HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

BRUNETTA FESTA APPELLANT

AND

THE QUEEN RESPONDENT

Festa v The Queen
[2001] HCA 72
13 December 2001
B39/2001

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation:

A J Kimmins for the appellant (instructed by Ryan & Bosscher, Lawyers)

M J Byrne QC with C W Heaton for the respondent (instructed by the Office of the Director of Public Prosecutions (Queensland))

CATCHWORDS

Festa v The Queen

Criminal law – Evidence – Admissibility – Exclusion of evidence – Identification evidence – Usual precautions for identifying suspects not followed – Whether probative value of identification evidence outweighed danger of unfair prejudice to the accused – Whether admission of identification evidence resulted in a miscarriage of justice.

Criminal law – Evidence – Identification evidence – Whether trial judge adequately directed the jury about the deficiencies of identification evidence.

Criminal law – Evidence – Weapons and ammunitions found at the unit of co-accused were of the same character as those used in the robberies but were not purchased until after the robberies – Whether evidence of weapons was admissible as "propensity" evidence – Whether the trial judge adequately directed the jury in relation to the discovery of weapons and ammunitions.

Criminal law – Evidence – Admissibility – Whether evidence of an association between the accused and co-accused was admissible – Whether direction by the trial judge about the association was a material misdirection.

Criminal law and practice – Appeal against conviction – Application of "proviso" – Whether errors by trial judge constituted a substantial miscarriage of justice – Whether evidence was so strong that no reasonable jury could fail to convict the accused.

Words and phrases – "circumstantial identification evidence" – "positive-identification evidence" – "unfair prejudice".

Criminal Code (Q), ss 408, 668E.

1 GLEESON CJ. The nature of the case against the appellant appears from the reasons for judgment of Kirby J and Callinan J. I will confine my remarks to the first three grounds of appeal. For the reasons given by Kirby J, I agree that the remaining grounds have not been made out.

2 Grounds 1, 2 and 3 are as follows:

> "1. The failure to exclude the evidence of the witnesses James, Ogilvie, Fyffe and Hill who purported to directly identify the appellant has resulted in a miscarriage of justice.
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> 2. The admission of the evidence of James, Ogilvie, Fyffe and Hill who purported to directly identify the appellant, as circumstantial evidence, has resulted in a miscarriage of justice.
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> 3. The trial judge's directions in relation to eye witness identification and voice identification evidence were inadequate."

3 In my view, ground 3 has been made out, but not grounds 1 and 2.

Grounds 1 and 2: admissibility

4 There is a risk of confusion arising out of a failure to distinguish between different parts of the evidence of the four named witnesses, the use of the general term "identification evidence" to describe the information they provided, and the reference to "circumstantial evidence", which had its origin in an expression used by the trial judge in ruling on admissibility.

5 Direct evidence is evidence which, if accepted, tends to prove a fact in issue. Here, the fact in issue was whether the appellant was one of the two people who took part in bank robberies at Biggera Waters on 27 May 1996 and at Paradise Point on 13 June 1996. (The charges, of course, had to be considered separately.) Circumstantial evidence is evidence which, if accepted, tends to prove a fact from which the existence of a fact in issue may be inferred[1]. The evidence of the first three of the four named witnesses was circumstantial. If accepted in full, it tended to prove that the appellant was, at the time of each bank robbery, near the scene of the crime, in the company of a male, and associated with a car of the kind used in the robbery. If those facts were established, they could form part of the basis for an inference that the appellant was one of the robbers. Even if those three witnesses had all said that they knew the appellant, saw her clearly, and recognised her, that would have been circumstantial, not direct, evidence of her participation in the robbery.

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1 *Cross on Evidence*, 6th Aust ed (2000) at 14.

6 Some of the evidence given by each of those three witnesses was plainly admissible. It was evidence of their observations of a female person, near the scene of the crime, at the time of the Biggera Waters robbery, who, although wearing a wig and disguised to an extent, was of a physical appearance consistent with that of the appellant, and who acted in a certain manner which, when related to other evidence, was such that it was open to the jury to infer that the female was one of the two bank robbers in each case. The significance of this evidence was not that, standing alone, it permitted the jury to conclude that the appellant was involved in the robberies. Indeed, standing alone, this part of the evidence of the witnesses did not even permit the conclusion that the female person whose behaviour was observed and described was the appellant. But, if accepted, it tied in with other evidence that one of the robbers was a female, and it showed that the appearance of the female was consistent with her being the appellant. It was only identification evidence in the loosest sense of that term. None of the witnesses professed to have known or recognised the appellant on 27 May or 13 June 1996. They observed, and were able to describe, a female's approximate age, size and general physical appearance. They said she wore a wig. That was particularly significant in the light of other evidence, which included fingerprints of the appellant on a can of wig and hair sheen, and a bottle of spirit gum, found in a unit occupied by the co-accused, Renton, together with wig stands and a set of instructions on the use of disguises.

7 The grounds of appeal, with their references to "direct identification", appear to relate, or relate principally, to evidence of later acts of identification by which the four witnesses said they recognised the appellant as the female they had seen on 27 May and 13 June respectively, although some of that evidence also fell short of positive identification.

8 Three witnesses, Mr Fyffe, Ms Ogilvie, and Mr James, had observed the behaviour of the female at Biggera Waters at about the time of the robbery on 27 May. Mr James had spoken to her briefly. All three attended the Southport courthouse on a date in October 1996, which had been fixed for the hearing of committal proceedings against the appellant and her co-accused. They were asked by police officers to let them know if they saw anybody fitting the description of the woman they had seen on 27 May. Mr Fyffe said that a detective "just asked me to keep my eye out, that the female could possibly be here on the day, and he said there would be no obligation for me to identify her, but if I seen her and I was certain it was her, could I at least let him know about it". Ms Ogilvie said the detective asked "if I recognised anyone that was fitting the description that I'd given to him … to let him know". Mr James said the detective said to him: "It might be somebody here you can recognise". Mr Fyffe said he recognised the woman as she came out of a lift at the courthouse. The features that attracted his notice were her size and height. Ms Ogilvie also saw the woman, who "looked familiar". Mr James saw the woman as she emerged from a lift, and heard her speak to a man who was with her. He said he

recognised her voice, and her gait. He was "about 75 per cent sure" it was the woman he had seen on 27 May.

9 The fourth witness, Mr Hill, was a hairdresser who worked near the bank at Paradise Point. He was at work on 13 June when the robbery occurred. He saw a woman, who was one of the robbers. She had layered hair and an olive complexion. On 18 August 1996, he was shown by the police a board containing a number of photographs. He said that the persons depicted in photographs 6, 8 and 11 had the same hair and skin type as the woman he had seen on 13 June. The appellant was depicted in photograph 6. This was not evidence that "directly identified" the appellant. It was some evidence that the appearance of the appellant was consistent with the appearance of the female seen at Paradise Point participating in the robbery. It should be added that there was evidence before the jury as to when and how the photo-board had been prepared. It was prepared after the appellant had been charged.

10 The evidence of Mr Hill was in some respects similar to that held to be admissible by the Supreme Court of South Australia in *Murphy v The Queen*[2]. There, a number of witnesses to a robbery were shown photographs. They selected one photograph being that of the appellant, but could do no more than indicate that there was a similarity. That evidence was held admissible. King CJ said[3]:

> "This evidence was not … in the true sense identification evidence. None of the witnesses were able to identify the photographic slide of the appellant as that of a participant in the robbery. Nevertheless the evidence did possess, in my opinion, some evidentiary value."

11 In that case, the number of witnesses who selected the same photograph was significant. But the case shows how evidence falling short of positive identification may nevertheless be of significance, having regard to the whole of the evidence.

12 The argument that the evidence of the four witnesses should have been excluded turned upon what were said to be deficiencies in its quality.

13 The strength or weakness of evidence may depend in part upon the use that might be made of it. Mr Hill's selection of three photographs, including one of the appellant, of itself could not support a positive conclusion that the woman he saw was the appellant. But the evidence did not stand alone. And even if it

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2 (1994) 62 SASR 121.

3 (1994) 62 SASR 121 at 123-124.

only showed that the woman he saw was consistent in appearance with the appellant, that was a material fact. Similarly, the cogency of the evidence of the acts of identification at the Southport courthouse depended in part upon what was sought to be made of it. As positive identification of the appellant, it was weak. In fact, the evidence of Ms Ogilvie and Mr James did not amount to positive identification. But as evidence that the appearance of the appellant was consistent with that of the wigged female seen near the bank at the time of the Biggera Waters robbery, it was of some probative value.

14 Questions as to the admissibility of evidence may be related to, but are different from, questions as to whether the totality of the evidence in a case is sufficient to sustain a jury's verdict, or questions as to the warnings that need to be given to a jury about the use that may properly be made of the evidence. If evidence is of some, albeit slight, probative value, then it is admissible unless some principle of exclusion comes into play to justify withholding it from a jury's consideration. It is not enough to say that it is "weak", and, as already mentioned, whether it is weak might depend on what use is made of it. The totality of the evidence may be such as to render a conviction unsafe. But that does not affect admissibility. And the jury may need to be warned that evidence, if accepted, only shows consistency of appearance between the person and the offender; a fact which may or may not be of much significance depending upon other matters. Evidence of blood sampling may be relevant and admissible, for example, even though, standing alone, it only establishes that it is consistent with the accused being the offender. Evidence may show that an accused was near the scene of a crime. Such evidence, on its own, does not show that the accused committed the crime. That does not mean it is of no probative value; in the end, it will have to be considered together with all the other admissible evidence.

15 For any one of a number of reasons, evidence of observations, including evidence of positive identification, may be made in circumstances which adversely affect its reliability. Those circumstances may be beyond anybody's control, or they may result, for example, from the way police have conducted an investigation. In *Davies and Cody v The King*[4] this Court considered evidence of positive identification of an accused by a witness whose previous knowledge had not made him familiar with the accused, and who was first shown the accused, alone, as a suspect. The risk involved in identification made in those circumstances is obvious. The Court said[5]:

> "[I]f a witness whose previous knowledge of the accused man has not made him familiar with his appearance has been shown the accused alone

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4 (1937) 57 CLR 170.

5 (1937) 57 CLR 170 at 182 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ.

> as a suspect and has on that occasion first identified him, the liability to mistake is so increased as to make it unsafe to convict the accused unless his identity is further proved by other evidence direct or circumstantial. Where that further evidence consists in or includes other witnesses whose identification has been of the same kind, the number of witnesses, their opportunities of obtaining an impression or knowledge of the prisoner and other circumstances in the case must be taken into account by the court of criminal appeal for the purpose of deciding whether on the whole case the possibility of error is so substantial as to make the conviction unsafe."

16 That passage assumed the admissibility of the evidence, and accepted the possibility that, although standing alone the "liability to mistake" of such evidence was apparent, in combination with other evidence, even other evidence of the same kind, it might sustain a conviction.

17 The decision of the New South Wales Court of Criminal Appeal in *R v Bouquet*[6] was cited with approval by this Court in *Alexander v The Queen*[7]. In *Bouquet*, the police had failed to conduct an identification parade, or to explain why one was not conducted, but had, instead, shown the victim a number of photographs, from which the victim selected a photograph of the appellant. The victim also made an in court identification of the appellant, both at the committal proceedings and at the trial. It was complained that the procedure adopted by the police in showing the photographs to the appellant was improper, and that the in court identifications were worthless. The failure to hold a line-up and the alternative procedure adopted was different from the course prescribed by police regulations. In that respect it was similar to what occurred at the Southport courthouse in the present case. The evidence, including the in court identifications, was held to be admissible. As to the photographs, Sugerman J said[8]:

> "The use of photographs in this way, in lieu of a personal identification parade, goes to the weight and sufficiency of the evidence rather than to its admissibility …".

18 Of all forms of identification evidence, one of the most notoriously dangerous is in court identification, which is usually performed in circumstances that strongly suggest the answer that is ultimately given. Even here, however, there is no absolute rule requiring rejection of such evidence; and there may be

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6 [1962] SR (NSW) 563.

7 (1981) 145 CLR 395.

8 [1962] SR (NSW) 563 at 568.

circumstances in which it is appropriate to allow it. In *Alexander*[9], Mason J discussed in court identification, which he said was "of little probative value", in terms that accepted its admissibility. He went on to say: "It has been the practice to reinforce this 'in court' identification by proving that the witness had earlier identified the accused out of court in a line-up or by selecting his photograph from a collection of photographs".

19 The actual decision in *Alexander*[10] was that, in a case where no identification parade was held, and witnesses, following the arrest of a suspect, identified him from photographs shown to them by police, the evidence of such photographic identification was admissible. Gibbs CJ said[11]:

> "The authorities support the conclusion that I have reached, which is that, as a matter of law, evidence of an identification made out of court by the use of photographs produced by the police is admissible. However, a trial judge has a discretion to exclude any evidence if the strict rules of admissibility operate unfairly against the accused. It would be right to exercise that discretion in any case in which the judge was of opinion that the evidence had little weight but was likely to be gravely prejudicial to the accused … If the trial judge admits the evidence, and the accused is convicted, the true question for the Court of Criminal Appeal is whether having regard to the whole of the evidence it would be so unsafe or unsatisfactory to allow the conviction to stand that to do so would amount to a miscarriage of justice. In considering that matter the Court of Criminal Appeal also will keep in mind the importance of ensuring that the most reliable evidence of identification is obtained in every case."

20 It may be noted that the wording of the grounds of appeal in the present case is consistent with what was said by Gibbs CJ. The complaint is that the failure to exclude the evidence resulted in a miscarriage of justice.

21 The approach taken by this Court in *Alexander* is consistent with that of the Supreme Court of Canada in the later case of *Mezzo v The Queen*[12]. An accused was tried for rape. The only issue was identification. The complainant had been attacked, in the dark, by a stranger, but she saw his face and described him to the police. Two weeks after the attack, the police arrested the accused. The police arranged for the complainant to be in court when the accused was

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9 (1981) 145 CLR 395 at 426-427.

10 (1981) 145 CLR 395.

11 (1981) 145 CLR 395 at 402-403.

12 [1986] 1 SCR 802.

brought to court. They did not conduct an identification parade. The police told the complainant that an arrest had been made, and that the suspect would be in court. The complainant sat in the public gallery. A number of prisoners were brought into court. When the accused was brought in, the complainant reacted visibly and trembled. She told the police the accused looked like her attacker but she was not sure, because her view in court had been partly obstructed. Some days later, the accused was brought before the court again. The police arranged for the complainant to be present. This time the complainant positively identified the accused. She identified him again in court at the preliminary hearing. She identified him again in court at the trial. All of that evidence was treated as admissible. However, the trial judge directed a verdict of acquittal on the basis of insufficiency of the evidence of identification. The Court of Appeal for Manitoba, and the Supreme Court of Canada, held that he was wrong to do so, and ordered a new trial. That order could not have been made if the evidence was inadmissible. Wilson J, referring to the frailties in the identification, pointed out that it was the function of the jury to weigh the evidence, and posed as the critical question whether the problems as to the quality of the evidence could be addressed adequately by appropriate instructions and warnings to the jury[13].

22 There are two principal dangers associated with identification by means of selection from a group of photographs. These were discussed in *Alexander*. There is the inherent risk of error associated with suggestibility, and what is sometimes called the displacement effect. But there is also a risk of a different kind. The fact that the police have photographs of a suspect might convey to the jury the message that the suspect is a person with a criminal history. A similar risk arises where identification is made in circumstances suggestive of a criminal background, such as where a person is asked to attend a police station and look at a number of people reporting in compliance with bail or parole conditions. This is sometimes called the rogues' gallery effect[14]. Because of the evidence as to the circumstances in which the photo-board shown to Mr Hill was prepared, that is not an issue in the present case. The first kind of risk concerns the probative value of the evidence. The second is a risk that the jury will draw an inference about a fact which, even if true, would ordinarily be excluded from evidence. In that connection, some care is needed in the use of the term "prejudice". Where it is present, a risk of the second kind is clearly a risk of unfair prejudice. It is a risk that a fact will be suggested which is of a kind that is ordinarily excluded from evidence in the interests of fairness to an accused. But prejudice does not arise simply from the tendency of admissible evidence to inculpate an accused. It is unfair prejudice that is in question. Where evidence is relevant and of some probative value, prejudice might arise because of a danger that a jury may use the

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13 [1986] 1 SCR 802 at 820.

14 (1981) 145 CLR 395 at 412 per Stephen J.

evidence in some manner that goes beyond the probative value it may properly be given. If there is relevant prejudice of that kind, it lies in the risk of improper use of the evidence, not in the inculpatory consequences of its proper use[15]. If it were otherwise, probative value would itself be prejudice. All admissible evidence which supports a prosecution case is prejudicial to an accused in a colloquial sense; but that is not the sense in which the term is used in the context of admissibility.

23 The evidence of the four witnesses named in grounds 1 and 2 was of some probative value. However, the trial judge had a discretion to reject it, in the interests of fairness to the appellant, if he concluded that its probative value was outweighed by the danger of unfair prejudice to the appellant. He was invited to exercise that discretion, but declined to do so. That was a decision that was open to him in the circumstances of the case, and his discretion has not been shown to have been affected by material error, or otherwise to have miscarried. And there has not been shown to have been a miscarriage of justice.

24 The argument for the appellant did not make clear the precise legal significance sought to be attached to the fact that the Queensland Police *Operational Procedures Manual* states as a matter of policy that, where an identification parade is not used, investigating police officers are to attempt to establish identification through some other means including having the witness identify the suspect from amongst a large group, and should avoid having a witness identify a suspect as the suspect enters a court building. The case is similar to *Bouquet*. It was not argued at trial that departure from the policy in the present case constituted illegality such as warranted exclusion of the evidence in accordance with the principles in *Ridgeway v The Queen*[16]. The argument was that the relevant discretion was that which permits a trial judge to exclude evidence on the ground that its probative value is outweighed by the risk of unfair prejudice. It is one thing to criticise the police for failing to adopt a better and fairer method of investigation. It is another thing to conclude that the existence of grounds for such criticism should result in the exclusion of evidence having probative value. There is no warrant for concluding that the trial judge failed to exercise his discretion in accordance with the correct principles.

25 The Court of Appeal was right to reject the argument that the evidence referred to in grounds 1 and 2 should have been excluded, and that its reception resulted in a miscarriage of justice.

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15 *Papakosmas v The Queen* (1999) 196 CLR 297 at 325-327 [91]-[97] per McHugh J.

16 (1995) 184 CLR 19.

Ground 3: directions

26 The Court of Appeal acknowledged that, although the trial judge gave lengthy and detailed directions about many of the risks associated with identification evidence, there were at least two respects in which his directions and warnings were inadequate. One was that he failed to warn the jury of the dangers of voice identification of the kind made by Mr James. The other was that he did not warn the jury adequately of the dangers involved in the acts of identification made at Southport by Mr James and Ms Ogilvie, who were sitting near one another, and whose recognition of the appellant, who was said to be "one of few women seen coming into the court that day", might have been influenced by combining their respective impressions and reactions. The Court of Appeal pointed out that these matters were strongly emphasised to the jury by counsel for the accused. Nevertheless, the judge should have dealt with them, and added the weight of his authority to the need for caution.

27 This ground of appeal has been established.

Conclusion

28 For the reasons given by Kirby J and Callinan J, the case against the appellant was so strong that, although ground 3 has been made out, there was no miscarriage of justice. The appeal should be dismissed.

29 McHUGH J. After a trial by jury in the District Court of Queensland, Ms Brunetta Festa and her co-accused, Renton, were convicted on charges of armed robbery and unlawful use of vehicles. The charges against Ms Festa related to two armed robberies on the Gold Coast, the first committed at the Biggera Waters branch of the National Australia Bank on 27 May 1996, the second at the Bank's Paradise Point branch on 13 June 1996[17]. A man and a woman were identified as committing those two robberies. The central issue at their joint trial was whether Renton was that man and Ms Festa that woman.

30 Ms Festa's appeal to the Court of Appeal of the Supreme Court of Queensland (McPherson and Pincus JJA, Williams J) was dismissed. She now appeals to this Court. Her appeal raises six issues:

- **The identification evidence.** Were the circumstances in which four witnesses identified Ms Festa such that the trial judge should have rejected their evidence?
- **The identification directions.** If all or some of the identification evidence was admissible, did the trial judge adequately direct the jury concerning the deficiencies in that evidence?
- **The tools of trade evidence.** Was evidence of the discovery of weapons and ammunition in Renton's unit admissible?
- **The tools of trade directions.** If the evidence concerning the weapons and ammunition was admissible, did the trial judge err in directing the jury as to the use that they could make of the evidence?
- **The association direction.** Did the trial judge err in directing the jury as to the use that they could make of Ms Festa's association with Renton?
- **The effect of the proviso.** If the trial judge erred in admitting evidence or directing the jury, should the appeal be dismissed on the ground that no substantial miscarriage of justice has occurred?

