CITATION:	*Herbert v Byrne* [2018] NTSC 37
PARTIES:	HERBERT, Stephen Geoffrey v BYRNE, Nicholas O'Shea
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21717904 (LCA 52 of 2017)
DELIVERED ON:	7 June 2018
DELIVERED AT:	DARWIN
HEARING DATES:	13 February 2018
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – appeal against conviction – evidence – whether conviction unsafe and unsatisfactory – appeal Court must review whole of evidence and ask whether trial judge should have had doubt as to guilt – evidence must be assessed realistically considering witness' vulnerabilities, expression, speech modes and responsiveness – some characteristics undermined reliability of witness' evidence including gratuitous concurrence – trial judge closely scrutinised sole witness' evidence – *Murray* direction given – nature of warning and considerations of reliability mitigatable in appropriate circumstances – factors relevant in assessing probative value of identification evidence enumerated – length and nature of witness' and appellant's acquaintance relevant – circumstances preceding and of assault

made witness' evidence reliable – conviction not unsafe or unsatisfactory – appeal dismissed.

CRIMINAL LAW – appeal against conviction – evidence – whether trial judge failed to adequately direct himself on identification issue – no particular format needed for warning – trial judge warned himself – trial judge gave himself *Murray* direction – trial judge discussed circumstances diminishing witness' reliability with reference to risks of identification evidence – trial judge directed himself adequately – no substantial miscarriage of justice – appeal dismissed – *Evidence (National Uniform Legislation) Act* (NT) s 116 – *Local Court (Criminal Procedure) Act* s 177(2)(f).

CRIMINAL LAW – appeal against conviction – evidence – whether trial judge treated evidence of witness' prior statements erroneously – whether prior statement can support identification when identification key issue – representation evidence admissible to prove truth of representation and support witness' credibility – mistaken identification not cured by multiple identifying statements – representation relevant and had probative value in determining identification issue – representation made soon after assault reduced but did not eliminate risks of identification – appeal dismissed.

Evidence (National Uniform Legislation) Act (NT) s 116.
Local Court (Criminal Procedure) Act (NT) s 177(2)(f).

Carr v The Queen (2000) 117 A Crim R 272; *Davies v The King* (1937) 57 CLR 170; *Grbic v Pitkethly* (1992) 65 A Crim R 12; *Longmair v Bott* [2010] NTSC 30; *M v The Queen* (1994) 181 CLR 487; *Mills v Western Australia* (2008) 189 A Crim R 411; *Morluk v Firth* [2017] NTSC 91; *R v Murray* (1987) 11 NSWLR 12; *Sharrett v Gill* (1993) 65 A Crim R 44; *Winmar v Western Australia* (2007) 35 WAR 159; *Wurramarba v Langdon* [2017] NTSC 5 referred to.

Stephen Odgers, *Uniform Evidence Law* (Thompson Reuters, 12th ed, 2016)

REPRESENTATION:

Counsel:

Appellant:	P Coleridge
Respondent:	L Hopkinson

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	BLO 1802
Number of pages:	23

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Herbert v Byrne [2018] NTSC 37
LCA 52 of 2017 (21717904)

BETWEEN:

STEPHEN GEOFFREY HERBERT
Appellant

AND:

NICHOLAS O'SHEA BYRNE
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 7 June 2018)

Introduction and background

[1] This is an appeal against a finding of guilt and conviction in the Local Court for one charge of aggravated assault. The circumstance of aggravation were that the victim was a female and the appellant was a male, that she suffered harm, was threatened with an offensive weapon, and was unable to effectually defend herself.

[2] The broad facts were that the victim (MB) was drinking heavily with family members and eventually passed out in a park at Stuart Park. She was awoken by being hit with a rock repeatedly by a man she claimed was her ex-husband, the appellant in these proceedings. There was and is no issue MB

was the victim of a serious assault. The principal issue is whether it was proven to the requisite standard that the assault was committed by the appellant.

[3] There are three grounds of appeal. First, that the trial judge erroneously dealt with evidence of prior statements made by the victim. Second, that his Honour failed to direct himself or adequately direct himself on the issue of identification. The final ground is that the decision of the trial judge was unsafe and unsatisfactory.

