haven't gone through the –

MR MANDER:

Given that it's recognition evidence.

TIPPING J:

Yes.

MR MANDER:

Yes.

ANDERSON J:

Yes, there certainly are procedures that could have avoided this. If the summary trier of fact thought, "I've heard so much prejudicial evidence, I don't think I can fairly hear it substantively", a ruling could be made on admissibility and then it could be sent to another judge.

BLANCHARD J:

But probably all the judges knew this man's record anyway, so…

ANDERSON J:

Yes, but they have to keep it out of their mind.

BLANCHARD J:

Yes, and probably would be able to.

ANDERSON J:

Yes, they probably –

MR MANDER:

Yes, and I don't wish to resile too much from the point that I've made. The Court is charged with making a determination as to the admissibility of evidence, and if the Court isn't on notice that there is an issue in front of them that they have to determine as to admissibility until the end of the Crown case, in my submission it can lead to problems because the Judge may have got to the end of this case, submission of no case to answer is made to him in this case, and he could say, well, I need to hear more evidence about this.

TIPPING J:

Well, they could have applied for leave to recall the constable, which would probably have been given, and it would have been very difficult to argue against if the case wasn't beyond that point, and then he could have given his evidence. They just, with great respect, they just didn't know what they were doing.

MR MANDER:

No. The point I would just seek to make is that it seems to me that it needs to be clearly signalled to the Court that you have an, "You're hearing evidence about an admissibility question here, Judge, not just proof to the charge, but there is an admissibility question which you will have to decide based upon this evidence you're hearing". The Judge in fact was completely unaware until the end of the case that, in actual fact, that admissibility argument, the evidence relating to the admissibility argument, was being played out in front of him.

ANDERSON J:

One can see the force of that, because it takes a different type of evaluation from the general question of proof, but the prosecution, knowing that identity was in issue, would have opened and said, "Identify is an issue and I'll be calling evidence in the nature of qualifying evidence". So, perhaps this is a very convenient case for some instructive indications of how these things should be done.

MR MANDER:

Indeed.

BLANCHARD J:

Well, it would have been clear enough to the Judge, as the evidence was being called, that identification was in issue.

MR MANDER:

Absolutely, identification was in issue, Sir, but as to whether the evidence relating to the issue of identification was to be, was going to be admissible.

BLANCHARD J:

Well, again, I am not being critical of the Judge, because the statute's a relatively new one, but judges in future cases are going to have to be familiar with this section.

ELIAS CJ:

He doesn't in fact make a ruling on admissibility, he accepts the identification.

MR MANDER:

That's right, Ma'am, there's no separate rulings as such.

TIPPING J:

Well, the ultimate responsibility is that of the judge, it's not that of counsel, I don't think we can resile from that, pretty fundamental.

MR MANDER:

No, the decision is the decision of the judge.

TIPPING J:

Yes.

MR MANDER:

If I can perhaps just turn more generally to the more general submissions relating to the section itself, some reliance has been placed upon the code, Code D of PACE, English PACE, and in preparing yesterday, when the hearing was brought forward, I just checked to make sure that the version of the code in my learned friend's bundle was the most up to date, it would appear to be, 2008, at tab 15, but in fact the relevant paragraph, 3.12, has been amended again, and I have copies of the amended –

ANDERSON J:

It's very thorough of you, Mr Mander.

MR MANDER:

Thank you, Sir.

TIPPING J:

Is it amended substantively?

MR MANDER:

Yes –

TIPPING J:

It is?