31 In my opinion, the learned trial judge erred in his directions concerning the identification evidence and in admitting the tools of trade evidence, but in no other respect. Despite these errors, the case against Ms Festa was so strong that a

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17 Renton was charged in relation to a third robbery carried out on 8 May 1996 at the Morningside branch of the National Australia Bank. He was acquitted of this charge. The Crown did not allege that Ms Festa had participated in either that robbery or the unlawful use of the vehicle used in connection with the robbery.

reasonable jury, properly directed, would have convicted her on the admissible evidence.

Background facts and the evidence at the trial

32 On 3 May 1996, Renton was released from prison. While imprisoned, he wrote letters to Ms Festa, who lived in a unit at Runaway Bay ("the Kangaroo Avenue unit") with a man named Con Christef and her young child. Renton had got her address from a relative of Christef. Shortly after his release, Renton contacted her at that unit. The first of the armed robberies – in relation to which Renton alone was charged – occurred at the Morningside branch of the National Australia Bank, five days after his release from prison.

33 Eleven days after the Morningside robbery, Renton leased a unit ("the Pine Ridge Road unit") under the name of Donald White, paying the landlord $1,160 in cash. Ms Festa was a regular visitor to the unit, for which she had a set of keys; on at least one occasion she used the swimming pool at the units. She told police that she went shopping with Renton "every day", that he did not have a girlfriend, and that he did not know anyone else "down here". She also admitted to knowing that Renton was stealing cars and to "driving him around". The Crown relied on the association between Ms Festa and Renton to prove that she was the woman taking part in the bank robberies at Biggera Waters and Paradise Point.

34 After Ms Festa and Renton were arrested, police officers conducted a search of the Pine Ridge Road and Kangaroo Avenue units. They found $2,800 cash at the Pine Ridge Road unit, including a large number of $5 notes. When Ms Festa was arrested, she was carrying $850 cash in her wallet, including 25 $5 notes. The variety of denominations in which the money was found was consistent with it having been stolen from the banks.

35 The Pine Ridge Road unit had various items of new furniture and electrical equipment. Cash receipts indicated that some items had been bought or paid for on 22 May 1996, 14 days after the Morningside robbery. A receipt found at the Kangaroo Avenue unit indicated that one "D White" – a man answering Renton's description – had paid a deposit of $4,300 in cash for a yellow Toyota sedan. That car had been parked outside the Pine Ridge Road unit. Renton and Ms Festa were in it on 19 June 1996 shortly before they were arrested.

36 Police officers also found numerous items in the two units which, in the words of the Court of Appeal, were "not a common concomitant of suburban life among law-abiding members of the community". Guns were discovered in the Pine Ridge Road unit. There had been little, if any, effort to conceal them – one was lying across a chair in the lounge room. The guns had been purchased on 17 June 1996, four days after the last robbery. Police officers also found various

types of ammunition, some of which did not match any of the guns found but did match the type of firearms described by witnesses as being used in the robberies[18]. Other items found in the Pine Ridge Road unit included a sledge hammer – a sledge hammer had been used in the Biggera Waters robbery – a made-up poster of Renton with the caption "Armed robber eludes police again", an instruction manual for a radio scanner that was found in the yellow Toyota and an earpiece matching a scanner left at the scene of the Biggera Waters robbery.

37 Other objects found in the units belonged to owners of vehicles that were stolen and used in connection with the robberies and were the subject of the unlawful use counts. Items belonging to a Mrs Sutton, the owner of a white Mazda sedan, were found in the Kangaroo Avenue unit, in Christef's gold-coloured Mercedes (regularly used by Ms Festa and frequently seen outside the Pine Ridge Road unit) and at a service station in Runaway Bay that Ms Festa frequented. Property belonging to a Mr Pilbeam, the owner of a red Laser sedan, was found in the Mercedes and at the service station.

38 Mrs Sutton's Mazda sedan was taken from a car park on 9 June 1996; Mr Pilbeam's Laser sedan was taken from where he had parked it on 6 June 1996. Four of the cars taken and used in the robberies had had their ignition locks removed prior to being "hot wired". Other cars had scratch marks or damage to the ignition consistent with attempts to do so. Police officers found an implement capable of being used for that purpose in the Pine Ridge Road unit.

39 The cars belonging to Mrs Sutton and Mr Pilbeam were seen by witnesses on 13 June 1996 in circumstances proving or at least strongly suggesting that they were used in the Paradise Point robbery. In fact, the male robber rammed Mrs Sutton's Mazda into the doors of the bank. He fled from the scene in Mr Pilbeam's Laser, driven by a woman. One witness saw a loaded shotgun in the Laser. Twelve gauge shotgun cartridges were found in the Laser when it was recovered. Before, during and after the robbery, witnesses saw a man and woman loading a bag or bags into or out of one or both of these and other vehicles, including the gold-coloured Mercedes. The Court of Appeal said that it was a fair inference that the man and woman were changing from one car to another in order to avoid detection or pursuit.

40 Witnesses to the robberies also asserted that the two participants used disguises. Police officers found a can of hair and wig sheen, two wig stands and a set of instructions on the use of disguises at the Pine Ridge Road unit, along

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18 The Court of Appeal noted that no fingerprints were found on any of these items, a fact which it considered surprising "if they had been bought and were being used for legitimate purposes".

with a bottle of spirit gum remover. The can of wig sheen and the bottle of spirit gum remover had Ms Festa's fingerprints on them.

The identification evidence

41 In support of the charges, the Crown also relied upon the evidence of four witnesses who identified Ms Festa as being present in circumstances that indicated that she was involved in the robberies and in the unlawful use of the vehicles with which she was charged. Three witnesses, Mr Fyffe, Ms Ogilvie and Mr James, identified her as being present in circumstances indicating that she was involved in the Biggera Waters robbery. Mr Hill, the other witness, identified her as being present near the scene of the Paradise Point robbery.

42 On the day of the Biggera Waters robbery, Mr Fyffe twice saw a man and a woman acting suspiciously near his home. On the first occasion, they were in separate cars. On the second occasion, they were in the same car. Although he identified Renton from a photoboard as the man he had seen, he could not identify the woman he had seen from the books of photographs that he was shown. Those books did not include any photographs of Ms Festa. In October 1996 at the Southport Court House, however, he identified her as the woman driver whom he had seen on the day of the robbery.

43 While Ms Ogilvie was sitting in her parked car near the Biggera Waters Shopping Centre on the day of the robbery, she saw a man and a woman driving the same cars as Mr Fyffe had seen. Upon parking their cars one behind the other on the opposite side of the street to Ms Ogilvie, the man and the woman proceeded to take things out of one car and put them into the other. They then drove off together in the second car. Ms Ogilvie was a hairdresser. She was certain that the woman was wearing a wig. She also thought that the woman was wearing a dark green tracksuit. At the Southport Court House in October 1996, Ms Ogilvie identified Ms Festa as the woman she had seen.

44 On the day of the robbery, a woman parked her car – of the same make and colour as one of the cars identified by Mr Fyffe and Ms Ogilvie – underneath the block of units where Mr James lived. He described the woman as being approximately 5 feet 5 inches or 5 feet 6 inches tall, in her late thirties and wearing a blue tracksuit. She left the engine running. When she came out from the car park, Mr James criticised her for parking there. She said that she would not be long. Later, Mr James saw the woman go past the units in another car, seated next to a male driver. He identified Renton from photographs as the male, but was unable to identify Ms Festa from photographs shown to him. At the Southport Court House in October 1996, after watching Ms Festa walk and hearing her talk he identified her as the woman he had seen at the units. Mr James conceded that this voice identification of Ms Festa was based on him hearing her speak some six words at the units and six words at the Court House, four of which were small, everyday words. At the units, the woman had said,

"I'll be back in a minute". At the Court House, he heard Ms Festa say "Oh, I'm in the wrong court".

45 Thus, the identification of Ms Festa by the three witnesses to the Biggera Waters robbery rested largely upon their seeing her at the Southport Court House in October 1996, at least four months after the robberies were committed. Upon their arrival at the Court House, one of the investigating police officers, Detective Holmes, spoke to the witnesses collectively, telling them, in the words of Ms Ogilvie, "that if we seen anything that we thought looked like the second person to let him know". The three witnesses conceded in cross-examination that Ms Festa may have been the only woman at the Court House that day who was in the age range of 25-30 and who came close to matching the description they had previously given of her.

46 The one witness to the Paradise Point robbery, Mr Hill, worked at a salon close to the bank. After hearing a commotion near the salon, he turned and saw a woman in a car outside the bank. He observed her for 20-30 seconds. Although Mr Hill could not see her face very clearly, he noted that she had brown hair. In his original statement Mr Hill described the woman as fair, but at the trial he said that she had an olive complexion. Mr Hill was unable to identify Ms Festa from a board of photographs. The best he could do was to provide the numbers of photographs that he thought showed women similar to the woman he had seen. One of these numbered photographs was a photograph of Ms Festa.

47 Ms Festa did not give evidence at her trial. In fact, on day 12 of the hearing she failed to appear – which was a breach of her bail conditions. Hanger DCJ continued the trial in her absence. On appeal, she did not contest that the jury could regard her absconding as indicating a consciousness of her guilt.

The grounds of appeal

The admission of the identification evidence

48 Ms Festa contends that the trial judge erred in not excluding the identification evidence. It was, she claims, of low probative value and of a highly prejudicial character and obtained by an irregular process. She argues that, because of the absence of precautions usually observed by police in formal identification parades, the identification evidence of Ms Ogilvie, Mr Fyffe and Mr James resulted in a miscarriage of justice.

49 Hanger DCJ admitted the evidence of the four witnesses on the basis that the jury was the proper body to determine what weight should be attributed to that evidence. His Honour said that the evidence was not so unfair to Ms Festa that it called for the exercise of his discretion to exclude it, although he conceded the identifications were of little weight, particularly that of Mr Hill.

50 The evidence identifying Ms Festa as the woman seen on the days of the robberies was weak. The identifications were obtained in circumstances marked by an absence of the precautions usually taken in the identification of suspects. They were made in informal circumstances, as Ms Festa was entering a court building[19] unaccompanied by any other women[20]. No police officer kept a record of the identification process. No-one made notes of the process. No-one took photographs of the identifications or recorded them on video camera[21]. By asking the witnesses to look out for the female participant and allowing them to remain together, Detective Holmes also removed the possibility of each witness spontaneously identifying Ms Festa as the woman he or she had seen[22].

51 But the weakness of relevant evidence is not a ground for its exclusion. It is only when the probative value of evidence is outweighed by its prejudicial effect that the Crown can be deprived of the use of relevant but weak evidence. And evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial only when the jury are likely to give the evidence more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task.

52 Nor is it an automatic ground of exclusion that the identification took place at a court house or after someone has suggested that a suspect may be present at a particular place. The courts have not gone so far as to say that a court house identification must be automatically excluded where a police officer or other person has suggested that the identifying witness should be on the lookout for the perpetrator of the crime at the court house. Such statements inevitably weaken the effect of the identification evidence. They are matters to be considered in determining whether evidence should be excluded because its probative value is outweighed by its prejudicial effect. Of itself, however, a statement such as that made by Detective Holmes does not provide a ground of exclusion.

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19 Section 2.11.5 of the Queensland Police *Operational Procedures Manual* stipulated that, where an identification parade was not used, officers should avoid having a witness identify a suspect as he or she entered a court building. See *Wright* (1991) 60 A Crim R 215; *R v Gorham* (1997) 68 SASR 505.

20 Section 2.11.5 of the *Operational Procedures Manual* also advocated having a witness identify the suspect from amongst a large group of other members of the public. See *R v Turner* (2000) 76 SASR 163.

21 *Penny* (1997) 91 A Crim R 288.

22 *R v Williams* [1983] 2 VR 579.

53 Ms Festa contends that, by characterising the evidence as "more circumstantial than direct", Hanger DCJ effectively obviated the need to weigh the probative value of the evidence against its prejudicial effect. To understand the force of this contention, it is necessary to draw a distinction between positive-identification evidence and evidence of similarities between the accused and the perpetrator of a crime.

54 Most cases concerned with identification evidence are cases of positive identification. That is to say, cases where a witness claims to recognise the accused as the person seen on an occasion that is relevant to the charge. Positive-identification evidence may be used as direct or circumstantial proof of the charge. A positive identification of the accused is direct evidence of the crime when it identifies the accused as the person who committed one or more of the acts that constitute the crime in question. A positive identification is circumstantial evidence when its acceptance provides the ground for an inference, alone or with other evidence, that the accused committed the crime in question. A witness gives direct evidence of the charge when she testifies that the accused ordered her to hand over the takings. A witness gives circumstantial evidence of the charge when she testifies that the accused was the person who ran out of the bank immediately after other evidence proves it was robbed.

55 Positive-identification evidence has often proved to be unreliable. This Court has insisted that where identification evidence, direct or circumstantial, represents a significant part of the proof of guilt of an offence, trial judges must warn juries not only of the potential unreliability of that evidence but also of any particular weaknesses in the evidence, in the case being tried[23].

56 Unfortunately, another class of evidence is sometimes called "circumstantial identification evidence"[24]. It is evidence that asserts that the general appearance or some characteristic or propensity[25] of the accused is similar to that of the person who committed the crime. It may be evidence of age, race, stature[26], colour or voice or of a distinctive mark or gait[27]. It differs from positive-identification evidence in that the witness does not claim to recognise the accused as the person who committed the crime or was present in

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23 *Domican v The Queen* (1992) 173 CLR 555 at 561-562.

24 *Murphy v The Queen* (1994) 62 SASR 121; *R v Clune (No 2)* [1996] 1 VR 1; *R v Wilson* [1999] SASC 377; *R v Turner* (2000) 76 SASR 163.

25 Ligertwood, *Australian Evidence*, 3rd ed (1998) at 211.

26 *State v Dutton* 318 P 2d 667 (1957).

27 *Beale v Posey* 72 Ala 323 (1882); *Trulock v State* 69 SW 677 (1902).

circumstances from which it can be inferred that the accused committed the crime. Although such evidence does not directly implicate the accused in the crime or as being present in incriminating circumstances, it is admissible evidence[28]. It is proof of a circumstance – usually, but not always, weak – that with other evidence may point to the accused as the person who committed the crime. It will be weak evidence, for example, when it merely proves that the perpetrator and the accused are persons of the same ethnic background. It may be nearly conclusive evidence of identity when it proves that the accused and the perpetrator have used a unique modus operandi which is admissible in accordance with the principles concerning the admission of similar fact evidence[29].

57 When circumstantial identification evidence has no element of positive identification, it usually does not have the potential unreliability of positive-identification evidence. A judge is not automatically required to warn the jury concerning the dangers of circumstantial identification evidence[30]. But the circumstances of a particular case may require a warning. When a witness claims that the facial features of the accused are similar to those of the perpetrator, it would usually be appropriate to give the standard warnings given in cases of positive-identification evidence. But the warnings[31] that must be given to juries

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28 Evidence of similarity remains presumptively admissible (see, for example, *Murphy v The Queen* (1994) 62 SASR 121 and *R v Sparkes* (1996) 6 Tas R 178 at 193-194 per Underwood J (who excluded such evidence only in the exercise of the residual discretion)) and may, when combined with other circumstantial evidence, support a verdict of guilty if the jury is adequately directed: see *R v Clune (No 2)* [1996] 1 VR 1. The distinction between testimony of recognition and testimony of similarity in characteristics is particularly emphasised in the context of voice identification. In *R v Brownlowe* (1986) 7 NSWLR 461 the voice testimony was held to be inadmissible as evidence of recognition, but it would have been admissible if left to the jury as mere evidence of voice similarity supporting a circumstantial case.

29 cf *R v Straffen* [1952] 2 QB 911, where the circumstances of the offence with which the accused was charged bore unique similarity to two prior offences which he admitted committing. In all three cases, a little girl was murdered, without any sign of sexual molestation and without apparent motive, and was left unconcealed in a place where they could readily be discovered.

30 *R v Benz* (1989) 168 CLR 110. See also *R v King* (1975) 12 SASR 404, where it was held that the practice of requiring a warning did not presumptively apply in cases involving circumstantial evidence; *R v Bartels* (1986) 44 SASR 260 at 272-274 per Johnston J; *Marijancevic* (1993) 70 A Crim R 272 at 278 per Teague J.

31 *Domican v The Queen* (1992) 173 CLR 555 at 561-562.

concerning positive-identification evidence do not apply to most forms of circumstantial identification evidence.

58 Thus in *R v King*[32], the Court of Criminal Appeal of South Australia held that no special warning was required where the witness did not profess to recognise the accused as the person he had seen on the day of a robbery. The witness had described the man he saw as being about 6 feet 1 inch tall, of slim build, with blond hair which was fairly straight, and with a tattoo on his shoulder. Hogarth ACJ, Mitchell and Zelling JJ drew a distinction between positive-identification evidence and evidence that described a person in terms that broadly agreed with the physical characteristics of the accused.

59 Their Honours said[33]:

> "Recognition constitutes a mental process whereby one person, by observation, is able to establish to his own satisfaction the identity of another person. In so doing he no doubt takes into account the general physical characteristics of the person who he is recognising. But a complete catalogue of these personal characteristics, if supplied to a stranger, would be insufficient to enable that stranger to achieve the same act of recognition. At most he could say that the person at whom he is looking *could* be the man to be recognised, in that the description fits him. He could not say 'it is the man'; and it is evidence of the last category which constitutes recognition; it is that type of evidence of which the cases speak when they refer to evidence of identification. It is that type of evidence which the law requires, in certain circumstances, to be accompanied by a warning to the jury." (original emphasis)

60 Their Honours went on to say, correctly in my opinion, that "evidence which may be relevant on the issue of identity is not necessarily evidence of identification within the meaning of the cases"[34]. They held that the evidence of the witness was not evidence of that character.

61 The Court of Appeal of Queensland refused to follow *R v King* in *R v Zullo*[35], where two witnesses testified that "a man in a red shirt" stabbed the victim. Neither witness was able to identify Zullo as the killer. There was evidence that Zullo was wearing a shirt of a reddish colour that day and that he

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32 (1975) 12 SASR 404.

33 (1975) 12 SASR 404 at 410.

34 (1975) 12 SASR 404 at 411.

35 [1993] 2 Qd R 572.

was in the vicinity when the victim died. The Court held that the trial judge should have directed the jury in accordance with the *Domican* principles. In my opinion, *Zullo* was wrongly decided on this point and should not be followed. There was no more danger of the witness being mistaken in giving this evidence than in most other forms of evidence.

62 *R v Bartels*[36], where no *Domican* type directions were given, was a borderline case. After raping a woman in a laundromat, the perpetrator struggled with her outside the laundromat and then ran down the street. A couple witnessed the struggle from far away. The light was not good. Shortly after, they saw a man jog past them in the otherwise empty street. They identified that man as the accused who conceded that he had jogged past them. They also identified him as the man in the struggle outside the laundromat. That identification was contested. The couple said that he had a similar build, and deduced that he was the same man as they saw run past moments later. Johnston J said that "this evidence was evidence of an assumption of identity based on circumstances, not evidence of visual identification"[37]. His Honour said that such a case "may call for some direction but not the warning applicable to identification evidence"[38].

63 The judicial discretion to exclude evidence in criminal cases applies to circumstantial identification evidence as much as it does to positive-identification evidence. When a trial judge is asked to exclude circumstantial identification evidence on the ground of unfairness, the judge must examine its probative value and its prejudicial effect (if any). In *Alexander v The Queen* – a case of positive-identification evidence from photographs – Gibbs CJ said[39]:

> "[A] trial judge has a discretion to exclude any evidence if the strict rules of admissibility operate unfairly against the accused. It would be right to exercise that discretion in any case in which the judge was of opinion that the evidence had little weight but was likely to be gravely prejudicial to the accused."

And as Perry J pointed out in *Murphy v The Queen*[40]:

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36 (1986) 44 SASR 260.

37 (1986) 44 SASR 260 at 274.

38 (1986) 44 SASR 260 at 274.

39 (1981) 145 CLR 395 at 402-403.

40 (1994) 62 SASR 121 at 128.

> "However such evidence is given, and however it is expressed, whether as positive evidence of identification or as an opinion as to similarities, it is for the jury to assess the probative value of the evidence in the context of the evidence as a whole. *The trial judge's discretion to exclude such evidence applies equally to both forms of expression*." (emphasis added)

64 In the exercise of the discretion, however, the distinction between the two classes of evidence is important. Experience has shown that juries are likely to give positive-identification evidence greater weight than that to which it may be entitled. Few witnesses are as convincing as the honest – but perhaps mistaken – witness who adamantly claims to recognise the accused as the person who committed the crime or was present in incriminating circumstances. That is why this Court insisted in *Domican v The Queen*[41] that juries be given directions concerning:

- the dangers of convicting on recognition evidence where its reliability is disputed, and
- the factors (if any) that may affect the reliability of that evidence in the circumstances of the particular case.