The evidence before the Local Court

Evidence of MB

[4] MB was the only witness called in the trial. Other people who were in the area at the time told police they heard what happened but did not see the incident.[1]

[5] MB told the Court that she and the appellant were married for eight years, had known each other for 19 years, and have four children together.[2] They separated in 2006 but had remained in contact since then.[3]

[6] On the evening of 9 September 2016, she was in Winnellie drinking cask chardonnay with family members and the appellant.[4] The group shared some three of four casks of chardonnay between six of them. They consumed

1 Exhibit P2, statutory declaration of Sen. Con. Steven Clark.
2 Transcript, Local Court, 16 October 2017 at 5.
3 Transcript, Local Court, 16 October 2017 at 5.
4 Transcript, Local Court, 16 October 2017 at 6.

about half a cask each.[5] Around two hours later, MB, a person called Janice, another called Sophie, some family members and the appellant caught a bus travelling towards the city. While on the bus, MB shared a 600 millilitre water bottle filled with chardonnay with a friend.[6] The appellant and some of the other people in the group alighted at Stuart Park. MB remained on the bus until reaching the city, where she continued to drink from the bottle filled with chardonnay.[7] The chardonnay was from one of the four casks mentioned above. She could not remember how many times the bottle was refilled with wine.[8] Later on, she waited for a bus for around 20 minutes while drinking half of the 600 millilitre bottle filled with chardonnay.[9] She took the bus to the Stuart Park shops, during which time she and a friend (Gracie) who she had encountered on the bus, shared the remaining half of the bottle.[10] MB described herself as "a bit drunk" at that time.[11]

[7] Upon arriving at Stuart Park, MB searched for the appellant as she thought she "wanted to go to sleep beside [him]".[12] She was not sure what time of the day or night it was.[13] She said she found him sleeping in a park lane near the pipeline, and that she fell asleep 1.5 metres away from him.[14] She did not say anything to him, and there was no one else in the vicinity at that

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5 Transcript, Local Court, 16 October 2017 at 18.
6 Transcript, Local Court, 16 October 2017 at 7-8.
7 Transcript, Local Court, 16 October 2017 at 7-8.
8 Transcript, Local Court, 16 October 2017 at 9.
9 Transcript, Local Court, 16 October 2017 at 19.
10 Transcript, Local Court, 16 October 2017 at 9-10.
11 Transcript, Local Court, 16 October 2017 at 10.
12 Transcript, Local Court, 16 October 2017 at 9-10.
13 Transcript, Local Court, 16 October 2017 at 10.
14 Transcript, Local Court, 16 October 2017 at 10-11.

time.[15] When asked in examination-in-chief how she knew she had found the appellant, she simply responded, “He was”, and agreed that she could see him clearly.[16]

[8] MB was awoken in the early hours of the morning by pain in her ribs. She said she saw the appellant with a large rock measuring approximately 20 centimetres standing close to her.[17] It was “a little bit dark” at that time, but there was nothing obstructing her view of the assailant.[18] She was feeling “a little bit sober” at that point.[19] Upon being asked how she knew the assailant was the appellant, she replied, “I know because I saw him,” and when asked again, because “He got close”. MB was then questioned about what she saw when he came close, to which she stated, “Saw Stephen”.[20]

[9] She said the appellant hit her again with the rock in the middle of her back and leg, and she told him to stop hitting her.[21] She tried to grab the rock from him, and he hit her on the right eye with the rock.[22] At this stage he was 20 centimetres from her.[23] He then threw the rock away, punched her on her hand, and left.[24] At no point during the assault did the assailant say anything to her.[25]

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15 Transcript, Local Court, 16 October 2017 at 10-11.
16 Transcript, Local Court, 16 October 2017 at 10-11.
17 Transcript, Local Court, 16 October 2017 at 11-13.
18 Transcript, Local Court, 16 October 2017 at 13-14.
19 Transcript, Local Court, 16 October 2017 at 15.
20 Transcript, Local Court, 16 October 2017 at 13-4.
21 Transcript, Local Court, 16 October 2017 at 11-13, 27.
22 Transcript, Local Court, 16 October 2017 at 11-13; although she did not tell police she had attempted to grab the rock from the appellant: transcript, Local Court, 16 October 2017 at 28.
23 Transcript, Local Court, 16 October 2017 at 11-13.
24 Transcript, Local Court, 16 October 2017 at 11-13, 27.
25 Transcript, Local Court, 16 October 2017 at 11-13.