MR MANDER:

Very pertinently, I think, Sir. Your Honours will note that the earlier version refers to an example of when the formal identification procedure would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence, and then it gives an example. The example given in relation to recognition originally referred to the suspect already being well known to the witness, whereas the new code refers to the suspect is already "known" to the witness, as opposed to "well known", and I know my learned friends were placing great emphasis upon the language used in the number of the authorities as being a high threshold of familiarity. The code appears to have been deliberately amended not to place a particular level of familiarity or threshold of familiarity, just the neutral term, "already known to the witness" and, in my submission, that supports the submission that I made earlier, that the level of familiarity, the level of knowledge on the part of the

witness of the suspect purported to be identified, is something which has to be gauged in the individual case. For instance, in this case, if there had been more information given about those two incidents while they were two incidents five years and seven years ago, that could have been, that would have been information highly relevant to the assessment.

TIPPING J:

Are you asking us to write down the authorities to "known" from "well known"?

MR MANDER:

No, my submission is firmly based upon the formula set out by the Court of Appeal in *Edmonds* upon their distillation of the UK authorities.

TIPPING J:

And what precisely is that in relation to this concept of well known?

MR MANDER:

And that, Sir, is set out in the Crown submissions, but I'll just briefly get it.

TIPPING J:

Is it 37 of your submissions where they talk about well familiar?

MR MANDER:

No Sir, paragraph 28 of the Crown's submissions, which sets out paragraphs 72 and 73 of the Court of Appeal's formulation.

TIPPING J:

Is this the use of the word "recognises"?

MR MANDER:

That's correct, Sir.

TIPPING J:

Well that's a sort of question begging, in this context.

MR MANDER:

Well, the Court of Appeal, it goes back to the original, to the, I guess the broader question of whether or not the formal identification procedure would serve a useful purpose and if it would then the procedure should be conducted.

TIPPING J:

Isn't the tenor, of at least the English authorities, that you can't claim to recognise unless the person is well known to you?

MR MANDER:

In my submission the tenor of the UK authorities is to the effect, and I'm sorry, I'm not trying to be circular, but is whether or not the identification procedure would serve a useful purpose in that, by carrying out the formal procedure, there would something be learnt about the reliability of the witness, or would, given the person's familiarity with the person they purport to identify, all they're going to do as a result of carrying out the formal identification procedure is just point out or identify the person they know anyway.

ANDERSON J:

To show that they recognise – all it shows is that they do recognise the person.

MR MANDER:

Yes.

ELIAS CJ:

Would it be better if, with that objective in mind, with the objective that you acknowledge, would it be better if paragraph 72 read something like, although we'd accept – the fact that an accused – sorry it's not an accused – recognised an alleged offender, the fact that a witness, is it –

MR MANDER:

Yes.

ELIAS CJ:

– recognises – should it be that a witness has a good basis for recognising an offender? I mean doesn't the section really force the judge, where identity is in issue, to address that?

MR MANDER:

Yes, the judge does need to address that.

ELIAS CJ:

Yes, and it may be that well known is putting it – being well known to someone, is not putting it on the correct basis. There just has to be some foundation for something that the judge accepts makes it likely that the recognition is reliable.

MR MANDER:

Yes, but in the judicial assessment –

ELIAS CJ:

Yes.

TIPPING J:

Doesn't the strength of the claim to recognise, all the strength of the background, march with the likelihood of mistake? In other words, in accordance with the spirit of this provision, we should require a reasonably high threshold before we dispense with formal procedures. A good basis, I agree, interpreted in that way. But just saying someone recognises someone, I mean it doesn't tell you anything about the objective strength of the basis for the recognition.

MR MANDER:

It doesn't, Sir, but I think the other question that needs to be considered is, what's the dangers associated with getting such a witness to undertake a formal identification parade when all they're going to do is potentially confirm a mistake?

TIPPING J:

Well it's all – I think this is a bit of a straw man, because there's always a risk that that will happen, but the policy of the legislation is that you do it this way, unless –

MR MANDER:

Unless there's a good reason not to.

TIPPING J:

Yes, exactly.

MR MANDER:

Indeed.

TIPPING J:

And I don't think we should set the bar very low on this.