65 In exercising the discretion to exclude positive-identification evidence, the judge must take account of the risk that that evidence will be given greater weight than it deserves and will operate to the prejudice of the accused. In considering that risk, the judge must determine whether the *Domican* directions that will be given will be likely to overcome the prejudice that might ensue without those directions. If, despite those directions, the risk of prejudice remains and the evidence is weak, the proper exercise of the judicial discretion may require the exclusion of the evidence. Because circumstantial identification evidence is usually no more presumptively prejudicial than other forms of circumstantial evidence, the occasions for its exclusion under the unfairness rule are likely to be fewer than the occasions for excluding positive-identification evidence.

66 Ms Festa claims that the trial judge should have made a positive assessment at the time of legal argument as to whether the "identification evidence" was positive-identification evidence or merely circumstantial identification evidence[42]. His Honour's directions to the jury treated all the "identification" evidence as circumstantial evidence in the same category as

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41 (1992) 173 CLR 555 at 561-562.

42 *Murphy v The Queen* (1994) 62 SASR 121; *R v Clune (No 2)* [1996] 1 VR 1; *R v Wilson* [1999] SASC 377; *R v Turner* (2000) 76 SASR 163.

similarity evidence. This suggests that, in exercising his discretion to exclude this evidence, his Honour did not consider whether some or all of it was positive-identification evidence that had to be treated differently from circumstantial identification evidence. But his reasons for admitting the evidence were so compressed that it is impossible to form a firm view about the matter. Nevertheless, his Honour's reasons, brief though they were, indicate that he did engage in a balancing process and concluded that, weak though the evidence was, it was not unfair to the accused to admit it. Accordingly, although I have a strong suspicion – based on his subsequent directions and the argument of the Crown in support of admitting the evidence – that his Honour's discretion miscarried, Ms Festa has failed to establish that his Honour failed to exercise his discretion properly[43].

67 Nor was this a case where the only course open to his Honour was to exclude the evidence on the ground that its prejudicial effect outweighed its probative value. Much of the evidence was positive-identification evidence that required a *Domican* type direction. If such a direction was given, it could not be said that the trial judge, acting reasonably, must have excluded the evidence. In so far as the evidence was circumstantial identification evidence, nothing about it suggested that its prejudicial effect required its exclusion.

The directions on identification

68 Ms Festa contends that, in directing the jury, the trial judge failed to distinguish between direct evidence of identification and circumstantial identification evidence. In his summing up, Hanger DCJ described the identification evidence as "not very strong". But his Honour told the jury that it was important evidence. He warned them to be very careful when evaluating it. He pointed out that people could, and did, make mistakes in identification, particularly when the person identified had not been known to them beforehand and where there had been little opportunity to observe them. Hanger DCJ instructed the jury to closely examine the evidence with an eye to details such as the distance between the witness and the person, and the length of time that elapsed between the original observation and the subsequent identification or purported identification. His Honour told the jury that it was for them to assess the quality of the evidence "in any particular case".

69 The learned trial judge did not specifically refer to the evidence given by Ms Ogilvie, Mr Fyffe and Mr Hill. Instead, Hanger DCJ gave a blanket warning with regard to the identifications, pointing out that most of the witnesses observed the person they subsequently purported to identify over fairly short periods of time. His Honour emphasised that the degree of certainty expressed

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43 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

by the witnesses "differed considerably", and that there were apparent inconsistencies at times between the evidence given at the trial and the original statements that they made to the police. So far as the witnesses' purported photoboard identifications were concerned, his Honour invited the jury to listen carefully to the tapes on which most of those identifications were recorded.

70 Hanger DCJ also directed the jury to bear in mind that there was evidence upon which they could conclude that the offenders in some instances may have worn disguises, making identification additionally difficult. That fact also went some way to explaining discrepancies in the descriptions given by the various witnesses. His Honour singled out the evidence of Mr James because it was based on a few words he heard Ms Festa say and her manner of walking. As this evidence was very different in kind from standard identification or purported identification evidence, Hanger DCJ pointed out that it was a matter for the jury to assess its weight and determine whether or not it was reliable.

71 Ms Festa submits that proper directions would have identified and explained:

(a) what evidence in the case could be considered direct evidence of identification;

(b) how the jury could use this evidence;

(c) what evidence in the case could be considered circumstantial evidence leading to identification;

(d) how the jury could use this evidence;

(e) that the jury could not simply interchange both concepts[44], ie direct evidence and circumstantial evidence;

(f) that both concepts could not sit together in the case on the same evidence[45].

72 Although Hanger DCJ did not describe all of the identification evidence as circumstantial, his Honour's directions tended to treat all of it as falling into that category. This is apparent from his Honour's description of the nature of circumstantial evidence:

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44 *R v Wilson* [1999] SASC 377; *R v Turner* (2000) 76 SASR 163.

45 *R v Wilson* [1999] SASC 377 at [22].

> "Circumstantial evidence is sometimes compared with direct evidence. Direct evidence is evidence, for example … of some person *who actually saw the offender committing the offence*, perhaps someone who knew him and there could be no doubt about identification and he said, 'Yes, I saw Bill Smith committing the offence.' That would be direct evidence. *We don't have that here*." (emphasis added)

73 However, that last sentence was only partly true. Some of the evidence identified Ms Festa as the person who unlawfully used vehicles that were the subject of separate charges. That was direct evidence of those charges. Other evidence was circumstantial. Thus, neither Ms Ogilvie nor Mr Fyffe nor Mr James witnessed Renton and Ms Festa committing the Biggera Waters robbery. They merely identified Ms Festa as the woman they saw in suspicious circumstances on the day of the robbery and in vehicles linked with the commission of the offence. It is also true that the three witnesses' identification of Ms Festa rested upon their recognising *features* of "the woman" in Ms Festa, as opposed to *recognising Ms Festa* as "the woman". But it was a case of positive-identification evidence that called for a *Domican* direction. The evidence of Mr Hill was also circumstantial evidence although of a different class. It was not recognition evidence. He saw a woman sitting in the Laser after the robber had rammed Mrs Sutton's Mazda into the doors of the bank at Paradise Point. The robber escaped in the Laser. Mr Hill pointed out photos of women who looked "similar" to the woman who was in the Laser, one of which was Ms Festa.

74 At the trial, counsel did not seek any directions along the lines now suggested by Ms Festa. If they had been asked for, the judge ought to have given them, for they are correct in principle. But the failure to give them has not constituted any miscarriage of justice or deprived the accused of a fair trial. I cannot see how the giving of these directions would have advanced Ms Festa's case or made an acquittal more likely. The difference between the actual directions and those that should have been given is one of form rather than substance. In so far as the judge's directions classified evidence concerning the use of the cars as circumstantial, they were too favourable to Ms Festa.

75 Too favourable is not a description that can be made of Ms Festa's other complaints concerning the directions on identification evidence. Where evidence as to positive identification of an accused person represents "any significant part" of the proof of guilt of an offence, the judge must warn the jury of the inherent dangers of acting on such evidence. In addition, the jury must be instructed as to the factors that may affect the consideration of that evidence in the circumstances

of the particular case. A warning in general terms is insufficient[46]. In *Domican*[47], Mason CJ, Deane, Dawson, Toohey, Gaudron JJ and I said that:

> "It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence."

76 In the present case, the trial judge gave fairly extensive general directions on the identification evidence. But his directions did not sufficiently draw the jury's attention to the weaknesses in the evidence of the individual witnesses, in accordance with the principles set out in *Domican* and developed in subsequent cases[48]. Ms Festa's challenge to the specificity of the directions relates primarily, as it did before the Court of Appeal, to:

(1) the trial judge's directions on the "court house identifications"; and

(2) the directions on Mr James' voice identification.

The court house identifications

77 The Court of Appeal dismissed Ms Festa's complaint about the court house identifications largely on the basis that the trial judge *may* have thought the cross-examination of the relevant witnesses sufficiently highlighted the weaknesses in their evidence. With respect, this response does not answer the objection of Ms Festa that *no* line of reasoning justified omitting reference to those inherent weaknesses.

78 The most significant weakness in the court house identification evidence was that the witnesses made their identification as the result of seeing or hearing Ms Festa at the Court House. In *Bedford*[49], Street CJ referred to the climate of the court precincts as one generating "some element of predisposition" on the part of the identifier to make a positive identification. For that reason, his Honour considered it important that a trial judge canvass all matters relevant to

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46 *Domican v The Queen* (1992) 173 CLR 555 at 561-562.

47 (1992) 173 CLR 555 at 562.

48 *R v Reardon* unreported, Victorian Court of Appeal, 13 November 1995; *R v Gorham* (1997) 68 SASR 505; *R v Wilson* [1999] SASC 377; *R v Turner* (2000) 76 SASR 163; *Yarran v The Queen* [2001] WASCA 52. Cases decided prior to *Domican* dealing with the same issue include *R v Williams* [1983] 2 VR 579; *Dawson v The Queen* (1990) 2 WAR 458.

49 (1986) 28 A Crim R 311 at 314-315.

the circumstances in which any such identification is made. Street CJ's comments were referred to by Duggan J in *R v Gorham*[50] where witnesses identified the accused after seeing him in the dock and in the precincts of the courtroom. Although the trial judge directed the jury that the dock identifications were of negligible probative value, he said nothing about the out-of-court identifications, nor of the dangers that are often associated with identifications made in these circumstances. Duggan J, with whom Lander and Bleby JJ agreed, held that it was essential that jurors be given instructions concerning the weakness of identifications made in such circumstances[51].

79 In the present case, the Crown relied upon other circumstantial evidence of greater weight than the purported identifications at the Court House. But, as this Court pointed out in *Domican*[52], a trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence which, if accepted, is sufficient to convict the accused.

80 Directions concerning the weaknesses in individual cases need follow no particular formula. It is sufficient if the jury receive directions that give them a sufficient understanding of the potential weaknesses in the particular evidence put before them, as opposed to weaknesses generally inherent in identification evidence. The directions must ensure "that the jury understands the possible weaknesses in identification evidence and the need for it to take particular care in its use"[53]. At the same time, the judge must be careful that the directions do not rob the evidence of all probative value. The Court of Criminal Appeal of New South Wales has specifically acknowledged the difficulty trial judges face in drawing the line between informing a jury of the otherwise unappreciated dangers in identification evidence and the deprecation of that evidence[54].

81 Given the particular circumstances in which the court house identifications were made in this case, proper compliance with established principles required the trial judge to refer specifically to the circumstances in which they were made. The jury should have been directed that the identifications may have been unreliable because:

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50 (1997) 68 SASR 505 at 508-509.

51 (1997) 68 SASR 505 at 508.

52 (1992) 173 CLR 555 at 565.

53 *R v Williams* [1983] 2 VR 579 at 586.

54 *Clarke* (1993) 71 A Crim R 58 at 72.

- the statement of Detective Holmes may have led the witnesses to expect that one of the perpetrators would be present that day,

- the absence of other women with whom Ms Festa could blend drew attention to her presence and made it more likely that she was the expected perpetrator, and

- the three witnesses sitting together and discussing their identification of Ms Festa might have led one or more of them to put aside doubts about the identification.

A proper direction would have instructed the jury to consider these matters in determining whether the identification evidence was reliable.

82 The judge's directions on identification did not sufficiently impress upon the jury the weaknesses inherent in the circumstances in which Ms Ogilvie, Mr Fyffe and Mr James identified Ms Festa at the Southport Court House. The Crown concedes that "fuller directions could have been given". Nevertheless, it submits that, in light of the compelling circumstantial case that existed independently of the identification evidence, the inadequacy of the directions occasioned no substantial miscarriage of justice. That is a submission to which I shall return after dealing with the remaining grounds of appeal.

The voice identification

83 Hanger DCJ made specific reference to Mr James' identification of Ms Festa, describing it as one "based on very minimal information". He reminded the jury that the evidence was based on seeing Ms Festa walk and hearing her talk. But he said no more about its reliability than that it was a matter for the jury to assess. The Court of Appeal considered that the trial judge took this approach to avoid giving Mr James' evidence undue emphasis. However, Ms Festa submits that the judge should have directed the jury as to the theoretical and actual weaknesses of the voice identification evidence in order to highlight how weak and vague it was.

84 The risk of mistake in identifying a voice is at least as great as in identifying a person[55]. The reliability of voice identification varies with such factors as the length and volume of speech heard, the witness's familiarity with the accused's voice and the time elapsing between the occasions when the witness heard the voice of the perpetrator and the voice of the accused[56]. They

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55 *R v O'Sullivan* unreported, Supreme Court of Queensland, Court of Appeal, 21 July 1995 at 4.

56 cf *Bulejcik v The Queen* (1996) 185 CLR 375 at 381-382 per Brennan CJ, 394-395 per Toohey and Gaudron JJ, 406-407 per McHugh and Gummow JJ.

are among the factors that in many cases will warrant consideration by the jury and require adequate directions from the trial judge. In this case, the trial judge emphasised that Mr James' voice identification was "based on a few words which he said he'd previously heard a woman speak and a few words that he heard [Ms Festa] say in the precincts of that Court". Read in the context of the more general directions that he gave, the directions concerning this evidence were adequate.

85 Ms Festa has failed to make out the ground of appeal concerned with the voice identification evidence.

The evidence of weapons discovered at the Pine Ridge Road unit

86 Ms Festa contends that the trial judge should have rejected evidence concerning the discovery of guns and ammunition at the Pine Ridge Road unit. The receipts showed that the guns had not been purchased when the robberies occurred. Thus they could not have been used in committing them. Although the jury could have regarded the guns and ammunition as part of a robber's "tools of the trade", she points out that the evidence had no specific connection with the robberies. It merely proved that Renton was a person likely to commit illegal acts.

87 In *Thompson and Wran v The Queen*[57], Barwick CJ and Menzies J acknowledged that evidence of possession of "tools of the trade" was not necessarily admissible only when it appeared that tools of that nature were used in carrying out the alleged crime. Their Honours cited with approval the *dictum* of Lord Goddard CJ in *R v Sims*[58]:

> "Thus, in the case of burglary, evidence is admissible that housebreaking implements such as might have been used in the crime were found in the possession of the accused."

The crucial point of admitting such evidence was to identify the accused with the crime the subject of the charge. If the tools could not have been used in the crime, they were not admissible. Barwick CJ and Menzies J said[59]:

> "[E]vidence that the possession of tools of crime other than those which were or might have been used to commit the crime charged, or tools of

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57 (1968) 117 CLR 313 at 316.

58 [1946] KB 531 at 538.

59 (1968) 117 CLR 313 at 316.

> such a nature, is, in the absence of some special connexion, inadmissible because it does no more than prove criminal disposition".

88 Thus in *R v Connolly*[60], the Queensland Court of Appeal held that evidence of finding a "virtual arsenal" of weapons was inadmissible because it did no more than depict the accused as a dangerous person likely to commit the offence in question. Evidence of the arsenal had been led in addition to evidence concerning three weapons which were relevant to proof of the offence[61]. In those circumstances it took "little imagination" to perceive the prejudicial effect of that additional, essentially superfluous evidence[62]. Similarly in *Driscoll v The Queen*[63], the police had found a pistol very similar to that used in the killing with which the applicant was charged. Gibbs J held[64] that the discovery of a number of *other* firearms at Driscoll's house was inadmissible, as it:

> "[did] not throw any light on the admissible evidence which tends to connect [Driscoll] with the crime charged, and is not so inextricably interwoven with the admissible evidence that the latter could not properly be presented if the former were excluded".

89 Despite these authorities, the Court of Appeal thought that "the evidence about the discovery of the firearms and ammunition in Renton's unit may have been properly admitted".

90 Given other evidence in the case, the inference was open that Renton intended to use the weapons for criminal activities – including armed robberies – in the future. But how did the possession of weapons bought after the date of the three robberies for which he was charged tend to prove that he had committed those robberies? The fact that they were of the same character as those used in the robberies – that is to say, that they were guns of a similar type – throws no light on the probability that he committed any of those robberies. Possession of those subsequently acquired weapons tended to prove that Renton had a propensity for committing robberies, and it is a short step to the conclusion that that propensity existed before the date of the purchase. But the possession of the

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60 [1991] 2 Qd R 171.

61 The three weapons which the Court of Appeal held relevant were two pistols taken from police officers by the accused and a weapon produced by the accused at the scene of the robbery.

62 [1991] 2 Qd R 171 at 178.

63 (1977) 137 CLR 517.

64 (1977) 137 CLR 517 at 533.

guns does not have any specific connection to the robberies or throw any light on the admissible evidence connecting Renton to those robberies. Nor was it so inextricably connected with other admissible evidence that without it the admissible evidence would have been unintelligible. There was therefore no ground for the application of the principle of completeness, a principle which ordinarily applies only to verbal utterances or documents.

91 To admit this evidence against Renton would be to reject the application of a principle that has been followed for over a hundred years. The Anglo-Australian law of evidence does not permit a crime to be proved by reference to the criminal or discreditable propensity of the accused except in those rare cases where that propensity has a *specific* connection with the crime. In *Pfennig v The Queen*[65], Mason CJ, Deane and Dawson JJ said that to be admissible propensity evidence "needs to have a specific connexion with the commission of the offence charged". Later, their Honours said[66] that it was necessary "to find something in the evidence or in its connexion with the events giving rise to the offences charged which endows it with a high level or degree of cogency". Absent evidence of such a connection, the rule is that stated in *Dawson v The Queen*[67] by Dixon CJ*:*

> "It is the thesis of English law that the ingredients of a crime are to be proved by direct or circumstantial evidence of the events, that is to say, the parts and details of the transaction amounting to the crime, and are not inferred from the character and tendencies of the accused."

92 Here possession of the guns did no more than prove the criminal character and tendencies of Renton. Since the guns were not in his possession at the time of the robberies, they were not weapons that might have been used to commit the crimes with which he was charged. They had no more connection with the charges than would proof of a previous and recent conviction for armed robbery of a bank. In *Thompson and Wran*[68], Barwick CJ and Menzies J said that the principle of completeness might sometimes require "that evidence should be admitted going beyond proving the possession of tools which might have been used to commit the crime in question". But their Honours immediately went on to say:

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65 (1995) 182 CLR 461 at 485.

66 (1995) 182 CLR 461 at 488.

67 (1961) 106 CLR 1 at 16.

68 (1968) 117 CLR 313 at 317.

> "While recognizing this, however, we are satisfied that in this case, where a collection of tools was found, the detailed evidence of the use to which some of the tools, *which, it is clear, were not used in the crime* might be used by a thief to commit *other crimes*, was no more than evidence of a particular criminal propensity, ie, the propensity to steal from safes, and of the means to indulge that propensity." (emphasis added)

93 But it does not follow that, because Renton's propensity to rob banks was not admissible against him, it was not admissible against Ms Festa. A critical issue in the case was the nature of Ms Festa's association with Renton. Was it an innocent association in which she simply befriended a friendless man, recently released from jail? Or were they associates in the criminal enterprise of robbing banks and stealing cars for use in those robberies? If Ms Festa knew of Renton's propensity to commit armed robberies on or before the robberies of the two banks and still associated with him, it would be some evidence that their daily association was not innocent.

94 Knowing that Renton, a convicted criminal, had a shotgun and a 5.6 calibre assault rifle in his possession provided solid ground for concluding that Renton had the intention to commit armed robberies, at least from the date of purchase of those guns. That conclusion was strengthened by the presence in the Pine Ridge Road unit of a made-up poster of Renton with the caption "Armed robber eludes police again". Ms Festa was in his company every day. She had a key to the Pine Ridge Road unit. It is quite likely that she was "driving [Renton] around" on the day that he bought or acquired possession of the guns. As from 17 June 1996, when the guns were bought, she could have had no doubt about the purpose for which the guns were likely to be used.

95 But does this knowledge provide any ground for concluding that she knew of Renton's propensity at the time of either of the robberies, that is to say, on 27 May or 13 June 1996? It could only do so if an adverse inference against her could arise from her continued association with Renton from 17 June 1996 until their arrest on 19 June 1996. The Court of Appeal said:

> "Once the inference was drawn that she was aware of the firearms and ammunition in the unit, it is remarkable that, if innocent, she did not take action to distance herself from him and from the unit, instead of continuing, as she did, to associate herself with him and it."

96 The Court of Appeal thought that the most that could be said by way of innocent explanation of Ms Festa's continuing association with Renton was that:

> (1) she must not have been of an inquisitive nature, and so knew nothing of his propensity to commit robberies; or

(2) although she knew of it, she was more than ordinarily determined to mind her own business and continue associating with him.