[10] MB suffered multiple facial fractures, injuries to both eyes, her mouth, the top of the head, left elbow, right pelvic area, ribs, and right lower back.[26] She was still unable to open her right eye over 24 hours after the assault.[27]

[11] In cross-examination, the following matters relevant to the quality of MB's recognition evidence were elicited. She had already drunk approximately half a cask of chardonnay by the time she went into the city, and was "very drunk".[28] The group had drunk three casks of wine before departing for the city.[29] She did not know what time it was when she was searching for the appellant to pass out beside, but she stated she knew that her memory was not hazy then.[30] She and the appellant did not regularly sleep near the pipeline in Stuart Park, but other people do.[31] When they had slept there, it would not have been in the exact same place. The nearest light to the pipeline was at the Stuart Park shops, which are across the road, and there is a grassy area adjacent to the pipeline.[32]

[12] MB has a longstanding history of partial blindness in her right eye, a fact which is corroborated by medical records from her admission for the assault at the Royal Darwin Hospital.[33] She could see "two fingers" in the right eye, and her pupils appeared divergent (with the right eye not moving), both of

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26 Exhibit P1, victim's medical records, at 5, 9.
27 Exhibit P1, victim's medical records, at 53.
28 Transcript, Local Court, 16 October 2017 at 18.
29 Transcript, Local Court, 16 October 2017 at 18.
30 Transcript, Local Court, 16 October 2017 at 18, 21.
31 Transcript, Local Court, 16 October 2017 at 21.
32 Transcript, Local Court, 16 October 2017 at 21.
33 Transcript, Local Court, 16 October 2017 at 22; Exhibit P1, victim's medical records, at 4, 19.

which she reported to medical staff as chronic.[34] When put to MB that the combination of the above elements made it possible that she had become confused about who was actually asleep on the ground near the pipeline, she said, "I'm not sure", "I think it was him" and finally, "I'm sure it was him".[35]

[13] Further, in cross-examination, MB agreed that it was still dark when she was awoken by the assault.[36] She also agreed that the manner of her awakening would have been confusing, and that she took a moment to realise what was happening.[37] Things happened very quickly, and she was still drunk at that point.[38] She also said she became dizzy. When MB spoke to police officers at approximately 8:30am on the morning of the assault, she was described as mumbling and difficult to understand, and appeared intoxicated.[39] She agreed she did not tell police she tried to grab the rock from the appellant.[40] She believed it was the appellant who attacked her, because he was the person she considered she had fallen asleep beside.[41] She did not get a good opportunity, if any, to see who her attacker was.[42] During the assault, she was curling up in a ball to protect herself. She was asked if she would concede, given all of the surrounding circumstances, that it was possible she

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34 Exhibit P1, victim's medical records, at 4, 50, 70.
35 Transcript, Local Court, 16 October 2017 at 25.
36 Transcript, Local Court, 16 October 2017 at 27.
37 Transcript, Local Court, 16 October 2017 at 26-7.
38 Transcript, Local Court, 16 October 2017 at 26-7.
39 Exhibit P2, statutory declaration of Sen. Con. Steven Clark; Exhibit P3, statutory declaration of Sen. Con. Mark Derkson.
40 Transcript, Local Court, 16 October 2017 at 28.
41 Transcript, Local Court, 16 October 2017 at 27.
42 Transcript, Local Court, 16 October 2017 at 27.

got mixed up about who was asleep on the ground and she said "I'm not sure", and then "I think it was him".