MR MANDER:

But the question arises – I mean the old, the usual caution given to a jury. You may be very sure you see your cousin or your neighbour across the road, you walk across the road, it's not your neighbour, even though you're very sure of it. So even a person that's very, could be very familiar, you might think it's your grandmother –

ELIAS CJ:

That's why I'm a little worried about "well known". I know lots of people well that I always fail to recognise.

MR MANDER:

I think there is that danger. The danger is the person that actually is convinced, and they might be convinced because they know, they think they know the person very well.

ANDERSON J:

It's really that, if someone, in fact, is well capable of recognising X, the procedure will not inform the reliability of their act of recognition on a particular occasion. It will only inform their ability generally to recognise that person.

MR MANDER:

Indeed, Sir.

TIPPING J:

Well, it's a matter of where you put the balance really, isn't it? I mean, in the end – you've got to have a formula of words, but in the end it's a matter of judgement as to whether, as the Chief Justice says, there's a good or sufficient basis for relying on their recognition.

MR MANDER:

It does. That's correct, Sir, and whether a formal identification procedure will be of any utility given those circumstances, mindful that that's not the end of the test because it remains for an accused person to still establish, on the balance of probabilities, that in the circumstances the identification is still unreliable. So even though you get a good reason, even though that might be a good reason not to conduct the formal identification procedure, which has limitations in terms of being a test of reliability, there still remains the back-up of ensuring that an unreliable identification doesn't go through to the fact-finder, through to the jury, if, indeed, the circumstances are such that on the balance of proba – it's more probable than not that there are too greater risks associated with the identification.

ELIAS CJ:

Well, if you know the person very well that is a good reason for not going through the formal visual identification procedures, but it may be that your opportunity to observe them makes your identification on the occasion unreliable, and that's the reason for that.

ANDERSON J:

It's quite elusive, because when you think you've seen your cousin over the road and it turns out not to be, it's because you haven't seen their face sufficiently clearly, but make an assumption that it's them, or you've recognised, or think you've recognised, a favourite jacket and the way they walk, and there are other people with the same sort of jacket and walk the same way and that's how those sort of mistakes arise. So one has to actually look at how was this person recognised on the occasion? There's a general ability to recognise why because of this and this and this, and how did you recognise on the particular occasion, and you may get a coincidence of the features of recognition or it might not be sufficient.

ELIAS CJ:

But you still have to get past the judge, that's the admissibility question. So the judge has to turn his mind, because there is a presumption in the legislation that where you have identification evidence, unless there is good reason, you are going to have to have some sort of formal process, and the difficulty you have with this particular case is that there's very little – well, first of all, it doesn't look as if the judge really turned his mind to the admissibility question, which doesn't really seem to conform with the statute because it does emphasise the importance of that preliminary step, and then

there's the issue that it's really not substantiated beyond an assertion, but I've seen him on two other occasions, one can infer in sort of quite lurid circumstances or something, but is that really good enough?

MR MANDER:

Well I think, in my submission, what needs to be added to that is at the end of the day, as has been pointed out more than once this afternoon, it's an opinion. It's opinion evidence, and one, at the end of the day, is having to place a level of responsibility on the appreciation by the witness of the consequences of the evidence that they've given. So they are giving an opinion that they are sure, they are confident that, indeed, this is the person that they saw on two previous occasions.

ANDERSON J:

I wonder whether it's just far too simplistic to talk about well known or not very well known or all the rest of it. Each case is fact specific as to why it would serve no useful purpose, and this requires an examination not only of how well known, but how that person is known and how it relates to the circumstances of recognition. You have to go into all of that to say, well, I am satisfied from all of this that no useful purpose would be served by going through an identification because all the other factors show that that would be utterly superfluous and possibly, on occasions, unhelpful.

MR MANDER:

Indeed.

ANDERSON J:

So it's much more –

McGRATH J:

You see the ultimate question, don't you, as to whether, given what material is there, a formal procedure on top of that would have been useful?

MR MANDER:

Yes.

McGRATH J:

That's the way you've –

MR MANDER:

That's fundamentally the submission, Sir, yes.