The Court of Appeal said an explanation of this nature did not sit comfortably with other evidence in the case. That evidence included her admission that she was "driving him around" and knew that he was stealing cars, some of which were shown at the trial to have been used in committing the robberies.

97 It is an irresistible inference that, from 17 June 1996 at the latest, Ms Festa knew that Renton was likely to engage in armed robberies. But it is another matter to conclude from knowledge of his propensity for armed robbery on and after that date that she knew of his propensity before that date. There was a great deal of evidence ("the other evidence") that implicated Ms Festa in the bank robberies. But the inferences from the other evidence were not connected with the inferences that could be drawn from the possession of the guns and the presence of the wall poster, except in the sense that, if drawn, they led to the same conclusion. The guns and the poster were one body of evidence. The other evidence was an independent body of evidence. Each of these two bodies of evidence gave rise to independent inferences. The admissibility of the evidence concerning the guns has to depend on the inferences that could be drawn from that evidence standing alone. On that basis, I do not think that a jury could logically draw the inference that Ms Festa knew of Renton's propensity on or before 13 June 1996 by reason of her knowledge of that propensity on and after 17 June 1996.

98 It follows that the trial judge erred in admitting the evidence of the presence of the guns in Renton's unit.

99 Because it is necessary to determine whether the admissibility of this evidence may have led to the conviction of Ms Festa, it is necessary to examine the directions that the trial judge gave to the jury in respect of it.

The directions on the weapons

100 Ms Festa contends that the trial judge should have specifically directed the jury as to what inferences could properly be drawn from the possession of the guns and ammunition. She submits that the judge did not make it clear to the jury that, if the guns and ammunition were admissible, the evidence did not show that Ms Festa had any knowledge of them prior to the raid by the police. The only inference available was that she was associating with a man who, at some stage after 17 June 1996, when he purchased the rifles, may have had an intention to do something illegal with them.

101 Hanger DCJ stressed to the jury that none of the weapons found in the Pine Ridge Road unit were used in the robberies. His Honour noted, however, that two of the weapons found were similar to those observed in the course of the

Biggera Waters robbery. Some of the ammunition located in the unit could have been used in similar weapons. Hanger DCJ continued:

> "[A]s I understand it, one of the purposes of adducing that evidence is to show, in effect, that the possession of firearms and ammunition are part of the tools of trade of a robber and if you find weapons and firearms in the possession of a person it's another circumstance which you may take into consideration, seeing that weapons or firearms and ammunition are used by bank robbers, such items were found in premises occupied by Renton. It doesn't in itself prove anything, but it is another relevant consideration."

102 His Honour did not specifically direct the jury as to how the existence of the weapons was evidence against Ms Festa. However, he did direct the jury that, if they were not satisfied that Ms Festa *knew* of the existence of the items found in the Pine Ridge Road unit, that evidence could not be used against her. The jury may have understood this direction as suggesting that, if they found that she knew of the weapons, they could use her knowledge of the presence of "the tools of trade" of a robber to find her guilty of the robberies.

103 With respect, the discovery of the weapons in the Pine Ridge Road unit was not probative of Ms Festa's involvement in the robberies. And the directions that his Honour gave may have indicated to the jury that they could use the discovery of those weapons to convict her.

The direction on association

104 As the Court of Appeal pointed out, the evidence suggested a line of reasoning from which the jury could conclude that Ms Festa was the woman involved in the robberies:

(1) Renton committed the robberies at Biggera Waters and Paradise Point, as well as the unlawful use offences, of which he was found guilty;

(2) in doing so, he was assisted or accompanied by a woman;

(3) "every day" during the period May-June 1996 he was in the company of Ms Festa, and perhaps with no other woman "down here";

(4) Ms Festa was directly linked with Renton through (a) her access to and presence in the Pine Ridge Road unit to which she had a set of keys; (b) the yellow Toyota in which the accused were both found on 19 June 1996; and (c) various motor vehicles, including those that were unlawfully taken and used;

(5) those vehicles were used by Renton and a woman in committing the robberies;

(6) that woman was Ms Festa, and could not have been anyone else.

105 Hanger DCJ reminded the jury that the Crown case rested upon circumstantial evidence, a fact that was not disputed. His Honour referred to the evidence establishing that Ms Festa had frequented the Pine Ridge Road unit. He directed the jury that, if they accepted that evidence, they might conclude that Ms Festa and Renton were closely associated. Furthermore, his Honour told the jury they might also conclude:

> "that they were seen together, or where a man and a woman were seen together and one of them was identified to some extent, the other person may well have been – well, for example, Renton was identified as being with a woman. You may well come to the conclusion that the woman was [Ms Festa] and vice versa. *That's just a minor piece of evidence*, but it does show the association between the two." (emphasis added)

106 Ms Festa submits that Hanger DCJ's direction on the association between Renton and herself effectively permitted the jury to override any dissatisfaction on their part as to the strength of the identification evidence against her. Ms Festa argues that the jury could have convicted on the basis of Hanger DCJ's direction, provided that the jury accepted the evidence identifying Renton as a participant in both robberies. In view of the circumstantial character of the association evidence, Ms Festa submits that Hanger DCJ should have directed the jury to consider alternative hypotheses. In the absence of other hypotheses, his Honour's directions were at best incomplete.

107 A trial judge is in a unique position to determine what should be incorporated into the summing up in a given case. The judge hears the addresses of counsel and observes the reactions of the jury, if any, to the evidence, the addresses, and the summing up. The judge is therefore in a better position than an appellate court to appreciate how much assistance the jury needs on particular issues. In *Jones v Dunkel*[69], Windeyer J emphasised that a summing up is dependent upon the trial judge's view of what guidance the particular jury should have in the particular case, having regard to the conduct of the trial. In *Doggett v The Queen*[70], I recently pointed out that:

> "Except where the due administration of justice clearly demands that juries be directed as to particular matters, the contents of summings up are

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69 (1959) 101 CLR 298 at 314.

70 (2001) 75 ALJR 1290 at 1304 [95]; 182 ALR 1 at 21.

best left to the discretion of those who preside at criminal trials. They are in the best position to determine what needs to be said to the particular jury."

108 As the Crown submits, it is important to evaluate the trial judge's directions on association in the context of his general explanation of the nature of the Crown case as one based wholly on circumstantial evidence. It was essential for the Crown to show an association between Ms Festa and Renton in order to tie this evidence together. To this end, the Crown presented evidence that was arguably far stronger than was suggested by the trial judge's description of it as "minor". Evidence of association included Ms Festa's possession of a set of keys to the Pine Ridge Road unit, her seeing Renton every day and "driving him around", and her admission that she knew he was stealing cars. The closeness of the association could also be seen in the items of stolen property that were in places she frequented or vehicles that she used. The evidence that Renton stole the vehicles from which these items were taken was overwhelming. If Ms Festa did not take them herself, Renton certainly passed them on to her. The trust and closeness of their association can also be seen in the hanging in the unit of the made-up wall poster asserting that the bank robber had eluded the police.

109 In view of the evidence, the Court of Appeal held that the trial judge did not err in directing the jury that it was open to them to conclude that *where one of the accused* was identified to their satisfaction, it was open to them to conclude that it was *the other accused* who was seen with him or her. The trial judge expressly stated that the hypothetical could work both ways. He also described the hypothetical as "a minor piece of evidence", a description which the Court of Appeal correctly held was favourable to Ms Festa. Although Ms Festa submits that the trial judge should have put other hypotheses to the jury, the absence of persuasive alternative suggestions highlights the strength of the Crown's explanation of the circumstantial evidence.

The exercise of the proviso and the legacy of *Mraz v The Queen*[71]

110 I have found that the trial judge erred in failing to give proper directions concerning the court house identifications and in admitting evidence as to the discovery of weapons in the Pine Ridge Road unit. Because that is so, Ms Festa's convictions must be set aside unless, despite these errors, the Crown can establish no "substantial miscarriage of justice" has occurred within the meaning of the proviso to the common form criminal appeal statutes[72].

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71 (1955) 93 CLR 493.

72 The provision in Queensland legislation containing "the proviso", as it has come to be known, is s 668E(1A) of the *Criminal Code* (Q). That sub-section provides that:

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111 In *Mraz v The Queen*, the meaning of the proviso was explained by Fullagar J in a judgment that has been regarded as authoritative. *Mraz* concerned s 6(1) of the *Criminal Appeal Act* 1912 (NSW). Its proviso follows the form of the common appeal statute. Fullagar J said[73]:

> "It is very well established that the proviso to s 6(1) does not mean that a convicted person … must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried."

112 Fullagar J found support for his analysis in various English authorities[74], saying that "the broad principle shines clearly enough through the cases". He referred to the judgment of Channell J in *Cohen and Bateman*[75] – which up to that time was regularly cited as correctly expressing the principles for

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> "the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

73 (1955) 93 CLR 493 at 514.

74 His Honour referred ((1955) 93 CLR 493 at 514-515) to *Sanders* (1919) 14 Cr App R 11 at 13; *White* (1922) 17 Cr App R 60 at 65; *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 482-483, where Viscount Sankey LC stated that the proviso would apply only "if [had] the jury ... been properly directed they would have inevitably come to the same conclusion". Fullagar J was of the view that no-one would have supposed Viscount Sankey LC to have been thinking of any such abstraction as absolute certainty, or would have doubted that he was thinking of "a reasonable, and not a perverse, jury": (1955) 93 CLR 493 at 515. See also *Kelly v The King* (1923) 32 CLR 509 at 516.

75 (1909) 2 Cr App R 197.

determining whether a case fell within the proviso to the common form statutes. Channell J said[76]:

> "Taking s 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction, the jury *must* have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground,' so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision of a point of law." (original emphasis)

113 As Brooking JA pointed out in *R v Gallagher*[77], that passage had been accepted as representing the correct approach to the proviso in England[78] until amendments in 1966 omitted the word "substantial" from the English legislation[79]. It was regularly applied in Australia[80] until *Mraz* was decided.

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76 (1909) 2 Cr App R 197 at 207-208.

77 [1998] 2 VR 671 at 676.

78 See, for example, *R v Haddy* [1944] KB 442 at 446; *Stirland v Director of Public Prosecutions* [1944] AC 315 at 321.

79 *Criminal Appeal Act* 1966 (UK).

80 In *R v Aves* (1925) 25 SR (NSW) 360 at 362-363, in the New South Wales Court of Criminal Appeal, Ferguson J said that *Cohen and Bateman* properly stated the principles to be applied when determining whether an irregularity in a criminal trial

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Although Fullagar J appears to have thought that he was not departing from the principles laid down in *Cohen and Bateman*, his judgment differs from that judgment in a number of respects. First, Fullagar J expressed a single test for applying the proviso while Channell J distinguished between errors of law and other errors. Second, what Fullagar J expressed as the principle – "If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open" etc – was the conclusion, not the basis, of the reasoning of Channell J. Moreover, it was the conclusion in respect of grounds other than errors of law.

114 Furthermore, in *Re Johnston's Appeal*[81], the Courts-Martial Appeal Tribunal pointed out that Fullagar J did not expressly advert to the distinction between "a miscarriage of justice" and "substantial miscarriage of justice". In ascertaining what the latter phrase meant, the Tribunal referred back to the judgment of Viscount Simon LC in *Stirland v Director of Public Prosecutions*[82] where his Lordship stated that the proviso "assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict". Fullagar J also referred to this decision in *Mraz*[83], in reaching the conclusion that it appeared impossible to maintain that the Crown had established that no miscarriage of justice had actually occurred in that case.

115 Subsequent decisions in this Court have stressed the need to look behind the error that may have occurred in the course of a trial in order to ascertain whether there has been a substantial miscarriage of justice. In *R v Storey*[84], Barwick CJ said:

> "If error be present, whether it be by admission or rejection of evidence, or of law or fact in direction to the jury, there remains the question whether none the less the accused has really through that error or those errors lost a real chance of acquittal. Put another way, the question remains whether a jury of reasonable men, properly instructed and on such of the material as

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had led to a substantial miscarriage of justice. See also *R v Messervy* (1932) 49 WN (NSW) 221. In *R v Miller* (1980) 25 SASR 170 at 224, Walters and Wells JJ said that *Cohen and Bateman* was the *fons et origo* of judicial interpretation of the proviso.

81 (1960) 9 FLR 31 at 49.

82 [1944] AC 315 at 321.

83 (1955) 93 CLR 493 at 515.

84 (1978) 140 CLR 364 at 376.

should properly be before them, would have failed to convict the accused: or were the errors such that if they were removed a reasonable jury might well have acquitted."

116 In *Driscoll v The Queen*[85], Barwick CJ said:

"It is noticeable that the proviso to s 6(1) speaks in terms of 'substantial miscarriage of justice'. The word 'substantial' in this connexion denies, as it seems to me, the proposition that of necessity the existence of any of the enumerated circumstances in the sub-section amounts to a miscarriage of justice. *No doubt the oft quoted passage from the reasons for judgment of Fullagar J in [Mraz] rightly emphasizes that it is for the Crown to satisfy the court that occasion exists for resort to the proviso: but that passage ought not be read as saying that every departure in the course of a trial from compliance with the relevant law or rule of procedure results of necessity in a miscarriage of justice. Indeed, in my opinion, the very terms of s 6(1) and its counterparts would seem to deny that proposition.* The important words, in my opinion, in the passage from the judgment of Fullagar J in that decision and at that page are 'may thereby have lost a chance which was fairly open to him of being acquitted'. Of course, if the Court of Criminal Appeal on its review of the facts and circumstances of the case concludes that before a jury, properly directed, the appellant can be said fairly or reasonably to have had a chance of acquittal, it will not be warranted in concluding that there was no miscarriage of justice.

It is *for the court itself* to be affirmatively satisfied in this respect, and for this purpose the court will consider for itself the evidence and the inferences properly available therefrom." (emphasis added)

117 Barwick CJ went on to say that if "every irregularity of summing up, admission of evidence or in procedure warranted a new trial, the basic intent of the court of criminal appeal provisions would be frustrated and the administration of the criminal law plunged into outworn technicality"[86]. While the Chief Justice was mindful of the great responsibility which such a view cast on courts of criminal appeal, he said that it had to be borne in mind that "a retrial where in truth no miscarriage of justice has occurred is not conducive to the proper administration of the criminal law"[87].

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85 (1977) 137 CLR 517 at 524-525.

86 (1977) 137 CLR 517 at 527.

87 (1977) 137 CLR 517 at 527. Gibbs J, with whom Mason, Jacobs and Murphy JJ agreed, stated that even though the case against the applicant may have been strong, it ultimately depended upon questions of credibility. Having regard to the

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118 In *Wilde v The Queen*[88], Brennan, Dawson and Toohey JJ discussed the applicable principles in terms close to those formulated by Channell J in *Cohen and Bateman*. Their Honours said[89]:

> "Those authorities establish that where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice if the applicant has thereby lost 'a chance which was fairly open to him of being acquitted' to use the phrase of Fullagar J in [*Mraz*] … Unless it can be said that, had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused, the conviction must be set aside. Unless that can be said, the accused may have lost a fair chance of acquittal by the failure to afford him the trial to which he was entitled, that is to say, a trial in which the relevant law was correctly explained to the jury and the rules of procedure and evidence were strictly followed. *The loss of such a chance of acquittal cannot be anything but a substantial miscarriage of justice*." (emphasis added)

119 Nevertheless, as Barwick CJ pointed out in *Driscoll*[90], the use of the word "substantial" performs the function of denying the proposition that, of necessity, the existence of any of the enumerated circumstances in the sub-section amounts to a miscarriage of justice. As his Honour also pointed out in that case, understating the significance of the word "substantial" runs the risk of focussing on the error at the expense of assessing the effect, if any, of the error on the jury's verdict[91].

120 These statements by Barwick CJ in *Storey* and in *Driscoll* contain the correct principles to apply.

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evidence that was wrongly excluded, and to the possible effect of the admission of inadmissible evidence, his Honour found it impossible to say that the errors had not affected the result or that the jury would certainly have returned the same verdict if the errors had not occurred: (1977) 137 CLR 517 at 542-543.

88 (1988) 164 CLR 365.

89 (1988) 164 CLR 365 at 371-372 (footnotes omitted).

90 (1977) 137 CLR 517 at 524.

91 (1977) 137 CLR 517 at 527.

121 The question whether a jury, acting reasonably, would inevitably have convicted an accused ultimately falls to be determined by the relevant court according to its assessment of the facts of the case[92]. The prevalence of dissenting views in cases dealing with the application of the proviso[93] illustrates the largely subjective nature of the inquiry, resting as it does on factors such as the error alleged, the relative strength of the prosecution and defence cases and the court's characterisation of the hypothetical jury, "acting reasonably" and properly directed. As Brennan, Dawson and Toohey JJ stated in *Wilde*[94]:

> "In the end no mechanical approach can be adopted and each case must be determined upon its own circumstances."

122 But one important development has occurred since this Court decided *Mraz*, *Storey*, *Driscoll* and *Wilde*. Courts of criminal appeal are now required to examine and analyse the evidence in criminal trials to a much greater extent than previously. This Court has interpreted the "miscarriage of justice" ground of appeal as entitling a court of criminal appeal to examine the whole of the evidence and form its own opinion as to whether there is a reasonable doubt as to the accused's guilt. Even 30 years ago, such an approach would not have been contemplated. In *M v The Queen*[95] Mason CJ, Deane, Dawson and Toohey JJ said:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced."

123 Although the term "miscarriage of justice" appears both as ground of appeal and as part of the criterion for determining whether a conviction should

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92 *Wilde v The Queen* (1988) 164 CLR 365 at 372.

93 See, for example, *R v Miller* (1980) 25 SASR 170; *Liberato v The Queen* (1985) 159 CLR 507; *Green v The Queen* (1997) 191 CLR 334; *Farrell v The Queen* (1998) 194 CLR 286.

94 (1988) 164 CLR 365 at 373. See also *Simic v The Queen* (1980) 144 CLR 319 at 331.

95 (1994) 181 CLR 487 at 494, cited and applied by Gaudron, McHugh and Gummow JJ in *Jones v The Queen* (1997) 191 CLR 439 at 451.

stand, the issue under each provision is different. In one, the issue is whether the jury must have had a reasonable doubt; in the other, it is whether the jury must have convicted. But that said, there is no reason why the role of a court of criminal appeal should differ in deciding these issues. In examining the evidence for the purpose of applying the proviso, the court should assume that ordinarily if it thinks that the accused must be convicted, so would a reasonable jury. Speaking generally, the court's view of the evidence should prevail except where the error has so affected issues of credibility that the court cannot determine what are the primary facts of the case. In cases of circumstantial evidence, for example, the court's view of the evidence should be regarded as the view of the reasonable jury unless proof of one or more circumstances has been affected by an error relating to credibility. Even when a particular circumstance involves a credibility issue, other circumstances may be admitted or proved which are sufficient to permit the court to sustain the conviction.

The errors in this case did not result in a substantial miscarriage of justice

124 In the present case, even when the evidence of the court house identifications and of the presence of the guns and ammunition in the unit are put aside, the case against Ms Festa was overpowering. No reasonable jury could fail to convict her.

125 The evidence convincingly proved that Renton was the man engaged in the robberies. The only woman known to associate with him during the relevant period was Ms Festa. Her association with him was very close. She went shopping with him every day. She had keys to his unit. She admitted to "driving him around" and knowing that he was stealing cars. In the absence of evidence of any other woman being in Renton's company, her association with him by itself convincingly pointed to her as the woman involved in the robberies.

126 But there was other highly incriminating evidence that pointed to her as the woman involved in the robberies. Property from two of the stolen cars was found at her unit, in the gold-coloured Mercedes that she drove and at a service station that she frequented. The two stolen cars were used in the robberies and abandoned. Before, during and after the robberies, witnesses saw a man and a woman loading a bag or bags into and out of one or more vehicles, one of which was the gold-coloured Mercedes. Witnesses to the robberies asserted that the man and woman used disguises. Police found instructions on the use of disguises at the Pine Ridge Road unit. Ms Festa's fingerprints were found on a can of wig sheen and a bottle of spirit gum remover found in the unit. Upon her arrest she was in possession of a substantial sum of money including 25 $5 notes. Mr Hill, the witness to the Paradise Point robbery, picked a photograph of Ms Festa as being similar to the woman that he had seen in a car parked outside the bank. And on the twelfth day of the hearing she fled, giving rise to the conclusion that she was conscious of her guilt.

127 I think that a reasonable jury, properly instructed, would inevitably have convicted her even if the judge had not made the errors which he made.

Conclusion

128 The appeal should be dismissed.

129 KIRBY J. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of Queensland[96]. The grant of special leave confines the appeal to four grounds. Those grounds concern the admission of, and directions in relation to, certain evidence that was placed before the jury in the prosecution case. That evidence tended to inculpate the accused in the crimes charged. She claims that its reception, and the instructions to the jury about it, involved errors of law resulting in a miscarriage of justice requiring the quashing of her conviction.