[14] In a brief re-examination, MB was asked if she looked at the person who was asleep on the ground near the pipeline. She said, "Yes, I'm sure it was him". When asked why she was sure it was the appellant, she repeated, "I know it was him". She was asked what observations she made about the person asleep on the ground, and she said "It was him", and "Steven [sic]".[43]

The medical records

[15] The medical records tendered by consent[44] establish that on 10 September MB was taken to the Royal Darwin Hospital by ambulance and arrived at 8:49am. The injuries recorded clearly amount to harm, including obvious facial deformity and swelling, ecchymoses (bruises) to her eye, facial fracture and multiple soft tissue injuries. The injuries are also depicted in the photograph tendered.[45] As mentioned above, the records note MB had "decreased vision in R eye since birth" and that "she could see two fingers in the right eye. This finding is longstanding as per the patient".[46] In terms of the history recorded on 11 September 2016 at 11:49am, the Clinical Progress Notes record the following: "43 yo female admitted post alleged assault with a rock yesterday morning. Pt has been long grassing in Stuart Park, this is where she was assaulted reported by pt that it was her husband.

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43 Transcript, Local Court, 16 October 2017 at 31-2; the appellant's name was misspelled here.
44 Exhibit P1.
45 Exhibit P4.
46 Exhibit P1 at 4.

Pt reports assault happened around 0500, SJA not called until 0830. Pt reports heavy etoh prior".

Police statements

[16] The statutory declarations of Senior Constable Steven Clark[47] and Senior Constable Mark Derkson[48] establish those officers were tasked to attend Bill Sullivan Park at 8:30am to investigate a report of an assault. They located MB and observed facial injuries. Senior Constable Derkson noted MB "appeared intoxicated and her speech was hard to understand".[49] Senior Constable Steven Clark said MB was "only mumbling and was difficult to understand".[50] He also spoke to "several other people in the area". They all heard what had happened but did not see the incident.[51]

Ground 3 – The finding of guilt was unsafe and unsatisfactory

[17] I will deal with this ground first to reflect the order of submissions made to the Court. When dealing with this ground, the Court is required to review the whole of the evidence and ask whether, making due allowance for the advantage of the judge at first instance, there is a doubt as to the appellant's guilt which the judge at first instance ought to have experienced. The principle is summarised in the following statement from *M v The Queen*:[52]

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47 Exhibit P2.
48 Exhibit P3.
49 Exhibit P3 at 4.
50 Exhibit P2 at 5.
51 Exhibit P2 at 6.
52 [1994] HCA 63; 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ.

> 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.

[18] Counsel for the appellant emphasised that the prosecution case depended entirely on the evidence of MB. As proof of the only fact in issue relied on the evidence of a sole witness, a *Murray*[53] direction was required. The evidence of MB was required to be scrutinised with great care before a conclusion of guilt could be made. The learned trial judge was required to be satisfied that MB was reliable beyond reasonable doubt. There is no doubt that his Honour paid close attention to this requirement, as can be seen from the reasons.[54] In reviewing the evidence, I too remind myself of the need to scrutinise the evidence of MB closely and with great care, considering any features relevant to credibility and reliability.

[19] In the context of this ground, the appellant draws attention, in addition to the question of directions covered in ground 2, to the general problematic nature of identification evidence. Counsel for the appellant emphasised the principle that significant caution must be exercised in relation to honest witnesses who appear confident of an identification. It is well recognised that honest mistakes are easily made, even when the perpetrator is known to

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53 In accordance with *R v Murray* (1987) 11 NSWLR 12.
54 Transcript, Local Court, 17 October 2017 at 58-59.

the identifying witness. In *Carr v The Queen*[55] the Tasmanian Court of Appeal held "recognition" cases, in the sense of persons known to each other, often involve just as much danger of mistaken identification as cases involving persons first seen at the time of the alleged crime. Directions that do not acknowledge this may be inadequate. On this subject Blow J said:[56]

> As *Boardman* and *Turnbull* illustrate, "recognition" cases will often involve just as much danger of mistaken identification as cases involving persons first seen at the times of their alleged crimes. It would therefore be illogical to hold that a warning as to the dangers of mistaken identification of the sort discussed in *Domican* need never be given in a recognition case. Obviously, such a warning would be inappropriate when the witness is familiar with the appearance of the accused and the circumstances of the recognition leave little scope for any chance of mistake. Whether such a warning is necessary in a recognition case must depend on all the relevant circumstances, including the degree of familiarity of the witness with the accused, the circumstances in which the accused was previously seen by the witness or known to the witness, and the circumstances in which the accused is alleged to have been seen by the witness at or about the time of the crime.