ELIAS CJ:

It is, I mean, it really does strike me as a very difficult section, though, because one would have thought that, yes, the judge still needs to decide on the balance of probabilities whether to bring it in, but why should the defendant have the onus there, because, yes. And, of course, the other aspect of it really the – it puts a huge load on investigating police officers, doesn't it, because it's too late by the time it gets into the court if they haven't had one of these formal identification parades, the evidence is inadmissible.

ANDERSON J:

Because it will be unreliable, inherently.

TIPPING J:

Presumably, though, there are general police instructions, give police officers guidance as to the presumptive requirement for ID parades.

MR MANDER:

They would have, as long as I can remember they always have, yes, indeed Sir.

ELIAS CJ:

But probably principally a problem in the case of police identification, isn't it.

TIPPING J:

Yes.

MR MANDER:

I think that's right, Ma'am, yes.

ANDERSON J:

And relatively minor offences that are prosecuted by police officers rather than trained lawyers.

MR MANDER:

Indeed, Sir.

ANDERSON J:

In busy courts.

MR MANDER:

Indeed, Sir. The case of *Edwards* is a very good illustration, in my submission, of a situation whereby the clear familiarity of the witness with the individuals that he purported to identify provides a good reason for not carrying out an identification parade. I'm mindful of the time, but I do urge that authority on the Court as an illustration.

TIPPING J:

Edwards, did you say, or *Edmonds*?

MR MANDER:

I'm sorry, *Edmonds*. It is also, in my submission, a very good illustration of why subs 4(d) does not adequately cover all the circumstances where the issue of familiarity will cover when a good reason arises, because in that case the two gang members who were identified by the eyewitness, who had a large degree of contact with them over many years, simply denied at police interview that they were there at the scene of the crime and clearly the police were on notice that identification was an issue. So the police could not, at some later stage at trial if an admissibility issue arose, they certainly couldn't rely upon subparagraph (d) and, indeed, this case itself, in my submission, is illustrative where the case, how else is this case going to be defended? What can possibly be in issue in this case? But who was the driver?

ELIAS CJ:

Yes.

MR MANDER:

Moving to s 45(2), the Crown is really on all fours with the appellant's submissions in terms of the circumstances that need to be taken into account, which are basically the *Turnbull* circumstances – external/internal. To be added to that, as is referred to in *Edmonds*, is any factor that may impact upon the way in which the identification has been collected, where there is a risk of contamination of the identification evidence, the witness having spoken to someone else, having been influenced by factors other than their actual identification.

ANDERSON J:

This is the hinted at, wasn't it, by Mr Bailey in his questions about unconscious predisposition to recognising Mr Harney because of what was going on in the police operation at the time?

MR MANDER:

Yes.

ANDERSON J:

Can you see that as a contaminating type of thing?

TIPPING J:

Is it the Crown's case that the subjective confidence of the identifier is a circumstance?

MR MANDER:

In the Crown's submission, the subjective confidence of the witness in the witness box of the sureness of their identity is irrelevant.

TIPPING J:

Is irrelevant?

MR MANDER:

Irrelevant.

TIPPING J:

Relevant?

MR MANDER:

Irrelevant, Sir.

TIPPING J:

Irrelevant.

MR MANDER:

However, the confidence displayed by the witness at the time of the making of the identification in the Crown's submission is a relevant circumstance. And the Crown's submission –

McGRATH J:

That's for the purposes of subs (2)?

MR MANDER:

Yes, Sir.

McGRATH J:

Thank you.

MR MANDER:

Evidence of an identification may be given by a witness who isn't the actual eyewitness as such. Evidence of identification may include evidence being given by a police officer, I think the example has already been given this afternoon, who observes the actions of the eyewitness at the identity parade. Officers charged with presenting photo montages to witnesses can quite rightly give evidence that: "I showed the montage to the witness. The witness immediately pointed to photograph number 3."