The trial, conviction and appeal

130 Brunetta Festa ("the appellant") and Marc Renton ("the co-accused") were jointly tried in the District Court of Queensland upon an indictment alleging a number of offences. The offences concerned a series of armed robberies of banks involving the unlawful use of motor vehicles. All of the offences were alleged to have occurred in May and June 1996.

131 Each of the armed robberies involved a branch of the National Australia Bank. Each took place after closing time whilst the staff were still on the premises. Each involved the smashing of glass doors of the bank. In two cases this was done by the use of a sledge hammer. In the third robbery it was done by driving a motor vehicle through the doors. In each case there was a demand for the Reserve Bank bag or words to that effect. There was police evidence that the *modus operandi* adopted was a rare one[97]. The events had the appearance of serial conduct involving common offenders.

132 The first robbery occurred on 8 May 1996 at Morningside. The appellant was not charged in relation to that offence. The two applicable counts of the indictment, respectively of armed robbery[98] and unlawful use of a motor vehicle[99], were laid solely against the co-accused.

133 The second robbery occurred on 27 May 1996 at the Biggera Waters branch of the bank. In respect of that robbery and the unlawful use of two motor vehicles the appellant and the co-accused were jointly charged. The third robbery took place at the Paradise Point branch of the bank on 13 June 1996. In respect of that robbery and the unlawful use of three motor vehicles the appellant and the co-accused were jointly charged. In relation to the second and third

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96 *R v Festa* [2000] QCA 73.

97 *Festa* [2000] QCA 73 at [27].

98 *Criminal Code* (Q) ("the Criminal Code"), ss 409, 411.

99 Criminal Code, s 408A(1)(a).

robberies, the appellant and the co-accused were further jointly charged with using vehicles for the purpose of facilitating the commission of an indictable offence[100].

134 An additional count was included in the indictment charging the appellant and the co-accused jointly with attempting to unlawfully use another motor vehicle[101]. This made ten counts to the indictment in all, eight of them concerning the appellant.

135 The appellant and the co-accused pleaded not guilty. The trial began before Hanger SJDC and a jury. At the beginning of the trial, which lasted seventeen days, the appellant was granted bail on her own undertaking to appear for the duration of the hearing. On the twelfth day of the trial, she did not appear[102]. In the absence of the jury, the appellant's then counsel informed the judge of a letter that Mr Christef, with whom the appellant had been residing, had allegedly received from the appellant complaining that she was not receiving a fair trial and stating that she expected to be found guilty. The appellant's counsel was given leave to withdraw. After an interruption of two days the trial recommenced in the absence of the appellant. No complaint is before this Court in relation to that course.

136 At the conclusion of the trial the jury returned with verdicts in respect of the appellant of guilty on all counts. The co-accused was acquitted of the first count that charged him with the armed robbery on 8 May 1996. However, in respect of the count of unlawfully using a motor vehicle on that day, he was found guilty. He was found guilty on all other counts.

137 The appellant, in her absence, and the co-accused, were convicted and sentenced. Each of them appealed to the Court of Appeal. The co-accused's appeal against his convictions was heard first. It was dismissed[103]. The Court of Appeal noted that, in respect of the first robbery, the co-accused's fingerprints had been found inside a vehicle used in connection with that robbery "but his participation in the robbery itself was evidently not established to the satisfaction of the jury"[104]. All of the other counts were, it seems, established to the jury's satisfaction against both accused.

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100 Criminal Code, s 408A(1)(a).

101 Criminal Code, ss 4, 408A(1)(a).

102 *Festa* [2000] QCA 73 at [12].

103 *R v Renton* unreported, Court of Appeal of Queensland, 12 December 1997: *Festa* [2000] QCA 73 at [1].

104 *Festa* [2000] QCA 73 at [1].

138 The appellant's appeal was likewise dismissed by the Court of Appeal in a unanimous judgment[105]. That judgment dealt with several grounds that are not of concern to this Court. The appellant applied for, and was granted, special leave to appeal to this Court.

The limited grant of special leave

139 The grant of special leave was limited to the following grounds:

1. The failure of the trial judge to exclude the evidence of witnesses Mr James, Ms Ogilvie, Mr Fyffe and Mr Hill who purported to directly identify the appellant. The admission of the evidence of those witnesses as circumstantial evidence was likewise said to have resulted in a miscarriage of justice.

2. The alleged inadequacy of the trial judge's directions to the jury in relation to eye-witness identification and voice identification.

3. The failure of the trial judge to exclude evidence of the discovery of weapons and ammunition found in premises visited by the appellant, or to give the jury proper directions in relation to such evidence.

4. The suggested material misdirection in the trial judge's directions to the jury as to the relevance of the association which the evidence showed existed between the appellant and the co-accused.

140 In addition to these grounds it is necessary to consider the "proviso" applicable to the case. This involves the determination of whether, having regard to the scope and operation of the "proviso", any errors demonstrated on the foregoing grounds did not cause a substantial miscarriage of justice to occur by reason of the strength of the prosecution case against the appellant that made her conviction inevitable.

Defects in the evidence of identification

141 The trial judge correctly told the jury that demonstration that the offences were committed by the same offenders was "useless" unless it was proved that "either of these accused persons was involved in those offences". To the ordinary problems of identification of strangers, viewed for a short period[106]

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105 McPherson JA, Pincus JA and Williams J.

106 *Smith v The Queen* (2001) 75 ALJR 1398 at 1400 [13], 1404 [38]; 181 ALR 354 at 357, 363.

(which problems are common to many criminal trials where the identity of the offender is in question) there was added in this case a special difficulty. This was that the offenders had taken unusual pains to disguise their natural appearance[107]. There was substantial evidence that of the two offenders, one was male and the other female. So far as the female was concerned, she was described on one occasion as wearing makeup "as if she was at Dracula's or one of those sort of places". She was also said on both occasions to have worn a wig, recognised as such by two witnesses who happened to be hairdressers. In these circumstances, it is not surprising that the evidence tendered to identify the appellant as the female offender was (as the prosecution conceded) "somewhat weak".

142 The question presented by the first two grounds in this appeal is whether the identification evidence was so weak that it ought to have been excluded from the jury's consideration or, if admitted, made the subject of more detailed directions than the trial judge gave.

143 In relation to the offences connected with the second armed robbery, at Biggera Waters, the prosecution called three witnesses, Messrs Fyffe and James and Ms Ogilvie.

144 Mr Fyffe was at his home not far from the bank on 27 May 1996. He saw a man alight from a blue Ford Laser vehicle and walk to a white Laser in which there was a woman driver. He saw the man get into the passenger seat of that vehicle. Shortly afterwards, the man returned to the blue Laser. Both cars drove off. Before long one of the vehicles returned with the woman driving and the man in the passenger seat. On 21 June 1996, Mr Fyffe correctly identified the co-accused from a photoboard depicting a number of male photographs. Mr Fyffe was also shown photographs of females, none of which were of the appellant, and he did not purport to identify the appellant from those photographs.

145 At the committal hearing at the Southport Court in October 1996, Mr Fyffe was told by a detective to keep an eye out to see if he could identify the female involved in the use of the cars just described. Mr Fyffe later said he recognised the appellant as the female driver. However, he agreed that she was the only female under forty years of age whom he saw at the courthouse that day. He also agreed that in May 1996 he had enjoyed only a fleeting glance of the offender, seated in a car. He had been unable to describe her height. Objection was taken on behalf of the appellant to the admission of the foregoing evidence before the jury. However, the trial judge admitted it, saying that its weight was for the jury to decide.

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107 *Smith v The Queen* (2001) 75 ALJR 1398 at 1405 [42]; 181 ALR 354 at 364.

146 Ms Ogilvie was driving her car near the bank in Biggera Waters shortly before the robbery on 27 May 1996. She saw a blue Laser and white Laser park behind her vehicle. The female driver alighted from the blue Laser and ran to the other vehicle and talked to the male driver of that vehicle. That person then returned to the white Laser and both cars drove off, turned abruptly and drove back past Ms Ogilvie, stopping again. The drivers began taking objects out of the white Laser and putting them into the blue Laser. They then drove off together in the white Laser. Ms Ogilvie was a hairdresser. She recognised that the female driver was wearing a wig. She was not shown a photoboard.

147 On the day of the committal hearing Ms Ogilvie was also asked by a detective at Southport courthouse to see if she recognised anyone fitting the description of the female driver. She too purported to identify the appellant. She accepted in cross-examination that the appellant was the only woman whom she saw outside the courtroom at Southport. Once again, at the trial, the appellant's counsel submitted that this evidence should be excluded. The trial judge found that it was part of the "circumstantial case" and that its weight should be considered by the jury. He admitted the evidence.

148 Mr James was raking leaves off the driveway of an apartment block not far from the bank on 27 May 1996. He saw a white Laser being parked underneath the block of units. A female driver, described as about "five foot six inches or five inches" tall and in her late thirties, was seen running from the vehicle. Mr James remonstrated with her about parking where she had. She replied that she would not be long. He saw her walk a distance. Later another vehicle was seen driving along the road. From the tracksuit she was wearing, he recognised the female passenger in this vehicle as the woman who had left the white Laser parked at his apartment block. She was wearing a shoulder length black wig and was seated next to a male driver.

149 On 18 June 1996, Mr James was shown a photoboard containing male photographs. He correctly identified the co-accused as the male car driver. He was shown another photoboard containing photographs of twelve women. He selected two photographs, not being those of the appellant, as similar in facial appearance to the female he had seen and remonstrated with. However, he emphasised the difficulty of selection without viewing the body and height of the persons displayed in the photographs. On 26 June 1996 police returned to Mr James' home with another photoboard. This included a photograph of the appellant. Mr James selected two other photographs as similar to the female driver. He did not select the photograph of the appellant.

150 In October 1996, Mr James was also asked at Southport courthouse to keep a lookout for the female driver. He too purported to identify the appellant there from her visual appearance. However, he added two other features that he said he had noticed. The first was her voice and the second the way she had been

observed to run. As to her voice, he had heard the appellant say "Oh, I'm in the wrong court" and then she ran to another courtroom. From hearing these six words and observing the appellant's gait, Mr James was confirmed in his ability to identify the appellant as the female offender. He had not previously mentioned to police either of these two distinguishing characteristics. Once again, objection was taken to the admission of this evidence. The trial judge ruled that its reception was not unfair and that it would be left to the jury to decide what weight they attached to it.

151 In respect of the armed robbery at Paradise Point on 13 June 1996, only one identification witness was tendered, Mr Hill. He was working in a hairdressing salon one shop distant from the bank. He heard a car smash into the bank doors. He saw a female driving a red Laser reverse into the parking area in front of the bank. Interviewed by police, he described how this driver was "frantically" turning the steering wheel trying to get into position as it later emerged to provide an escape vehicle. He described her long "layered" hair that swung freely and her "pale complexion". He said he "couldn't sort of say what her face really looked like". However, he was shown a photoboard. He selected three photographs as looking like the female offender. One of these photographs was indeed a photograph of the appellant.

152 Mr Hill agreed in cross-examination that the appellant had an olive complexion. His identification from photographs took place two months after the robbery. Again, counsel sought to have this evidence excluded. The trial judge rejected the submission. As with the earlier evidence he concluded that its weight should be determined by the jury.

The admissibility of the identification evidence

153 *The incident identification*: There were many defects in the foregoing evidence which the four identification witnesses were allowed to give before the jury. The evidence is divided into two categories. The first is that relating to what the witness saw at about the time of the relevant bank robbery ("the incident identification"). The second is the evidence of what three of the four witnesses saw at the Southport courthouse ("the courthouse identification").

154 So far as the incident identification is concerned there were obvious deficiencies in the procedures followed. No evidence was given that the appellant was ever asked to participate in an identification parade and declined to do so. Obviously, such a procedure is fairer to a suspect because it permits the blending of that person into a mixed group of other persons[108]. It affords a wider range of identifying factors and a more natural circumstance for perceiving the

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108 *R v Hamood* (1987) 46 SASR 340; *Wright* (1991) 60 A Crim R 215.

entire person of the suspect rather than head and shoulders photographs. The difficulty of selection from the latter was expressly referred to by Mr James. In default of proof that an accused has declined to participate in an identification parade, identification of an accused as the suspect by other means and stratagems will often be seriously unfair. It will invite exclusion of the resulting evidence[109].

155 Although a sound recording was taken of some of the foregoing procedures for identification of the appellant from photographs, the process was not filmed or photographed. The full course followed in the selection was thus unavailable to the jury[110]. The dangers of procedures of informal identification from photographs have been long recognised. They are well documented[111]. They explain the remarks of Gibbs CJ in *Alexander v The Queen*[112]:

> "The safest and most satisfactory way of ensuring that a witness makes an accurate identification is by arranging for the witness to pick out from a group the person whom he saw on the occasion relevant to the crime."

156 In Queensland, the last-mentioned principle is recognised in the Queensland Police *Operational Procedures Manual* ("the Manual"). By virtue of the *Police Service Administration Act* 1990 (Q), s 4.9, the provisions of the Manual are given the force of law[113]. In par 2.11.5 of the Manual appears the following policy:

> "Where an identification parade is not used, investigating officers are to attempt to establish identification through some other means including having the witness identify the suspect from amongst a large group of other members of the public."

157 *The courthouse identification*: The defects of the incident identification pale into insignificance in comparison to the plainly unsatisfactory evidence of

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109 *R v Shannon* (1987) 47 SASR 347 at 350-351; cf *R v Smith* [1984] 1 NSWLR 462 at 482.

110 cf *Penny* (1997) 91 A Crim R 288.

111 *R v Hallam and Karger* (1985) 42 SASR 126 at 130; *R v De-Cressac* (1985) 1 NSWLR 381; *Pitkin v The Queen* (1995) 69 ALJR 612 at 615; 130 ALR 35 at 38-39. The dangers were collected and described in The Law Reform Commission, *Criminal Investigation*, Report No 2, (1975) at 52-58.

112 (1981) 145 CLR 395 at 399-400, see also at 428.

113 *R v W* [1988] 2 Qd R 308; cf *Penny* (1997) 91 A Crim R 288 at 294.

the courthouse identification. Before the police asked the witnesses at Southport Court to attempt to identify the female suspect from persons attending that courthouse, they would have known that the appellant was to be one such person. Her presence at the courthouse, as the accused whom the police had charged, placed her in a position of severe disadvantage, especially when, as might have been anticipated, few if any other females of her age, height and general appearance would be in the vicinity of the courtroom at that time. The request had all the potential to produce a self-fulfilling outcome. Moreover, it contradicted the essential instruction appearing in the Manual which reads[114]:

> "Officers should avoid having a witness identify a suspect as that suspect enters a court building."

158 The likelihood, as occurred, that some of the witnesses would exchange impressions and thereby reinforce the identification of the appellant made in such unsatisfactory circumstances, merely underlines the unreliability of the procedure in which the identification witnesses were asked to participate. Their process of identification at the courthouse was not recorded. It lacked the spontaneity that can sometimes repair the deficiencies of such circumstances of identification[115]. It was carried out in circumstances in which the witnesses were able to discuss the matter together. In the case of Mr James, he was actually approached by police after the appellant had walked by and asked whether he knew her. By that time he had already been shown photographs, one of which contained the appellant's image[116].

159 In such circumstances, the identification of the appellant from recognition of her voice upon the basis of her uttering six words four months after the female offender's voice had been heard had additional and obvious deficiencies. The witness could not point to any distinctive characteristics of the voice which he had recognised or could describe. There were similar weaknesses in Mr James' testimony about the appellant's gait.

160 One of the common deficiencies of identification evidence is that it can often reflect unconscious projection by the witness of what he or she wants or expects to see, hear or otherwise perceive[117]. This is clearly established in

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114 par 2.11.5.

115 cf *R v Williams* [1983] 2 VR 579 at 582.

116 cf *Davies and Cody v The King* (1937) 57 CLR 170 at 182; *Alexander v The Queen* (1981) 145 CLR 395 at 400.

117 The Law Reform Commission, *Criminal Investigation*, Report No 2, (1975) at 54 [122]-[123].

respect of visual recognition. Voice recognition is a commonplace in ordinary life[118]. However, here too there are recognised dangers. Some of these were described by Brennan CJ in *Bulejcik v The Queen*[119]:

> "Admissibility of such evidence depends not only on the witness' familiarity with the speaker's voice or the distinctiveness of the voice or the witness' expertise. Other factors are material. One factor is the clarity with which the witness has been able to hear the voice of the putative speaker on the material occasion and, in a case when a comparison with a voice heard on another occasion is relied on, on that occasion. Another factor is the time which elapsed between those two occasions."

161 *The exclusion question*: The trial judge enjoyed, as he recognised, a discretion to exclude the foregoing identification evidence, or any part of it, from the jury's consideration if its probative value were outweighed by the prejudice, danger or unreliability associated with it[120]. By reason of the objections taken for the appellant at the trial, it was open to the judge to reject all of the court identification evidence or part only, such as the courthouse identification. The judge exercised his discretion against the applications. The Court of Appeal did not consider that an error had been established. Specifically, that Court noted that the trial judge had accepted that the evidence was "not very strong" and amounted to no more than "purported identification" of the appellant[121]. Most of the Court of Appeal's consideration in this respect was addressed to the next issue, namely the warnings that were necessary in light of the "poor quality" of the identification evidence which "on its own [did] not take the Crown case much further"[122]. The reasons for rejecting the complaint about the admission of the evidence in the first place appeared to come down to the recognition that the trial judge had a discretion and had expressed the opinion that the identification evidence was simply part of the "circumstantial" case which the prosecution built against the appellant and the co-accused[123].

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118 *Bulejcik v The Queen* (1996) 185 CLR 375 at 381.

119 (1996) 185 CLR 375 at 381-382.

120 *Alexander v The Queen* (1981) 145 CLR 395 at 402-403; see also *R v R* (1989) 18 NSWLR 74; *Domican [No 3]* (1990) 46 A Crim R 428 at 443; *R v Swaffield* (1998) 192 CLR 159 at 183 [29], 191-193 [62]-[65], 211-214 [132]-[135].

121 *Festa* [2000] QCA 73 at [33].

122 *Festa* [2000] QCA 73 at [34].

123 *Festa* [2000] QCA 73 at [33].

162 With respect to the Court of Appeal, their Honours did not sufficiently differentiate between the appellant's submission that the evidence should have been excluded and her complaint that more extensive directions were required, once it was admitted[124]. As many cases involving like questions illustrate, the question of exclusion, in circumstances such as the present, is a live one. It cannot be met only by reliance on the fact that the trial judge has a discretion. Where complaint is made, the issue is presented as to whether the discretion has miscarried.

163 The applicable principles, which derive from what this Court said in *Alexander*[125], are stated by King CJ in *R v Hallam and Karger*[126]:

> "It should be emphasized that the proper method of procuring evidence of identification is by the identification parade. Identification by selection of photographs is open to grave objections and should be resorted to only where unavoidable. That method may be unavoidable, during the course of an investigation, where there is no definite suspect or where the suspect will not consent to an identification parade. If it has to be resorted to, it must be recognised as the inferior form of identification which it is, for the reasons emphasized by the High Court in *Alexander's* case. Identification by confronting the victim with the suspect in circumstances which tend to suggest to the victim that the suspect is under suspicion is a virtually valueless form of identification which should be resorted to only in the most exceptional situation."

164 These and like principles have been expressed in many cases[127]. In my opinion, they ought to have been applied in this case by the trial judge and the Court of Appeal. Although it is true that the identification evidence, once admitted, has to be considered as part of the entirety of the evidence in the case, and in that sense may become part of the "circumstantial evidence" offered against the accused[128], an objection to the admissibility of identification evidence cannot be met by simply categorising it as just another piece of the circumstantial evidence, part of the "jigsaw" as it were, and thus sufficiently addressed by

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124 The difference is noted in *Festa* [2000] QCA 73 at [28].

125 (1981) 145 CLR 395. See also *Reid (Junior) v The Queen* [1990] 1 AC 363 at 379.

126 (1985) 42 SASR 126 at 130 (footnote omitted).

127 eg *R v Shannon* (1987) 47 SASR 347 at 353-354; *Smith v The Queen* (2001) 75 ALJR 1398 at 1407 [56]; 181 ALR 354 at 367.

128 *R v Hissey* (1973) 6 SASR 280 at 290-291; *Bara* (1998) 106 A Crim R 1 at 13.

appropriate warnings[129]. If that were so, all identification testimony would be tendered as "circumstantial evidence".