[20] In relation to the matters that may bear upon the reliability of the identification, his Honour commented on MB's level of intoxication at the time of the offence. The statutory declaration of Senior Constable Derkson (who attended upon the victim after the assault) stated that she appeared intoxicated and her speech was difficult to understand.[57] However, in relation to observations made of MB during the trial, his Honour stated that he could have made those same observations as officer Derkson had made.

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55 [2000] TASSC 183; 117 A Crim R 272; applied in *Longmair v Bott* [2010] NTSC 30.
56 *Carr v The Queen* (2000) 117 A Crim R 272 at 289.
57 Exhibit P3, statutory declaration of Sen. Con. Mark Derkson.

He noted MB was presumably sober during the trial.[58] She was, in his Honour's view, demonstrating the characteristics of speech of an intoxicated person, which his Honour said may be one of her traits. He referred to the advantage he had of seeing and hearing the witness MB himself[59] and stated:

> So it's hard to say whether the observations made by the police officer accurately reflected the true level of her intoxication because here in the courtroom, where presumably she was sober, she presented with a speech pattern which as I say was often difficult to follow.[60]

[21] A further matter noted by his Honour during the course of submissions was that when she was cross-examined, MB agreed she did not have an opportunity to observe the assailant. However, in re-examination, she said that she did have an opportunity to observe and recognise him. Counsel for the appellant submitted that contradictory evidence of that kind gave rise to a reasonable doubt.[61] Attention was drawn to the following observation made during the course of an exchange with counsel:

> I'm not sure that is exactly true in relation to contradictory evidence where cross examination is to one effect and re-examination to the other. It just might well be the Court can't really decide one way or the other.[62]

[22] His Honour identified that although this evidence could be viewed as inconsistent, MB was sure that the person who assaulted her was the appellant. When she was questioned as to why she was so certain, she said

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58 Transcript, Local Court, 16 October 2017 at 40-1.
59 Transcript, Local Court, 16 October 2017 at 40-1.
60 Transcript, Local Court, 17 October 2017 at 56.
61 Transcript, Local Court, 16 October 2017 at 43.
62 Transcript, Local Court, 16 October 2017 at 43.

on a number of occasions, "I saw him".[63] During the course of submissions his Honour said it left him in a rather difficult situation because of the state of that part of the evidence.[64] He said the evidence "sort of neutralises the situation because they're contradictory".[65]

[23] A long series of questions were asked of MB in a style that elicited answers and responses indicative of gratuitous concurrence.[66] At one crucial point MB answered a question relevant to identification with the answer, "I'm not sure" and later, "I think it was him" and later, "yes, I'm sure it was him".[67] The "I'm not sure" answer was given in response to a lengthy question full of multiple propositions. It is important to assess evidence of this kind in a realistic manner, bearing in mind a witness' vulnerabilities and the possibilities of gratuitous concurrence and suggestibility. Weak identification evidence may fall short of proof of an identification beyond reasonable doubt, however, the substance of the identifying witness' evidence must be assessed fairly in accordance with what is known of their expression, modes of speech and responsiveness. I would not give MB's answers that tend to illustrate suggestibility significant weight. It is not uncommon for witnesses who possess vulnerabilities of the kind that MB does that they may not be used to direct questioning in a court. Their evidence must be considered as a whole, as MB's evidence must be also.

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63 Transcript, Local Court, 16 October 2017 at 57.
64 Transcript, Local Court, 16 October 2017 at 43.
65 Transcript, Local Court, 16 October 2017 at 43.
66 Most recently discussed in detail in *Morluk v Firth* [2017] NTSC 91, per Grant CJ at [49].
67 Transcript, Local Court, 16 October 2017 at 25.

[24] His Honour remarked that he did not have evidence along the lines of "how many seconds were you able to see him? Where were you positioned in relation to him? Where was the lighting from the street – was it in front of you or behind you?"[68] However, after reflecting upon the evidence, his Honour concluded that MB's evidence indicated that the assailant was indeed the appellant, as she was firmly of the view that this was the case.[69]

[25] It is inappropriate to place substantial reliance on comments made during the course of argument when the trier of fact has not reached a concluded view. In this situation it is his Honour's reasons after reflection on the strengths or weaknesses of any evidence and the submissions that are of primary significance.