ANDERSON J:

It's often said, isn't it, in evidence, that type of thing?

MR MANDER:

Indeed.

ANDERSON J:

But what's your view on the proposition that the confidence of the witness at trial – as opposed to confidence at the time of identification – confidence of the witness at trial might be relevant to proof in terms of s 45(2)?

MR MANDER:

In terms of proof, yes, I –

ANDERSON J:

Not a circumstance, but may go to prove the circumstances

MR MANDER:

Indeed, Sir, yes.

TIPPING J:

Would you allow, when you say, "Confidence at time of identifying", would you allow clearly objective evidence like, "He pointed immediately to that photograph", or would you also allow the witness to say, "I felt confident with my identification"?

ANDERSON J:

I pointed immediately to the –

TIPPING J:

Well, no.

ANDERSON J:

What sometimes happens is that an officer will say, "And when the complainant saw the accused she started shaking and becoming very distressed".

MR MANDER:

In my submission, that must be relevant to the circumstances of which the identification is made. The words that are used in the subsection, "Unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification is made have produced reliable identification". The circumstances in which the identification was made, now, in my submission, any evidence that's relevant to the factual matrix relating to the making of the identification, in my submission, must be relevant and –

TIPPING J:

I agree with that, but my question was –

MR MANDER:

Yes, Sir. To answer your question, in my submission it is and would be. It must be relevant for a witness who is questioned about their identification to say that they weren't sure. That must relate –

TIPPING J:

Yes it must.

MR MANDER:

So if that's relevant to the circumstances in which the identification is made –

BLANCHARD J:

How can you prevent them from saying they were fairly sure but not absolutely sure?

MR MANDER:

You can't.

BLANCHARD J:

One part of that –

TIPPING J:

Yes, how sure were you? It could hardly be admissible if you said not very, but inadmissible if you said very.

MR MANDER:

No, it just has to be a question of weight and degree, I mean for the judge. I accept that, Sir.

TIPPING J:

Yes, I think that must be so, otherwise the law will be ridiculous.

ELIAS CJ:

It's a bit ridiculous.

TIPPING J:

Anyway.

BLANCHARD J:

Well, I guess they're familiar with that.

MR MANDER:

And, just finally, unless there are any questions from your Honours, is that, in relation to s 45(2) is, of course, *R v Turnbull*, when one examined the reliability of the identification in terms of examining the circumstances of the identification, held that you could look at other pieces of evidence to corroborate the reliability of the eyewitness' identification.

ELIAS CJ:

Yes.

MR MANDER:

Where s 45(2) says you can't. You can't look at any other type of evidence.

TIPPING J:

No.

MR MANDER:

The circumstances of the identification have to stand in their own right. So the prosecution has to prove beyond reasonable doubt the circumstances. It can't rely upon anything else.

ELIAS CJ:

You can't have, you know, the bundle of threads or –

MR MANDER:

No, it can't add all up.

TIPPING J:

Because there's so much else on him, the witness must have correctly identified.

MR MANDER:

Indeed. It was –

TIPPING J:

Yes.

MR MANDER:

Whereas *R v Turnbull* says you can.

TIPPING J:

Yes, *R v Turnbull* says you can, yes.

ELIAS CJ:

That's why I asked about the distinctive car.

TIPPING J:

That's, I think, how traditionally one would direct before this act. You can accumulate if you like. It sort of bootstraps it a bit but that was the way it was done.

MR MANDER:

Indeed, Sir.

ANDERSON J:

I think the present way draws the distinction between admissibility and, once admitted, how it's to be dealt with.

MR MANDER:

Indeed, Sir. Unless there are any questions from the Court?

ELIAS CJ:

No, thank you Mr Mander, that's been helpful. Nothing in reply. Thank you very much counsel for your assistance. I must say I thought the written submissions were extremely good, and the oral ones. It's been a good hearing, thank you.

COURT ADJOURNS: 4.24 PM