165 I agree with the response which Perry J recently gave to a similar suggestion in the Full Court of the Supreme Court of South Australia[130]. His Honour said: "Unsatisfactory evidence of an act of identification cannot be turned into evidence of a positive identification by reference to circumstantial or other evidence unrelated to the act of identification." Moreover, defects of identification evidence cannot be repaired by labelling it as "circumstantial" and suggesting that, for that reason, the evidence does not need to meet the stringent standards for identification evidence set by this Court, as by others. On no view could the identification evidence of Mr Hill be viewed as merely circumstantial. He witnessed the bank robbery occurring, saw the female offender and purported to identify the appellant as that person. His evidence was direct, not circumstantial. It was erroneous to treat it as otherwise.

166 *Observing a single rule*: The strictures about the particular dangers of identification evidence must be obeyed because courts in this country, as elsewhere, have recognised dual features of identification evidence against which special protections are required in criminal trials. This is particularly, but not only, related to trials conducted before juries. The first feature is the propensity of incorrect evidence of identity, even given honestly and with assurance, to involve mistakes leading to serious miscarriages of justice[131]. The second is the tendency for identification evidence to be given special weight, including in the mind of a jury. If accepted, such evidence will link the accused to the crime. No other evidence against the accused may then be needed. The link, once established, may be sufficient. Respectfully, I cannot agree with the opinion that "circumstantial identification evidence", or indeed identification evidence generally, is no more presumptively prejudicial than other forms of evidence[132]. The history of wrongful criminal convictions in this and other countries is littered with instances of convincing, honest identification testimony subsequently proved to have been erroneous. If believed, such evidence tends to be fatal for the accused.

167 Nor would I confuse what should be a relevantly straight-forward requirement by introducing a new supposed sub-category of "circumstantial

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129 *R v Wilson* [1999] SASC 377.

130 *R v Turner* (2000) 76 SASR 163 at 168.

131 See *Varley v Attorney-General (NSW)* (1987) 8 NSWLR 30 at 40; *Finn* (1988) 34 A Crim R 425 at 430-431.

132 Reasons of McHugh J at [65].

identification evidence" and distinguishing this from another supposed sub-category of "direct identification evidence". Such over-sophistication is likely to confuse judges, mislead lawyers and puzzle jurors. Over-analysis and disputable sub-classifications of evidence law lay traps for the conduct of trials. Past authority has not drawn such distinctions. We should not add them now. It is identification evidence, as such, that experience shows carries risks of great prejudice and of erroneous or inadequate directions to juries resulting in miscarriages of justice. That is why exclusion of such evidence is sometimes required and, where it is received, why careful directions to the jury are commonly necessary. A simple standard is stated by this Court in *Domican v The Queen*[133]. We should adhere to that standard.

168 In the present case, the courthouse identification was, as the primary judge and everyone else acknowledged, singularly weak. Its objectionable character went far beyond the fact that it was prosecution evidence harmful to the appellant's case at trial. It was seriously unfair to the appellant. It was prejudicial to her fair trial. Combined with the incident identification it might have been sufficient, without more, to convince the jury that, without any other evidence, the prosecution had established that the appellant was the female offender and thus guilty of all of the charges.

169 To the extent that the evidence was weak, it was incapable objectively of adding greatly to the weight needed to outweigh the distinct prejudice to the appellant of asking persons at a courthouse, in effect, to identify as the female offender, the only possible female in the vicinity who could qualify for such identification. To use the words of King CJ in *Hallam and Karger*[134], such evidence was "virtually valueless" in terms of probative weight. But potentially it was highly prejudicial. Having regard to the Manual, it ought not to have been procured, still less tendered at the trial. Once tendered, the objection to its reception ought to have been upheld[135]. The trial judge and the Court of Appeal erred in deciding otherwise.

170 The incident identification evidence is in a somewhat different class. The failure to conduct an identification parade was not adequately explained. However, some care was taken in this respect to record the witnesses' descriptions of the female offender and the selection of photographs that itself

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133 (1992) 173 CLR 555.

134 (1985) 42 SASR 126 at 130; cf *R v Burchielli* [1981] VR 611 at 621; *R v Williams* [1983] 2 VR 579 at 585.

135 *Dawson v The Queen* (1990) 2 WAR 458 at 467; *Grbic v Pitkethly* (1992) 38 FCR 95 at 110; cf *Bedford* (1986) 28 A Crim R 311 at 314-315.

indicated the imperfect recollection of the witnesses. At the start, the police may not have had a certain identified suspect. This might explain their procedures. The difficulty that the witnesses experienced, and which they acknowledged, was unsurprising given the steps that the offender had taken to disguise herself.

171 Had the incident identification evidence stood alone, I would not have interfered with the Court of Appeal's confirmation of the refusal of the trial judge to exclude that evidence of the identification witnesses[136]. In a sense, the mistaken identifications and the recorded protestations of difficulty spoke for themselves. However, the appellant has made good the objection taken at trial to the admission of the courthouse identification. That evidence should have been excluded. The Court of Appeal erred in failing to so hold.

The direction on identification evidence

172 *The Domican standard*: The appellant's alternative complaint concerned the content of the trial judge's warning to the jury about the imperfections of the identification evidence. On this subject, the Court of Appeal stated that the trial judge's directions "extended over six pages of transcript and dwelt on the recognised frailties inherent in evidence of that kind"[137]. The Court of Appeal considered that only two specific complaints could legitimately be made against the adequacy of the summing up in relation to identification evidence. The first concerned the warnings given in respect of the identification of the appellant by Mr James by reference to her voice. The second concerned the special deficiencies of the courthouse identification already referred to.

173 The adequacy of a warning to the jury concerning the dangers of identification evidence is not measured, as such, by its length. It depends on its content, balance and weight. What is required is not a particular set of words or a rigid formula, with a failure in compliance resulting in the verdict being quashed[138]. The law requires that the judge bring his or her authority to bear so that the jury understand that mistakes can occur from genuine but wrongful identification[139]. The warning given must not be "the perfunctory or half-hearted repetition of a formula, and a warning in general terms will not alone be

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136 cf *Clarke* (1993) 71 A Crim R 58 at 63.

137 *Festa* [2000] QCA 73 at [35].

138 *Allen* (1984) 16 A Crim R 441 at 444; *Domican [No 3]* (1990) 46 A Crim R 428 at 446; *Domican v The Queen* (1992) 173 CLR 555 at 567-568.

139 *R v Burchielli* [1981] VR 611 at 619, 621; *R v Clune* [1982] VR 1 at 8; *R v Dickson* [1983] 1 VR 227 at 230; *R v Hentschel* [1988] VR 362 at 383-384; *Domican [No 3]* (1990) 46 A Crim R 428 at 445.

sufficient; the jury should be given careful guidance as to the circumstances of the particular case, and their attention should be drawn to any weaknesses in the identification evidence"[140].

174 It is in this last respect that the trial judge's summing up was less helpful than it should have been. In this Court, the prosecution accepted that "fuller directions could have been given". The defects relate not just to the two items singled out by the Court of Appeal but also to the more general problem described by Lord Ackner in the Privy Council in *Reid (Junior) v The Queen*[141] namely the "ghastly risk run in cases of fleeting encounters". In Australia that risk is addressed by requiring that, in a jury trial, the judge explain to the jury how that risk was relevant to the particular case and how the jury were obliged to exercise care because of the law's experience that genuine but erroneous identifications can sometimes be made by honest witnesses.

175 A good part of the six pages of the trial judge's instruction about identification evidence in this case was addressed to the difficulties of obtaining identification where offenders disguise themselves, and the difficulties the jurors would themselves have in describing some of the witnesses who had given evidence. Whilst these were proper reflections, they left the balance of the instruction about identification in an unsatisfactory state. Once the identification evidence was admitted, it was imperative, given its obvious and acknowledged weaknesses, that the particular nature of at least the chief of those weaknesses should have been identified and called to the notice of the jury so that the warnings could be related to the weaknesses. Instead, with respect, the warnings were left hanging in the air as general remarks about the imperfections of identification evidence as a category of testimony.

176 The requirement of particularity is the standard established by this Court in *Domican*. There, the majority said of the instruction to be given[142]:

> "[I]t must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction

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140 *Kelleher v The Queen* (1974) 131 CLR 534 at 551.

141 [1990] 1 AC 363 at 380.

142 (1992) 173 CLR 555 at 562 (footnotes omitted).

> which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence."

177 *The courthouse identification*: By this standard, with respect to the learned trial judge and the Court of Appeal, the summing up in the present case fell short. In particular, the defects of the courthouse identification, once admitted, required very specific warnings lest the jury light upon that evidence and give it an undue weight that it certainly did not deserve. To say, as the Court of Appeal did, that counsel has referred to these weaknesses in cross-examining the witnesses and that the judge may not have wished to emphasise the identifications, runs counter to the explicit requirements stated in *Domican*. Juries may not always know of the grave risks of miscarriage of justice that can follow genuine, convincing but erroneous identification. Judges know this because it is part of the law's experience. This Court has insisted that clear instruction be given to juries relating the warnings to the particularities of the evidence. This was not done in the present case.

178 *The voice identification*: A further indication of the inadequacy of the trial judge's warning may be found in the warning that he gave the jury concerning Mr James' reliance on the appellant's voice and gait at the Southport courthouse. The trial judge told the jury:

> "You will recall Mr James' identification or purported identification. I can indicate to you when I use the term 'identification' it doesn't mean a positive identification, it means his identification or purported identification. It may or may not be correct, but you will recall that his identification of [the appellant] was, he said, based on a few words which he said he'd previously heard a woman speak and a few words that he heard [the appellant] say in the precincts of that Court, and he also based it on the manner of walking. He said it was a similar walk to the female he had seen sometime earlier … Of course, that is very different from identification or attempted identification from a photoboard which has obviously its limitations, but that was the basis that Mr James said he made his identification. Well, of course, it's a matter for you to assess its weight and determine whether or not it's reliable."

179 In fairness to the learned trial judge, by the time he gave his summing up to the jury, the appellant and her counsel had withdrawn from the trial. He received no submissions to assist him to provide a more appropriate and detailed warning about the way the jury should use the particular characteristics nominated by Mr James. He was not referred, for example, to the then recent

observations of this Court in *Bulejcik*[143], although the prosecutor did draw some earlier authority to notice[144].

180 The result was that the instruction to the jury about the dangers of identification evidence fell short of the requirements established by this Court[145]. The appellant has therefore also made good her second ground of appeal.

Evidence of and directions about weapons not used in robberies

181 *The admission of such evidence*: Before the commencement of the trial, the appellant had unsuccessfully sought an order that her trial be conducted separately from that of the co-accused. The refusal of the trial judge to do so was the subject of an unsuccessful ground of appeal to the Court of Appeal. That Court found that the factors favouring a joint trial were overwhelming. It rejected the challenge to the discretionary order of the trial judge[146]. That issue is not before this Court.

182 However, the consequence of the joint trial was undoubtedly to present risks of unfairness to the appellant. The evidence of identification of the co-accused was much more definite. Moreover, at the time of the offences, he was shown to have been a fugitive from prison in breach of his conditions of release. That release had occurred just a few days prior to the first bank robbery, for which he alone was charged. There was discovered in the apartment that the co-accused had rented under a false name a number of incriminating items of property[147]. Amongst these was a made-up poster depicting the co-accused with the caption "Armed robber eludes police again"[148]. But most importantly, the apartment, which the appellant visited on several occasions, was proved to contain a number of firearms and ammunition of the kind that might be used by a bank robber. These weapons were similar to at least one described as carried by the robbers during at least one of the bank robberies[149]. When the co-accused's

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143 (1996) 185 CLR 375 at 381, 393-394. See also *R v King* (1975) 12 SASR 404; *R v Harris [No 3]* [1990] VR 310; *R v Zullo* [1993] 2 Qd R 572 at 578.

144 *Corke* (1989) 41 A Crim R 292.

145 cf *Pearsall* (1990) 49 A Crim R 439 at 443; *R v Zullo* [1993] 2 Qd R 572 at 579; *R v Gorham* (1997) 68 SASR 505 at 509.

146 *Festa* [2000] QCA 73 at [3].

147 *Festa* [2000] QCA 73 at [8], [10], [23].

148 *Festa* [2000] QCA 73 at [8].

149 *Festa* [2000] QCA 73 at [19].

apartment was entered by police, they found, in addition to a rifle and a shotgun, a .22 sawn-off rifle and a considerable quantity of ammunition of different calibres. They were not carefully hidden or disguised. They were readily discoverable within the premises and one firearm was on open display when the premises were entered by police.

183 It was established at the trial, and undisputed in this Court, that two of the actual weapons found at the co-accused's apartment had been purchased by him on 17 June 1996, ie after the occurrence of the final bank robbery.

184 The appellant submitted that the evidence of the firearms and ammunition should not have been admitted against her. She contended that such evidence was no more than propensity evidence and indeed was only evidence against the co-accused. Because of the date of purchase of two of the weapons, they could not have been directly relevant to the commission of any of the offences with which he or the appellant were charged. It was highly prejudicial and irrelevant to the offences charged. The evidence should therefore have been excluded on that ground.

185 The prosecution argued that the evidence was relevant, as constituting part of the "tools of trade" of a bank robber. To meet this submission the appellant relied on the decision of this Court in *Thompson and Wran v The Queen*[150]. In that case the accused were charged with counts of breaking, entering and stealing. At their trial, the prosecution led evidence that the accused, on apprehension, had in their possession what was described as a "kit" for opening safes by drilling and the use of explosives. It was not alleged that the offences with which the accused were charged had involved the use of explosives. This Court held that the evidence about the implements in the "kit" had been wrongly admitted.

186 The reasons of the Court, which were given by Barwick CJ and Menzies J, were particular to the evidence tendered in that case. Their Honours made the point that evidence of such a kind should not be admitted merely to prove that an accused had a criminal disposition. However, they rejected the suggestion that proof of the existence of tools apt for the commission of crime was only admissible "when it appears that tools of that nature were used in carrying out the alleged crime"[151]. Their Honours pointed out that it was "sufficient if such tools might have been so used". And what was necessary was that the implements, proof of which was offered as evidence, should have been "of the same character

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150 (1968) 117 CLR 313.

151 (1968) 117 CLR 313 at 316.

as what was used in the commission of those crimes"[152]. It would be necessary, in each case, to draw a line by reference to the offence propounded and the implements discovered. This point was made clear in the following passage of the reasons of Barwick CJ and Menzies J[153]:

> "[I]n a case such as this, when there is found in the possession of prisoners some implements which might have been used to commit the crimes charged and other implements which could not be put to that unlawful use, it is not always an easy matter to apply the principle which acknowledges the admissibility of evidence of the possession of tools of a burglar to identify the accused with the crimes charged. The principle of completeness might sometimes dictate that evidence should be admitted going beyond proving the possession of tools which might have been used to commit the crime in question."

187 In the present case the implements found in the co-accused's apartment were not relevant only to prove the "criminal propensity" of the appellant and the co-accused. They amounted to the "tools of trade" of bank robbers apt for carrying out what were alleged to be a series of robberies linked by a particular and unusual *modus operandi*. Thus, although the assault rifle and shotgun found in the premises could not have been those used in the robberies alleged, they were of the same character as the weapons carried by the offenders as described by witnesses. Some of the ammunition found was capable of being fired by the weapons discovered at the apartment. As well, certain other ammunition, of a different calibre, not being capable of being fired by the weapons in the apartment, was obviously referable to another weapon not discovered on the premises.

188 There were also discovered in the apartment, other items of property that were highly relevant to the offences charged. These included disguise instructions and wig stands, together with a can of hair and wig sheen and a bottle of spirit gum remover, both of which bore the appellant's fingerprints. These items were arguably specific to the *modus operandi* alleged to have been used in the two bank robberies with which the appellant was charged.

189 This was not, therefore, a case in which implements described in evidence were of little or no relevance to the actual crimes charged and merely prejudicial. Nor was it a case where the prejudice inherent in establishing the existence of the implements in the apartment outweighed the probative value inherent in the

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152 (1968) 117 CLR 313 at 316.

153 (1968) 117 CLR 313 at 317.

evidence itself[154]. In this case, the collection of items described was of the same character as those used in connection with the alleged offences. The items had to be viewed in relation to each other and to the crimes alleged in the indictment. So viewed, the evidence was specifically relevant. It was rightly admitted.

190 *The directions on the evidence*: The appellant alternatively argued that, once admitted, it was essential that the trial judge give the jury a firm warning about the use that could be made of the evidence of the weapons, in particular so far as that evidence bore on the appellant's guilt. His Honour's directions on this point were succinct. I do not detect any error. He made it clear that the issue for the jury's consideration was whether the appellant was the female co-offender. He pointed out that it was not contradicted that the appellant had keys to the co-accused's apartment. She had been there with her infant daughter. The keys to that apartment were found in her own residence when she was arrested. Her fingerprints were found in the co-accused's apartment, including on the can of hair and wig sheen and bottle of spirit gum remover.

191 The trial judge warned the jury that evidence specifically relating to the co-accused (such as in respect of his fingerprints) was not evidence against the appellant. He also warned the jury, helpfully to the appellant, against drawing inferences that because the co-accused had previously been in prison, he was therefore guilty of the offences charged. He gave an explicit warning about propensity evidence. As to the items found in the co-accused's apartment, specifically the weapons and ammunition, he said:

> "You have heard evidence of numerous items of property being found in the premises … You have heard evidence that [the appellant] visited those premises, but if you are not satisfied that she had any knowledge of any of that property which was found there, well, it cannot be used against her."

192 In the circumstances of this case, it is unnecessary to consider whether, as the Court of Appeal suggested, the decisions of this Court in *Thompson and Wran*[155] and *Driscoll v The Queen*[156] require reconsideration in the light of the later decision in *Pfennig v The Queen*[157]. Running through all of these decisions is a common proposition. It is that evidence may not be adduced merely to show

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154 *Driscoll v The Queen* (1977) 137 CLR 517; cf *R v Connolly* [1991] 2 Qd R 171 at 175.

155 (1968) 117 CLR 313.

156 (1977) 137 CLR 517.

157 (1995) 182 CLR 461.

that an accused has a criminal disposition or may have committed, or intended to commit, other and different crimes. I fully support that principle. If that were all that the evidence of the weapons proved, I would agree with the conclusion of McHugh J[158] that it should have been excluded or, if admitted, stronger directions given concerning its use. But if, as here, the particular evidence bears a striking similarity to the mode of carrying out the crimes charged it may, depending on the circumstances, be left to the jury to consider it as it bears upon the proof of the charges before the court. In such circumstances, it is important to warn the jury about the danger of propensity reasoning[159], although the use of the word "propensity" is not to be encouraged. In my view, by these standards the trial judge's warning, whilst at the borderline so far as the use of the evidence against the appellant was concerned, was adequate. Certainly, to have excluded evidence of the contents of the apartment would have been unreasonable and unrealistic in the circumstances. The third ground of appeal fails.

The appellant's association with the co-accused

193 The fourth ground of appeal concerns the trial judge's directions to the jury about the use they might make of the association between the appellant and the co-accused. He said this:

> "Now, if you accept that evidence you may come to the conclusion that there was a close association between [the appellant] and [the co-accused] and you may also come to the conclusion that they were seen together, or where a man and a woman were seen together and one of them was identified to some extent, the other person may well have been − well, for example, [the co-accused] was identified as being with a woman. You may well come to the conclusion that the woman was [the appellant] and vice versa. That's just a minor piece of evidence, but it does show the association between the two."

194 It was not really contradicted that the appellant and the co-accused had a close association. During the period of May to June 1996, the co-accused was seen in the appellant's company. She explained that he did not have a girlfriend. She had access to his apartment with her own set of keys. She had travelled in a number of motor vehicles with him including vehicles that had been unlawfully taken and used. She admitted to "driving him around" and to knowing that he was stealing vehicles, at least some of which were shown at the trial to have been used in committing the subject bank robberies. There was no evidence that the

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158 Reasons of McHugh J at [86]-[99].

159 *BRS v The Queen* (1997) 191 CLR 275 at 331; *Gipp v The Queen* (1998) 194 CLR 106 at 155-157 [140]-[141].

co-accused had another female companion at the relevant time. It was clearly established that the second and third bank robberies involved a male and a female offender. As the Court of Appeal recognised, the available inferences were either (1) that the appellant was innocent and remarkably uninquisitive and determined to mind her own business whilst continuing to associate with the co-accused[160] or (2) that she was the female co-offender.

195 It would perhaps have been desirable for the trial judge to have laid more emphasis upon the requirement for the prosecution to establish separately the guilt of the appellant of the offences charged against her. He could have made it clearer that, if the jury were satisfied upon the identification and circumstantial evidence of the co-accused's guilt but unsatisfied on the evidence of identification or otherwise that the appellant was the female co-offender, they would be bound to acquit the appellant.