[26] Reviewing the evidence independently as I am required to do, I do not find the conviction unsafe or unsatisfactory. In this particular case, the trial judge did have the advantage of seeing and hearing the sole identifying witness. His Honour was in the position to observe her unusual mode of speech. In the end, not a great deal turns on that particular point. It is clear MB was intoxicated at the time she was offended against. His Honour acknowledged that fact.

[27] MB's honesty was not in question; her reliability was. MB was clearly someone sleeping rough or was "long-grassing", as hospital staff recorded her circumstances at the time. MB possessed certain characteristics that in

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68 Transcript, Local Court, 16 October 2017 at 50.
69 Transcript, Local Court, 16 October 2017 at 57.

some circumstances may lead to doubts about the reliability of any identification. She had impaired vision, she was intoxicated and the lighting was poor, however she identified a person who was not just known to her, but was her former husband of many years with whom she continued to maintain a relationship of some kind. It may also be noted that he was in the same social or drinking group as MB earlier on the day of, or before, the offending. Although some of her answers were contradictory, which is not uncommon with vulnerable persons who are sleeping rough in drinking camps or similar spots around Darwin, she had seen the appellant at close range during the course of the assault. Her identification of him was not solely because she thought she slept near him. It was the combination of her firmly held belief that she slept near him, as she had sought him out for that purpose, along with waking to him assaulting her. Even though the assault upon waking would have been a startling event for her to comprehend at the time, it was a close-range identification of a person she knew well. She gave a consistent account to hospital staff. Her injuries appear to be consistent, or at the very least not inconsistent, with the account she gave. While it is the case MB did not give detailed evidence of the appearance of the appellant, my impression reviewing the evidence is that MB did not possess a sophisticated capacity to articulate visual descriptions, having regard to what appeared to be her very basic vocabulary.

[28] It is accepted that where the circumstances of observation and subsequent identification are less than ideal, the risks of honest mistake, especially with

strangers, dramatically increase. While the risks of a faulty identification endure to varying degrees with persons known to the identifying witness, the nature of the warning and considerations of reliability may be mitigated as appropriate to the circumstances. It must be remembered MB and the appellant were not mere acquaintances; they knew each other intimately for an extended period. In cases of this kind, regard must be had to the length and nature of any acquaintance and the circumstances under which the suspect was observed.[70]

[29] In *Davies v The King*[71] the High Court observed:

> It is almost unnecessary to say that the amount of care and the nature of the precautions which should be taken when a potential witness is brought to identify an accused or suspected person must vary according to the familiarity of the witness with that person. It would be ridiculous, because the prisoner has been shown alone to a potential witness, to deny the value or reliability of the identification if the witness' knowledge of the prisoner arose from long and close association or from everyday intercourse in business affairs.

[30] Odgers lists a number of factors that have been held to be relevant to an assessment of the probative value of an identification.[72] Of relevance here are the following factors drawn from that text (footnotes omitted):

- any prior familiarity with the subject;
- characteristics of the subject;
- the circumstances of the perception of the subject;

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70 *Mills v Western Australia* [2008] WASCA 219; 189 A Crim R 411.
71 [1937] HCA 27; 57 CLR 170 at 181 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ.
72 Stephen Odgers, *Uniform Evidence Law* (Thompson Reuters, 12th ed, 2016) at 881-2.

- relevant characteristics of the witness including sincerity, bias or interest, eyesight, concentration and ability to process and communicate perceptions;
- the nature of any description;
- the length of time between the initial perception and the identification;
- any record made of the identification;
- the state of mind of the witness at the first identification and any subsequent identification;
- any risk of displacement;
- the confidence of the witness;
- the existence of other evidence supporting the identification; and
- the reliability of other parts of the witness' evidence.

[31] MB was not particularly articulate, however, she appeared a sincere witness who knew her assailant very well. No bias was alleged. She articulated her identification of the appellant as the perpetrator soon after the assault. There was very little or no time for any displacement effect to operate. Her eyesight was poor but she knew him well and saw him at close range, despite her eyesight. She was intoxicated but not to the point that her intoxication affected her ability to recognise her former husband. It was a unique relationship and a unique circumstance. Although some of her evidence was contradictory, this did not affect the accuracy of the identification. The contradictions represented personal factors of unsophistication dealing with closed questions in a courtroom. She was

appropriately confident as to the identification. Her evidence about the overall incident was reliable.