196 The passage in the summing up, complained of on the fourth ground, must be read in context. It appears in a section of the summing up in which the trial judge was explaining the prosecution's submissions to the jury. The reference to the "minor piece of evidence" is a reference to the fact that the appellant and the co-accused had been "seen together". However, the total evidence of the links between them was by no means "minor". In the context of the trial and of the summing up as a whole, the direction did not involve a material error or an injustice to the appellant. The fact that the jury acquitted the co-accused of one offence of bank robbery, whilst finding him guilty of unlawful use of the motor vehicle deployed in that robbery, suggests that, as they were instructed, the jury properly addressed their attention to the evidence against each accused in respect of each count of the indictment. The fourth ground fails.

The application of the "proviso"

197 *Requirements of the Code*: The result of the foregoing analysis is that I would uphold the first two grounds of the appeal and dismiss the others. In these circumstances, the prosecution submitted that the case was one for the application of the provision of the Criminal Code permitting the dismissal of an appeal if the court "considers that no substantial miscarriage of justice has actually occurred"[161]. Having regard to its conclusions, the Court of Appeal did not have to consider this provision. However, this Court does.

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160 *Festa* [2000] QCA 73 at [25].

161 Criminal Code, s 668E(1A). See *KBT v The Queen* (1997) 191 CLR 417 at 423-424, 433. The text of the section is set out in the reasons of Callinan J at [263], fn 209. Although not expressed in the Criminal Code as a proviso, the provision is commonly so described: *R v Zullo* [1993] 2 Qd R 572 at 579.

198 The primary obligation under the Criminal Code, where there has been a "wrong decision of any question of law" shown in an appeal against conviction, is that the court "shall allow the appeal"[162]. This provision, which is common to criminal appeal statutes throughout Australia, seeks at once to uphold the high standards of legal accuracy expected in trials of offenders for criminal offences whilst at the same time recognising that mistakes of varying degrees of significance are difficult or impossible to eliminate completely in any system of criminal justice[163].

199 A criminal trial which involves a wrong decision of a question of law and which results in a conviction of the accused, in one sense, itself involves a miscarriage of justice without more. However, the postulate of provisions such as that invoked by the prosecution in this appeal is that a discretion is retained by the appellate court to dismiss an appeal, notwithstanding demonstration of such a wrong decision, if the appellate court considers that no substantial miscarriage has actually occurred. The emphasis upon "substantial" and "actually" requires the court that has detected a wrong decision on a question of law, to consider whether the circumstances of the particular case, viewed as a whole, require the outcome ordinarily required by the provision or permit, in effect, excusing the "wrong decision" because of an affirmative conclusion that the error has not resulted in a substantial miscarriage of justice and that the prisoner has not lost a chance of acquittal that was fairly open on the evidence.

200 *Alternative bases of the verdict*: In a number of decisions, it has been noted that the tendency of this Court in recent times has been towards a diminished willingness to view legal error as immaterial and to invoke the "proviso"[164]. This inclination has a special significance for the present case for reasons that were explained in *Domican*[165]. That too was a case in which error had been found in the directions given to the jury by the trial judge on the issue of identification evidence. However, the prosecution case had been very strong. The Court of Criminal Appeal of New South Wales described the strength of the other evidence against the accused. It concluded, notwithstanding imperfections which it mentioned in the judge's warnings about identification evidence, that, viewed in the totality of the trial, the jury's verdict was safe and the conviction

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162 Criminal Code, s 668E(1).

163 cf *Prasad v The Queen* (1994) 68 ALJR 194 at 195; 119 ALR 399 at 400.

164 *Gilbert v The Queen* (2000) 201 CLR 414 at 438 [86] citing *Whittaker* (1993) 68 A Crim R 476 at 484; cf *Doggett v The Queen* (2001) 75 ALJR 1290 at 1313-1314 [153], 182 ALR 1 at 34.

165 (1992) 173 CLR 555 at 567.

should stand[166]. The "proviso"[167] was applied. Although the specific directions about the identification evidence were defective, the "general warnings to the jury were accurate and effective and … [t]here were just too many elements of detail in [other] evidence for the appellant to overcome"[168].

201 This Court unanimously reversed that conclusion. Although Brennan J dissented in the result (concluding that the directions as to identification had been adequate) he agreed that the application of the "proviso" had been erroneous. In that case, there had been several distinct categories of evidence to implicate the accused, of which the identification evidence was but one. The joint reasons explained the error of the Court of Criminal Appeal in terms that are pertinent to the present appeal[169]:

> "A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused[170]. The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence. If a trial judge has failed to give an adequate warning concerning identification, a new trial will ordinarily be ordered even when other evidence makes a very strong case against the accused[171]."

202 In this case, it is theoretically possible that the jury might have found the appellant guilty of all charges by reasoning that the co-accused had been safely identified, that he had a female companion on the second and third bank robberies and that the appellant had been identified as that companion by the incident identification and the courthouse identification. It would have been possible for the jury, putting all other evidence aside, to conclude against the appellant on that basis. Because in my view the courthouse identification ought to have been excluded and because the directions as to identification evidence

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166 *Domican [No 3]* (1990) 46 A Crim R 428 at 453.

167 *Criminal Appeal Act* 1912 (NSW), s 6.

168 *Domican [No 3]* (1990) 46 A Crim R 428 at 454.

169 *Domican v The Queen* (1992) 173 CLR 555 at 565.

170 See *R v Bartels* (1986) 44 SASR 260 at 270-271; cf *R v Goode* [1970] SASR 69 at 77.

171 See *R v Gaunt* [1964] NSWR 864 at 867.

were in any case imperfect as lacking in specificity, the result is as stated in *Domican*. Ordinarily, a new trial should be ordered[172].

203 *Exception: inevitable conviction*: However, in the joint reasons in *Domican* following the passage just quoted, the Court said[173]:

> "Of course, the other evidence in the case may be so compelling that a court of criminal appeal will conclude that the jury must have convicted on that evidence independently of the identification evidence. In such a case, the inadequacy of or lack of a warning concerning the identification evidence, although amounting to legal error, will not constitute a miscarriage of justice. But unless the Court of Criminal Appeal concludes that the jury must inevitably have convicted the accused independently of the identification evidence, the inadequacy of or lack of a warning concerning that evidence constitutes a miscarriage of justice even though the other evidence made a strong case against the accused."

204 This reasoning is conformable with what this Court has said on many occasions in cases in which legal error is shown but where the proviso is invoked on the basis that the conviction was inevitable and that, therefore, the legal error was not determinative or material[174]. The ultimate issue in this appeal therefore becomes whether, notwithstanding the identified legal mistakes, the conviction of the appellant was inevitable.

Conviction inevitable: appeal dismissed

205 The evidence explicitly identifying the appellant as the female offender was weak, as all agreed. But the case against the appellant was far from weak. It was built up steadily in the course of the seventeen-day trial. By the end of the trial, it was compelling. Indeed, one inference arising from the flight of the appellant from the trial when it was well advanced, was that she could see just how strong the circumstantial case against her was.

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172 cf *Whitehorn v The Queen* (1983) 152 CLR 657 at 669, 689-690; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 604-605, 629-630; *Hamood* (1987) 27 A Crim R 184 at 196.

173 (1992) 173 CLR 555 at 565-566.

174 *Mraz v The Queen* (1955) 93 CLR 493 at 514-516 per Fullagar J; *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Glennon v The Queen* (1994) 179 CLR 1 at 8; *Green v The Queen* (1997) 191 CLR 334 at 346-347; *KBT v The Queen* (1997) 191 CLR 417 at 434-435; *Zoneff v The Queen* (2000) 200 CLR 234 at 246 [26], 267-268 [85]-[89]; *Doggett v The Queen* (2001) 75 ALJR 1290 at 1312-1314 [143]-[154]; 182 ALR 1 at 31-34.

206 In former times, the prosecution case against such an accused might have rested solely on the weak identification evidence. But the present was a case of a detailed and careful investigation, supported by fingerprint and scientific evidence. In the end, it presented such a strong body of testimony that the so-called identification evidence was virtually redundant. When that evidence is excised, the remaining evidence still made the conviction of the appellant inevitable.

207 The starting point was the undisputed evidence of the close association between the appellant and the co-accused soon after his release from prison, her frequent access to his apartment, her constant involvement with him in motor vehicles known by her to have been stolen and the lack of any evidence (although the co-accused's apartment came under surveillance) of any other female companion.

208 When to this evidence is added the presence of the appellant's fingerprints on the objects in the apartment associated with wigs and disguises, the evidence of several witnesses that the female offender, like the male, was wearing a wig and was otherwise disguised, takes on a sinister meaning. The similarity of at least one of the weapons found in the apartment with other weapons which the offenders were described as carrying (and the presence of ammunition possibly related to such weapons) makes the appellant's repeated visits to the apartment take on still more significance.

209 But there was more. The money stolen from the banks was in denominational assortments suitable for deposit with the Reserve Bank. A very large quantity of five dollar notes was found in the co-accused's apartment, as were receipts for furnishings and electrical equipment purchased for cash. At the time of her arrest, the appellant's wallet contained twenty-five five dollar notes, an unusual assortment[175]. A receipt for a newly acquired Toyota vehicle was found at the appellant's apartment. It was the vehicle in which, shortly before the appellant and the co-accused were arrested, they were seen seated together. Enquiries showed that this vehicle had been purchased in cash by a man answering to the co-accused's description. He bought it under a false name[176].

210 The appellant lived in her apartment with Mr Christef who owned a gold-coloured Mercedes sedan. It was garaged at the appellant's apartment. Found in that vehicle were items of property, including audiotapes, belonging to the owner of the vehicle used to smash through the doors of the bank on 13 June 1996.

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175 *Festa* [2000] QCA 73 at [5].

176 *Festa* [2000] QCA 73 at [5].

Further property of that owner was found amongst garbage at a service station which the appellant sometimes frequented. Audiotapes taken from another car, used to get away from the robbery on 13 June, were also found in Mr Christef's gold Mercedes[177]. Still further items of property from both cars were found in the appellant's apartment[178]. I agree with the Court of Appeal's judgment that "[i]n the absence of explanation, it was open to the jury to infer that some or all of this property and money was the product of or associated with robberies or with the unlawful use offences charged against the appellant"[179]. That is the inference that this Court should draw.

211 As the prosecution built its compelling case against the co-accused, its case against the appellant was also necessarily strengthened unless one could hypothesise the existence of a second female companion, never otherwise appearing, who materialised solely for the bank robberies and then disappeared. Intellectually, that possibility cannot be excluded. But in the practical world of the continuous and close relationship between the appellant and the co-accused, established by the evidence, it was not a reasonable hypothesis. Particularly damning as against the co-accused was the discovery in the apartment of the weapons and ammunition and the poster bearing his fingerprints, and a balaclava retrieved from one of the vehicles, which contained DNA material compatible with that of the co-accused. Again, I agree with the Court of Appeal's assessment[180]:

> "Once the inference was drawn that she was aware of the firearms and ammunition in the unit, it is remarkable that, if innocent, she did not take action to distance herself from him and from the unit, instead of continuing, as she did, to associate herself with him and it."

212 In the circumstances of such evidence, viewed in its totality, the suggestion that the appellant was simply not inquisitive is impossible to accept. Because of her flight, she offered no explanation of her own at the trial, compatible with innocence, such as infatuation. Although she was not bound to give evidence, the lack of any evidence necessarily meant that the case went to the jury on the compelling basis established by the prosecution. The case against the appellant was therefore irresistible. Her conviction was inevitable.

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177 *Festa* [2000] QCA 73 at [6].

178 *Festa* [2000] QCA 73 at [9].

179 *Festa* [2000] QCA 73 at [9].

180 *Festa* [2000] QCA 73 at [24].

213 It follows that the mistakes made in admitting the worthless courthouse identification evidence and in failing to provide adequate and specific directions to the jury on the dangers of the identification evidence, did not, in the result, cause a substantial miscarriage of justice actually to occur. The conviction of the appellant is therefore confirmed. However, the case stands as a warning of the need for continuing vigilance in the reception of identification evidence at trial, the provision of proper and detailed warnings related to the evidence when such evidence is received and the attention required by appellate courts to ensure that the stringent requirements of Australian law concerning identification evidence are fully complied with.

Order

214 The appeal should be dismissed.

215 HAYNE J. I agree that the appeal should be dismissed.

216 For the reasons given by Gleeson CJ the evidence of the witnesses Mr Fyffe, Ms Ogilvie, Mr James and Mr Hill was admissible and the trial judge is not shown to have erred in refusing to exclude it. I also agree, however, that the trial judge did not sufficiently draw to the attention of the jury the weaknesses in the evidence of voice identification given by Mr James and in the evidence given by Ms Ogilvie and Mr James of their recognising the appellant at the Southport Courthouse.

217 As the reasons of McHugh J demonstrate, it may sometimes be convenient to distinguish between positive-identification evidence and evidence of similarities between the accused and the perpetrator of the crime. It is, however, important to recognise that evidence which the prosecution relies on, to demonstrate that it was the accused who committed the alleged crime, may take many forms. The convenience of classifying some or all of those different kinds of evidence should not be allowed to obscure the fundamental reasoning that underpinned this Court's decision in *Domican v The Queen*[181]. In particular, deciding where the boundaries between classes of evidence may lie must not obscure the purpose of what is now commonly called a *Domican* direction. As was said in the joint judgment in *Domican*[182]:

> "Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed[183]. … [T]he jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'[184]."

The warning must "isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence"[185]. "The jury must have the benefit of a direction

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181 (1992) 173 CLR 555.

182 (1992) 173 CLR 555 at 561-562.

183 *Kelleher v The Queen* (1974) 131 CLR 534 at 551; *R v Turnbull* [1977] QB 224 at 228; *R v Burchielli* [1981] VR 611 at 616-619; *R v Bartels* (1986) 44 SASR 260 at 270-271.

184 *Smith v The Queen* (1990) 64 ALJR 588 at 588.

185 (1992) 173 CLR 555 at 562.

which has the authority of the judge's office behind it."[186] The purpose of the warning is self-evident. It is to draw to the attention of the jury the difficulties in evidence which, because it is so seductive, has so often led to proven miscarriages of justice.

218 Giving effect to that purpose does not depend upon, or require, the classification of evidence as positive-identification evidence or as evidence of similarities, as circumstantial or direct. The problem is more concrete than that. It is that witnesses may, with perspicuous honesty, give evidence that it was the accused they saw, or a person like the accused, or a person having particular physical characteristics (like those of the accused) and yet the painful experience of the law is that they may be mistaken. The duty of the judge is to draw the jury's attention in *every* such case, where the reliability of the evidence is disputed, to how and why the evidence may not be reliable. The trial judge did not do this sufficiently at the appellant's trial.

219 Of course, what is required will depend on the nature of the evidence that is given. If a witness says it *was* the accused that was seen, every element of the *Domican* direction will ordinarily be required. If, at the other end of the spectrum, the evidence is no more than "I saw a man wearing a red shirt" little more may be needed than to point to whatever difficulties the defence asserts that the witness may have had in observing and accurately recollecting the event. In this regard, as in *every* other aspect of a trial judge's charge to the jury, the content of the directions must be moulded with due regard to the issues at trial; they are not to be a mere recitation of general propositions derived from decided cases.

220 I agree that, for the reasons given by McHugh J, the trial judge also erred in admitting the evidence of the presence of the weapons found at the flat used by the co-accused. I also agree with what McHugh J has said, under the heading "The direction on association", about the directions to the jury concerning the association between the appellant and Mr Renton.

221 Despite concluding, as I do, that evidence was wrongly admitted at the appellant's trial and that insufficient directions about the weaknesses in the evidence of identification were given, I agree with the conclusion reached by the other members of the Court that the case against the appellant was so strong that there has been no substantial miscarriage of justice.

222 What is usually called "the proviso" to the common form Criminal Appeal statutes founded on s 4(1) of the *Criminal Appeal Act* 1907 (UK) is not without

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186 (1992) 173 CLR 555 at 562 (footnote omitted).

its difficulties[187]. How is the expression "no substantial miscarriage of justice has actually occurred"[188] to be understood? What significance is to be given to the word "substantial" in that expression? Why is there reference in the proviso to "no *substantial miscarriage*" but reference in the body of the provision[189], which the proviso qualifies, to the court setting aside the judgment of the court before which the appellant was convicted where "on any ground whatsoever there was *a miscarriage* of justice". As Brooking JA pointed out in *R v Gallagher*[190]:

> "It is extraordinary that, 90 years after the legislation providing for appeals in criminal cases was first enacted, doubt should exist about its effect. The legislation has been applied one could almost say daily in a number of jurisdictions. The reason why doubts provoked by the drafting have not in consequence been removed may lie, as Archbold[191] suggests, in the failure of busy appellate courts to state in express terms, or at times even to consider, which of the three available bases of appellate intervention is in point and whether, in relation to miscarriage of justice, the court is concerned with what must be shown by an applicant for the purposes of the body of the subsection or with the proviso."

However this may be, it is probably now too late to attempt to resolve satisfactorily every kind of difficulty that may be thought to lie within the language of the common form provision. There are, nevertheless, some features of the operation of the proviso to which reference might usefully be made.

223 First, the common form provision, taken as a whole, is to be understood as rejecting demonstration of mere formal error, as distinct from substantial error, as the criterion for setting aside the judgment of the court of trial. The rejection of that approach is reflected in the provision's specification of grounds on which an appeal is to be allowed[192]:

> "that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or

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187 The provisions that applied in the present case were s 668E(1) and (1A) of the *Criminal Code* (Q).

188 s 668E(1A).

189 s 668E(1).

190 [1998] 2 VR 671 at 673.

191 *Pleading, Evidence and Practice in Criminal Cases*, (1995), par 7.32.

192 s 668E(1).

> that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice".

But it also finds important reflection in the proviso, where the addition of the epithet "substantial" to qualify "miscarriage of justice" and the use of the word "actually" in the expression "actually has occurred" may be thought to emphasise to the court of appeal that the inquiry must be directed to the substantial merits of the case, not merely matters of form.

224 Secondly, the proviso to the common form provision can be seen as accepting that a basic premise of the common law is that an accused person is entitled to a trial according to law. For that reason, alone, any departure at trial from what the law requires is a miscarriage of justice. But the proviso recognises that not every departure, at trial, from the proper application of the law warrants setting aside a conviction.

225 Thirdly, both the framing and the subsequent application of the common form criminal appeal provisions, including the proviso, have had to take account of two other considerations: that the jury is the tribunal of fact in a criminal trial and that the prosecution must prove its case beyond reasonable doubt. In recent years, some prominence has been given to cases where a court of criminal appeal, having examined for itself the evidence given at trial, has formed its own opinion as to whether there was a reasonable doubt about the accused's guilt[193]. But those have been no more than particular applications of the common form provision requiring the court to allow the appeal "if it is of opinion that the verdict of the jury … cannot be supported having regard to the evidence"[194]. What is important for present purposes is that criminal appeals must be decided giving due recognition to the facts that it is for the jury to decide what evidence is persuasive and what is not, and that the degree of persuasion that must be attained to warrant conviction is very high.

226 It follows that for a court of criminal appeal to apply the proviso the court must conclude that the evidence properly before the jury would, if the jury had been properly instructed, have inevitably required the jury, acting reasonably, to return a guilty verdict. A court of criminal appeal must approach the consideration of the proviso in any particular case paying close attention to the nature and consequences of the error that has been identified in the trial. To take but one example, in some cases it may be possible to conclude that the jury could not have reached the verdict it did, unless it accepted some evidence and rejected

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193 *M v The Queen* (1994) 181 CLR 487.

194 s 668E(1).

other evidence. In such a case, could the error that has been identified have affected those conclusions? Often enough, that question will require an affirmative answer. If, however, the answer is no, what does that say about whether there has been a substantial miscarriage of justice?

227 By contrast, if evidence has been wrongly admitted at trial it may be more difficult to detect from the jury's verdict how it dealt with particular factual issues at trial. In such a case, of which the present is an example, it is necessary to direct attention to the uncontroverted facts and consider whether, on those facts, conviction was inevitable.

228 The formula usually cited in connection with the application of the proviso is taken from the reasons of Fullagar J in *Mraz v The Queen*[195]:

> "[E]very accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice."

It is to be noted that his Honour was not, in terms, describing the application of the proviso, so much as the operation of the common form provision taken as a whole. His Honour referred to the proviso two sentences later when he said[196], "[i]t is for the Crown to make it clear that there is no real possibility that justice has miscarried."

229 Be that as it may, use of the formula of "lost chance, fairly open, of acquittal" must not be permitted to obscure the nature of the inquiry that must be made. That is an inquiry which seeks to identify whether, on the evidence that was properly admitted at trial, a jury acting reasonably and properly directed would have inevitably convicted.

230 For the reasons given by McHugh J, this was such a case.

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195 (1955) 93 CLR 493 at 514.

196 (1955) 93 CLR 493 at 514.

CALLINAN J.