[32] The appellant argued the complainant gave no evidence that rendered it more likely that he, rather than another random person or member of the nearby group, was the attacker, and that a reasonable possibility existed that another person was responsible for the attack. After reviewing the evidence it is concluded the reasonable possibility of another person assaulting MB was excluded beyond reasonable doubt by MB's identification of her former husband.

[33] In my view it is not a fair reading of MB's evidence to conclude she only identified the appellant on the basis of an assumption that she slept next to him. Reviewing all of the evidence, but most particularly MB's evidence, I am not left with any doubt about the guilt of the appellant.

[34] I will not uphold this ground.

Ground 2 – The trial judge failed to adequately direct himself regarding circumstances which may have adversely affected the reliability of the recognition evidence

[35] Section 116 of the *Evidence (National Uniform Legislation) Act* (NT) ("*UEA*") provides:

116 Directions to jury

(1) If identification evidence has been admitted, the judge is to inform the jury:

(a) That there is a special need for caution before accepting identification evidence; and

(b) Of the reasons for that need for caution, both generally and in the circumstances of the case.

(2) It is not necessary that a particular form of words be used in so informing the jury.

[36] It is accepted here that s 116 applies equally whether a judge sits alone or with a jury.[73]

[37] The trial judge's warning to himself was as follows:

> I need to warn myself about recognition evidence. And it's quite clear that even in cases of recognition evidence there are still some dangers that a court must be alert to. And it's often said that the dangers are minimised by the fact that a person has familiarity with the person concerned. However as was stated in *R v Turnbull*, 'Even when a witness is purporting to recognise someone whom he knows, the jury should be reminded that the mistakes in recognition of close relatives and friends is sometimes made. And in practice the significance of this factor will be assessed in combination with other relevant factors such as the length and nature of the acquaintance, the uniqueness of the person identified and the circumstances under which the suspected criminal is first observed'.[74]

[38] Over the course of the trial judge's decision, he referred to the circumstances which may have had an adverse impact on the reliability of MB's recognition evidence. Much of this has been dealt with in the context of the discussion of ground 1. Firstly, as noted, his Honour acknowledged that before the commission of the offence, MB had consumed a

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[73] *Wurramarba v Langdon* [2017] NTSC 5; *Grbic v Pitkethly* (1992) 65 A Crim R 12; *Sharrett v Gill* (1993) 65 A Crim R 44; *Longmair v Bott* [2010] NTSC 30.

[74] Transcript, Local Court, 16 October 2017 at 57-8 [footnotes omitted].

"considerable amount of alcohol and … she was affected by alcohol".[75] Despite this, his Honour confirmed that he had the advantage of seeing and observing her, and that she gave a very detailed account of many events preceding the assault.[76] Furthermore, as mentioned, the trial judge commented that when giving evidence, MB was mumbling, slurring her words, and was difficult to follow, as if she were intoxicated.[77] Therefore, it was possible that the police officers' observations did not reflect the victim's true level of intoxication when they spoke with her.[78]

[39] Additionally, the trial judge referred to the length and nature of the acquaintance between the victim and appellant. His Honour incorrectly stated that the victim and appellant were married for 19 years (in fact, their association was of 19 years but they were married for eight years), and discussed the uniqueness of the husband-wife relationship, especially in the context of a lengthy marriage.[79] Therefore, despite the fast-paced offence and no prolonged period of observation of the assailant, his Honour found that due to the very close proximity of the victim and the assailant, the length and nature of the acquaintance between the victim and appellant, and the uniqueness of the person identified, that the dangers his Honour warned himself of "pale[d] into insignificance" in comparison.[80]

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75 Transcript, Local Court, 16 October 2017 at 56.
76 Transcript, Local Court, 16 October 2017 at 56.
77 Transcript, Local Court, 16 October 2017 at 56.
78 Transcript, Local Court, 16 October 2017 at 56.
79 Transcript, Local Court, 16 October 2017 at 58.
80 Transcript, Local Court, 16 October 2017 at 58.