The facts

231 A man named Marc Renton was released from prison on licence on 3 May 1996. Shortly afterwards he telephoned the appellant at her home in Runaway Bay, on the Gold Coast, where she was living with another man named Con Christef and her young child. Renton had been serving a term of imprisonment with one of Christef's relatives from whom Renton had obtained the appellant's address. Renton used the name Donald White to rent an unfurnished unit in Pine Ridge Road, Coombabah in respect of which he paid the landlord a sum of $1160 in cash. He did this 11 days after the robbery of a bank at Morningside in Brisbane. The unit was placed under covert surveillance. During it, the appellant was seen to be a regular visitor to the unit for which she possessed her own set of keys. She was there on the morning of 19 June 1996, the day on which she was arrested, some six days after the robbery of another bank at Paradise Point on the Gold Coast. She told police officers who interviewed her that she used to go shopping with Renton "every day"; that he did not have a girlfriend; and that he did not know anyone else "down here". Her fingerprints were found on a can of hair and wig sheen, and a bottle of spirit gum remover at the unit. Two wig stands and a set of instructions on the use of disguises were also found there.

232 The appellant was alleged to be concerned in two robberies committed in May and June 1996 in south-east Queensland. These robberies involved banks at Biggera Waters and Paradise Point, suburbs of the Gold Coast near Brisbane. On 25 April 1997, Renton was convicted, after a trial extending over some 17 days in the District Court at Southport, of the robberies at Biggera Waters and Paradise Point. He was acquitted of the robbery of the bank at Morningside; but he was convicted of a count of unlawful use of a motor vehicle involved in facilitating that robbery. He was also convicted of a further two counts of unlawful use associated with the robbery at Biggera Waters, and another three counts of that offence in relation to the Paradise Point robbery. His appeal against those convictions was dismissed by the Court of Appeal on 12 December 1997.

233 The appellant was indicted and tried jointly with Renton by Hanger DCJ with a jury in the District Court at Southport in Queensland in April 1997. She did not give evidence at the trial. She absconded before it was completed. She was found guilty in her absence, of the robbery of the banks at Biggera Waters and Paradise Point. No indictment was presented against her in respect of the robbery at Morningside.

234 The prosecution relied heavily on the evidence of the association between Renton and the appellant. A search of Renton's unit at Pine Ridge Road on 19 June 1996 by police officers located $2800 in cash (including a large number of $5 notes in the pocket of a suit in the main bedroom); and items of new

furniture and domestic electrical equipment, together with some receipts dated 22 May 1996 for their purchase. An amount of $850 in cash, including 25 notes of $5 value, was found in the appellant's wallet at the time of her arrest. In addition, a receipt dated 14 June 1996 for a deposit paid on the purchase of a yellow Toyota sedan 078 PUY was located on 25 June 1996 at 2/88 Kangaroo Avenue, where the appellant was residing. That was the vehicle in which Renton and the appellant were seated together on 19 June 1996 shortly before they were arrested on that day. The receipt for the deposit on the Toyota sedan had been given in return for a payment of $4300 in cash by a man answering Renton's description, and who had agreed to buy the vehicle in the name of D White. A membership card of the Royal Automobile Club of Queensland bearing that name and vehicle registration number was also found in Renton's unit.

235 Christef, with whom the appellant lived at 2/88 Kangaroo Avenue, was the registered owner of a gold coloured Mercedes sedan 105 DIN, to which the appellant had access and of which she was a regular user. Both it and the Toyota sedan were seen outside Renton's unit. Items of property (including audio tapes) belonging to a Mrs Sutton were found in the Mercedes sedan on 25 June 1996. Other items of property belonging to her were found in the unit at 2/88 Kangaroo Avenue. They were identified by Mrs Sutton as having been in her white Mazda sedan which was taken from a car park on 9 June 1996 and which was the subject of an unlawful use count against the appellant committed on 13 June 1996. Mrs Sutton next saw her car pictured on television in a news story as the vehicle used by robbers to smash through the doors of the bank at Paradise Point on 13 June 1996. On its return to her, the vehicle was in a severely damaged condition. Some of Mrs Sutton's property which had been left in her sedan was also found among garbage at the Caltex Runaway Bay service station, a service station which the appellant from time to time used. With that property were some other items of property belonging to a Mr Pilbeam. He was the owner of a red Ford Laser which was taken from where he had parked it at Ashmore on 6 June 1996. He next saw it on 14 June 1996, when he collected it from police officers on the day after he was told it had been recovered. It was the subject of an unlawful use count in the indictment against both Renton and the appellant. Some of the audio tapes taken from Mr Pilbeam's car were also found in the gold Mercedes sedan on 25 June 1996.

236 The vehicles belonging to Mrs Sutton and Mr Pilbeam were seen being driven by a man and a woman on 13 June 1996 in circumstances suggesting that they were involved in the Paradise Point robbery. After Mrs Sutton's car was rammed into the doors of the bank, a male robber escaped in Mr Pilbeam's red Laser sedan driven by a woman. A loaded shotgun was seen in that vehicle, and 12 gauge shotgun cartridges were later found in it. Various witnesses at different times before, during or after the robbery saw a bag or bags being loaded into or out of one or both of these and other vehicles including the gold Mercedes sedan. Four of the vehicles taken and used in the robberies showed signs of "hot wiring"; in others there was damage to the ignition system consistent with

attempts to do likewise. An implement was found in the unit at Pine Ridge Road capable of being used for that purpose.

237 The vehicles unlawfully used were seen being driven or used by a man and a woman. The appellant admitted that she knew Renton was stealing cars. She regularly visited the unit at Pine Ridge Road and had done so on the morning of 19 June 1996. It was at about midday on that day that the unit was entered by police officers using her keys and that firearms, ammunition, a "wanted" poster of Renton, a sledge hammer, and a radio scanner were found there. One of the firearms was lying across a chair in the lounge. A loaded magazine lay on the dining table.

238 Other relevant factual matters will be referred to in discussing the argument of the appellant in this Court.

The appeal to the Court of Appeal of Queensland

239 The appellant appealed against her convictions to the Court of Appeal of Queensland. In dismissing her appeal, the Court (McPherson and Pincus JJA, Williams J) said this:

> "On the basis of the evidence at the trial, the jury would have been justified in reasoning along the following lines: (1) that Renton committed the robberies at Biggera Waters and Paradise Point, as well as the related unlawful use offences, of which he was found guilty; (2) that, in doing so, he was assisted or accompanied by a woman; (3) that 'every day' during the period May-June 1996 he was in the company of the appellant, and perhaps with no other woman 'down here'; (4) that the appellant was directly linked with Renton through: (a) her access to and presence in Renton's unit at Pine Ridge Road to which she had a set of keys; (b) the yellow Toyota in which the accused were both found on 19 June; and (c) various motor vehicles, including those that were unlawfully taken and used; (5) that those vehicles were used by Renton and a woman in committing the robberies; (6) that woman was the appellant, and could not have been anyone else. The reasoning process may perhaps be abbreviated to saying that, once the jury were satisfied that the appellant was proved to have taken part in the unlawful use of the motor vehicles employed in the robberies, it was a logical, and probably an inevitable, next step that she should also be found to have been the woman involved in the robberies, especially given the incriminating material found in the unit at Pine Ridge Road. Such a conclusion was necessarily dependent on proof of association between Renton and the appellant during the relatively short period beginning at earliest with his release from prison on 8 May and continuing until their arrest on 19 June. If evidence of that association had not been adduced at the trial, it would not have been possible or legitimate to infer that the appellant was involved in the

unlawful use offences, or, consequentially, in the robberies themselves. They might, for all the jury would have known about it, have been complete strangers to one another. In summing up, his Honour approached the matter cautiously, saying that there was evidence showing association, which he described as 'minor', between the two accused that might assist in identifying her as the woman involved. That direction was, if anything, favourable to the appellant".

The appeal to this Court

240 The appellant appeals to this Court on the following grounds:

"1 The failure to exclude the evidence of the witnesses James, Ogilvie, Fyffe and Hill who purported to directly identify the Appellant has resulted in a miscarriage of justice.

2 The admission of the evidence of James, Ogilvie, Fyffe and Hill who purported to directly identify the Appellant, as circumstantial evidence, has resulted in a miscarriage of justice.

3 The trial judge's directions in relation to eye witness identification and voice identification evidence were inadequate.

4 The failure to exclude the evidence of the discovery of weapons and ammunition subsequent to the offences has resulted in a miscarriage of justice;

5 The trial judge's directions in relation to the discovery of the weapons and ammunition were inadequate.

6 The learned trial judge's directions as to the association between the Appellant and Renton has resulted in a material misdirection."

241 The first submission of the appellant was that the trial judge erred in failing to exclude the evidence of the identification given by Fyffe, Ogilvie, James and Hill, who were witnesses called by the prosecution.

242 I summarise the evidence of Mr James first. He lived in a unit in Biggera Waters, and in the late afternoon of 27 May 1996 was raking leaves off his driveway. At this time, Mr James saw a white Ford Laser sedan enter and stop underneath the block of units. The engine was left running and a woman, about 5 ft 6 ins or 5 ft 5 ins tall and apparently aged in her late thirties, ran out from the car. He remonstrated with her and she replied that she would not be long. Shortly afterwards, he saw another car, a Mitsubishi Magna station wagon, being driven away. From the "bluey" coloured tracksuit she was wearing Mr James recognised the female passenger as the woman he had seen earlier. She was wearing a shoulder length black wig and was seated next to the male driver

whose photograph Mr James selected from a photoboard he was shown on 18 June 1996. He was unable to identify the appellant from other photographs he was shown, but he claimed, in evidence, that he was able to do so from the way she walked or ran and from hearing her speak (some six or so words) when he saw her at the Southport courthouse during the committal proceeding on 24 October 1996. After that, he said he felt "100% sure" she was the same woman as he had seen parking the Laser sedan at the unit.

243 Mr Fyffe saw the appellant in a motor vehicle used in connexion with the robbery at Biggera Waters. On 24 October 1996 at the Southport courthouse, Mr Fyffe identified the appellant. Defence counsel unsuccessfully attempted to have the evidence of the identification excluded. The trial judge decided that it was a matter for the jury. Mr Fyffe said that a Detective Holmes had asked him "to keep [his] eye out" when he was at the Southport courthouse to see if he could identify the female whom he had seen on 27 May 1996. Mr Fyffe accepted that he had had only a fleeting glimpse of the appellant and was unable to ascertain her approximate height. He identified her at the courthouse by her hair and her "size". She could, he said, have been wearing a wig on 27 May 1996. Mr Fyffe agreed that the person he identified at the courthouse was the only female with long dark hair under 40 years whom he saw at the courthouse that day.

244 Mr Hill was another witness for the prosecution. Mr Hill was working at a hairdressing salon which was one shop away from the bank at Paradise Point. He heard a car smash into the doors of the bank, and he saw a woman of olive complexion and with long brown hair sitting in a red Laser sedan in front of the bank.

245 The appellant makes a number of criticisms of the evidence of these witnesses and the way in which the trial judge dealt with it. The appellant submitted that she was never asked to participate in an identity parade in connexion with any of the robberies; nor had she been given an opportunity to decline to participate in such a parade. It was inappropriate, therefore, for the police to resort to an informal identification parade before they had ascertained that the appellant refused to participate in a formal parade[197]. The police had been well aware for some time that the appellant was to face court, and there were ample time, and sufficient safeguards and facilities available for a proper identification parade to be conducted. No attempt was made to "blend" the appellant into a mixed group of persons[198]. On the occasion of purported identification, she was the only person in the vicinity of the courthouse who could have fitted even an approximate description of the offender. Moreover, it

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197 See *R v Shannon* (1987) 47 SASR 347 at 354; *Wright* (1991) 60 A Crim R 215.

198 *Wright* (1991) 60 A Crim R 215 at 221.

was submitted by the appellant, the witnesses were allowed to remain together prior to, at the time of, and after the arrival of the appellant at the courthouse. The witnesses subsequently discussed their identifications between themselves. Mr James had already been exposed to a photograph of the appellant before the day of the appellant's hearing[199]. The reliance by Mr James upon voice identification after hearing only six words or so spoken by the offender on 27 May 1996 was misplaced[200].

246 All of these are legitimate criticisms, including that of the non-separation of the individual witnesses and their being permitted by police officers to discuss their evidence among themselves.

247 The appellant referred to s 4.9[201] of the *Police Service Administration Act* 1990 (Q) and the *Operational Procedures Manual* to which it gives the force of law. Section 2.11.5 of the *Operational Procedures Manual* provides as follows:

> "POLICY
>
> Where an identification parade is not used, investigating officers are to attempt to establish identification through some other means including having the witness identify the suspect from amongst a large group of other members of the public.
>
> Officers should avoid having a witness identify a suspect as that suspect enters a court building."

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199 *Alexander v The Queen* (1981) 145 CLR 395 at 400.

200 *Bulejcik v The Queen* (1996) 185 CLR 375 at 381-383 per Brennan CJ, 393-394 per Toohey and Gaudron JJ.

201 "**Commissioner's directions**

> 4.9 (1) In discharging the prescribed responsibility, the commissioner may give, and cause to be issued, to officers, staff members or police recruits, such directions, written or oral, general or particular as the commissioner considers necessary or convenient for the efficient and proper functioning of the police service.
>
> (2) A direction of the commissioner is of no effect to the extent that it is inconsistent with this Act.
>
> (3) Subject to subsection (2), every officer or staff member to whom a direction of the commissioner is addressed is to comply in all respects with the direction."

248 The appellant submits that the evidence of the four witnesses should have been excluded and that the trial judge wrongly treated it as circumstantial evidence, albeit that his Honour may have regarded it as being of little weight: by so regarding it, its true character, as identification evidence, was obscured, and close scrutiny of it, which should have led to its exclusion, or the strongest of cautions to the jury about it, did not occur. Further, the appellant submits, the trial judge erroneously failed to distinguish between circumstantial and identification evidence, and the Court of Appeal condoned that approach by saying:

> "In the end, the directions on identification of the appellant appear adequate and sufficient for the occasion. They were given at the beginning of the substantive part of the summing up before his Honour turned to an analysis of the circumstantial evidence, emphasising as he did so that 'identification is very important in this case', but that identification 'is a part and part only of the circumstantial evidence on which the Crown relies to prove its case'."

249 I would accept that there is force in the appellant's criticisms of the conduct of those who were responsible for the failure to conduct a proper identification parade and who caused or permitted the witnesses to discuss the identity of the appellant and her appearance before they had all given evidence at the appellant's trial. So too, the departures from the strictures of the manual should be condemned. In addition, the trial judge did, inaccurately, refer to all of the identification evidence as circumstantial evidence. The consequences that flow from that are matters which I will discuss in due course.

250 The trial judge did say, however, that some of the identification evidence "is not very strong … in some cases it is purported identification [evidence]". His Honour warned the jury to "be very careful … people do make mistakes in identification". He went into considerable detail as to the dangers of uncritical acceptance of such evidence and discussed at some length the particular deficiencies in the evidence in this case.

251 It was not correct to describe all of the identification evidence as circumstantial. Much of it went directly to a fact in issue, whether the person identified was one and the same person as participated in, or was seen to participate in, the events forming part of the commission of the offence. That was certainly so in the case of Mr Hill's evidence. (There may be a qualification in respect of the identification evidence of Mr James and Mr Fyffe whose first sight of the appellant, in each instance, was of her in highly suspicious circumstances not at the scene of the crimes of robbery but tending to show her participation in them.)

252 Circumstantial evidence may be described as evidence of facts subsidiary to, or connected with the main fact to be established from which the conclusion of guilt flows as a natural inference[202]:

> "[T]he class of acts and occurrences that may be considered includes circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed."

253 If anything, however, the misdescription here of some of the identification evidence may have favoured the appellant by the suggestion implicit in it that it fell short of being directly probative of the ultimate fact in issue. It certainly in no way caused the trial to miscarry or deprived the appellant of a fair chance of acquittal.

254 That leaves for consideration the questions whether: the reception of the evidence of identification and the way in which the trial judge dealt with it; the occurrence of the discussions by the witnesses of their identification of the appellant; the failure of the investigating police officers to comply with the obligations imposed by the manual; and the fact that the evidence was misdescribed as circumstantial evidence; together or singly require that the verdicts be quashed.

255 I do not think that the verdicts should be quashed: I regard this case as being within the statement by the majority (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) in *Domican v The Queen*[203], who said[204]:

> "Of course, the other evidence in the case may be so compelling that a court of criminal appeal will conclude that the jury must have convicted on that evidence independently of the identification evidence. In such a case, the inadequacy of or lack of a warning concerning the identification evidence, although amounting to legal error, will not constitute a miscarriage of justice."

The case was, in my opinion, a very strong one indeed. Its strength lay in the matters to which the Court of Appeal referred in the passage that I have quoted and need not be repeated. The Court of Appeal was right to say that it was a

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202 *Plomp v The Queen* (1963) 110 CLR 234 at 243 per Dixon CJ, citing *Martin v Osborne* (1936) 55 CLR 367 at 375.

203 (1992) 173 CLR 555.

204 (1992) 173 CLR 555 at 565.

logical, and an inevitable next step that the appellant should be found to be guilty by the jury.

256 I do not regard the misdescription of some of the evidence as circumstantial evidence as a material misdirection. On numerous occasions during his summing up, the trial judge warned the jury of the need for them to exercise great care in considering the circumstantial evidence, and specifically, that part of it which his Honour may have been, immaterially as I have held, so misdescribing.

257 The next ground upon which the appellant relies is that the trial judge erred in admitting evidence about the firearms, unconnected with any of the robberies, which were found at Renton's unit, and, in giving the directions that his Honour did in relation to them. It seems to me to be logically probative of the likelihood that the appellant had been involved in armed robberies of banks as alleged, that she had access to, was often at a residence in which weapons of the kind used in the armed robberies were located, kept company with Renton, and was connected with the vehicles used in the commission of the robberies in the way in which she was. The evidence with respect to the firearms, taken with all of the other evidence upon which the prosecution relied, was important and logically probative of the appellant's guilt.

258 In *Thompson and Wran v The Queen*[205], the items in question were of a different kind and suited for a purpose unrelated to the types of offences alleged to have been committed there. And in each of *Driscoll v The Queen*[206] and *R v Connolly*[207], the evidence that was led was of an "armoury" and "arsenal" of weapons which were irrelevant to the offences charged. It is also significant that the weapons in this case were found with ammunition for them, instructions, wig stands and wig sheen, as well as a bottle of spirit remover bearing the appellant's fingerprints.

259 These items are not of the kind that ordinary law-abiding citizens usually have lying around their homes, and there is not a reasonable, innocent explanation of their presence in Renton's unit. These items would have to have been obtained for a specific purpose. Renton had only been at large for a short time, and had rented an empty unit. These items were therefore acquired recently and are exactly the sorts of items that would be required to commit the offences with which Renton and the appellant were charged. The presence of the weapons

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205 (1968) 117 CLR 313.

206 (1977) 137 CLR 517.

207 [1991] 2 Qd R 171.

and implements actually found by the police officers, and those used in the commission of the offences, goes well beyond coincidence.

260 *Pfennig v The Queen*[208] is the authority governing the admissibility of evidence of this type. Adopting some of the expressions of the test from *Pfennig*, it is submitted by the Crown that there is no rational view of the evidence of the finding of these "tools of trade" that is consistent with a view of the case other than that Renton must have been involved in the offences, or, that the objective improbability of the evidence having some innocent explanation is such that there is no reasonable view of it other than as supporting the inference that Renton is guilty of the offences. Having reached this conclusion, the Crown submits that the jury would have been justified in concluding that, in light of all of the evidence, the appellant was the female accomplice. In general those submissions should be accepted.

261 Not only was the evidence admissible but also the directions about it, although brief, were not erroneous. Indeed, to have referred at greater length to the items than the trial judge did, might have served to emphasise them to the appellant's disadvantage.

262 The last ground of appeal is that the trial judge misdirected the jury with respect to the association between the appellant and Renton. On any view this was an unusual relationship, quickly forged, and involving the use of stolen vehicles, access to weapons, and other materials and implements far removed from an innocent association. The appellant regularly visited Renton's unit. Renton had recently been released from prison. The appellant had a set of keys to the unit. She admitted that she used to shop with Renton every day. She possessed quite a large amount of cash, as did Renton, and for which an obvious explanation was that it consisted of part of the proceeds of the bank robberies. The trial judge did not err in emphasising these matters as important elements in the case for the prosecution.

263 In my opinion, notwithstanding that points raised by the appeal might be decided in favour of the appellant, particularly the failures of the police officers to act lawfully or properly in relation to the identification of the appellant, no substantial miscarriage of justice actually occurred in the circumstances of this case[209].

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208 (1995) 182 CLR 461.

209 See s 668E of the *Criminal Code* (Q):

> "(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to

(Footnote continues on next page)

Orders

264 I would accordingly dismiss the appeal.

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the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."