[40] The trial judge also considered whether the lighting conditions may have caused MB to mistakenly recognise the appellant, but due to their physical proximity during the assault, and despite the victim curling up to fend off the attack, she was firm and steadfast and said, "I'm sure it was him because I saw him".[81]

[41] In my view the potential or actual weaknesses of MB's identification evidence were specifically noted by the trial judge: MB's partial blindness, her intoxication, the lighting conditions, the poor quality of her descriptions, the length of the observation and the risk of displacement. Although not all issues were discussed specifically in the terms of s 116 *UEA*, in terms of the "special" need for caution and the "reasons" for the need for caution, it is clear his Honour was discussing these factors with reference to the need to proceed with caution because he was dealing with identification evidence. The warning need not be in a particular format.

[42] If this conclusion is in error and there has been non-compliance with s 116 *UEA*, I would in any event apply the proviso in s 177(2)(f) of the *Local Court (Criminal Procedure) Act* (NT), as there has been no substantial miscarriage of justice.

[43] Finally, in addition to the identification warning, the trial judge gave himself a *Murray* direction because the Crown case was based largely on a

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81 Transcript, Local Court, 16 October 2017 at 58.

single witness.[82] Although this direction does not amount to a s 116 *UEA* warning, it is a further safeguard directed to scrutinising the same evidence.

[44] I would not uphold this ground.

Ground 1 – The trial judge dealt erroneously with evidence of prior statements of the complainant

[45] Upon presenting at the Royal Darwin Hospital, MB alleged that she was hit by her "husband", and placed a visitor restriction on him.[83] The medical records documenting this were uncontested.[84] The learned trial judge said that this evidence of complaint bolstered the victim's evidence, and went to its reliability and credibility.[85] His Honour stated that it was akin to common law complaint evidence, but that the *UEA* extended the circumstances under which such evidence can be admitted. Representation evidence may be received for two purposes: primarily to prove the truth of the facts alleged in the representation or complaint, and also to support the witness' credibility. The evidence of prior complaint or the representation made to hospital staff was admitted for both purposes.[86] His Honour remarked that the complaint evidence was "an additional piece of evidence over and above the recognition evidence".[87]

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82 Transcript, Local Court, 16 October 2017 at 58-9.
83 Exhibit P1, victim's medical records, at 7, 42, 55, 60.
84 Transcript, Local Court, 16 October 2017 at 56-7.
85 Transcript, Local Court, 16 October 2017 at 43.
86 Transcript, Local Court, 16 October 2017 at 56-7.
87 Transcript, Local Court, 16 October 2017 at 58.

[46] The appellant argued that as the only issue in the trial was whether MB had mistakenly identified her former husband as the assailant, it was illogical for the trial judge to rely on her earlier statement as any meaningful support for the identification.

[47] It is the case that the earlier representation made at the hospital was not corroborative evidence in the sense that corroboration refers to evidence emanating from an independent source. Plainly the earlier representation was not independent evidence in that sense. However, the representation was a source of evidence that could be applied to the fact-finding and in my view possessed some, although not substantial, probative value with respect to the issue of the asserted mistaken identification.

[48] The appellant makes a fair point that a mistaken identification is not cured by the evidence of the identification being made (or stated) on more than one occasion. The representation is however relevant. This is illustrated in the rationale of cases that have held that where there is a delay between observation and identification, a trial judge should direct a jury that delay is a factor to be considered in assessing the accuracy of identification.[88] The early representation identifying the appellant as the perpetrator served to reduce some of the risks associated with identifications. It does not eliminate those risks. A first or fresh identification is usually crucial given the notoriously fragile nature of identification testimony. There was no objection to the evidence of the representation made by MB at the hospital.

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88 *Winmar v Western Australia* [2007] WASCA 244; 35 WAR 159.

It was clearly a relevant source of evidence. I do not agree the evidence of the representation of MB's recognition was misused. Had the trial judge found the recognition evidence to be unreliable, the first representation would have had no use.

[49] I would not uphold this ground.

Order

[50] The appeal is dismissed.
