*Powers v R* [2000] NTCCA 2

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| PARTIES: | POWERS, Justin Roy<br><br>v<br><br>THE QUEEN |
| TITLE OF COURT: | IN THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | COURT OF CRIMINAL APPEAL, SUPREME COURT OF THE NORTHERN TERRITORY |
| FILE NO: | CA3/99 |
| DELIVERED: | 6 June 2000 |
| HEARING DATES: | 26 May 1999, 17 April 2000 |
| JUDGMENT OF: | MARTIN CJ, ANGEL & RILEY JJ. |

**CATCHWORDS:**

CRIMINAL LAW

Evidence – identification of accused a central issue – probative value – whether verdict unsafe or unsatisfactory.

Identification of accused by principal Crown witness prior to the dock identification at the committal proceedings – prosecution led the dock identification during the committal proceedings – evidence of this incident not led at trial from any other witness – admissible to what the witness said and the strength of her identification, but not to the truth of what she said.

*R v Collings & Ors* (1976) NZLR 104 at p 114, applied and cited with approval by *R v Sutton*, unreported SCSA, CCA, 31 August 1990.
*Bliesner v The Queen* (1991) 1 Leg Rep p C1 referred to.

Duty on Crown to adduce evidence from other witnesses of the out of court identification – prosecutor in error

*R v Gorham* (1997) 68 SASR 505 at 509.

*Basha* inquiry not sought at trial (1989) 30 A Crim R 337

Gestures by witness going to identification even if innocently done – jury not dispelled of effect of gestures after the trial Judge's instructions – summing up amounted to a misdirection.

*Craig v R* (1933) 49 CLR 429 at 445, applied.
*Davies and Cody v R* (1937) 57 CLR 170 at 182, applied.
*Kelleher v R* (1974) 131 CLR 534 at 550-551, applied.
*Domican v R* (1992) 173 CLR 555 at 561, applied.

*Alexander v R* (1981) 145 CLR 395, referred to.
*Grbic v Pitkethly* (1992) 110 ALR 577, referred to.
*R v Turnbull* [1977] QB 224 at 228, considered.

Whether verdict unsafe or unsatisfactory.

*Criminal Code* 1983 (NT), s 411

*M v The Queen* (1994) 181 CLR 450 at 492-493, applied.
*Davies and Cody v The King*, supra, at 180, applied.

Upon the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | Mr J Tippett |
| Respondent: | Mr W J Karczewski |

*Solicitors:*

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| Appellant: | Northern Territory Legal Aid Commission |
| Respondent: | Director of Public Prosecutions (NT) |

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Mar20010

IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT DARWIN

*Powers v R* [2000] NTCCA 2
No. CA3 of 1999

BETWEEN:

**JUSTIN ROY POWERS**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: MARTIN CJ, ANGEL & RILEY JJ.

REASONS FOR JUDGMENT

(Delivered 6 June 2000)

**MARTIN CJ**:

[1] The appellant was found guilty by a jury on 10 December 1998 for that on 10 June 1995, at Darwin, he unlawfully caused grievous harm to Stefan Watkin.

[2] Leave to appeal under the grounds dealt with in these reasons was granted by a single Judge of the Court prior to the hearing. The hearing of the appeal, which goes to conviction and sentence, was commenced in May 1999, but interrupted by adjournment in the face of claims then advanced that counsel who appeared at trial was incompetent. The adjournment was granted so that instructions could be taken from the appellant as to whether

he was prepared to waive claims to legal professional privilege so that evidence could be received from his counsel if required. Further delay was caused by the problem faced by this Court in reconvening with the same members after an adjournment. Long standing court commitments made well into the future in the ordinary course by individual Judges make the task difficult. The allegations being advanced against counsel were not pursued upon the resumed hearing, although vestiges of those complaints emerged from time to time in other guises.

[3] The substance of the grounds of appeal went to the probative value of evidence of the identification of the appellant as the assailant, and for that and other reasons, the verdict was unsafe and unsatisfactory. I have taken into account the whole of the evidence at trial.

[4] The Crown case was that the victim in company with others had been at Squires Nightclub ("the nightclub") in Darwin after visiting a number of establishments and having alcoholic drinks. In the early hours of the morning at the nightclub an altercation took place between him and another person, as a result of which he was bodily removed by two security personnel (commonly referred to in the evidence as "bouncers"), and after they had reached the adjoining footpath, one of the bouncers, the appellant, set about the assault alleged by hitting and kicking the victim, particularly about his head whilst he lay on the ground. As a result of that he suffered the harm alleged.

[5] There could not be any doubt that the victim was assaulted during the course of the evening at or near the nightclub or that he suffered grievous harm. The central issue was the identification of the appellant as the assailant, and to a lesser extent whether or not the victim may have suffered his injuries or some of them in the altercation inside the nightclub as opposed to outside.

[6] The difficulties facing the learned trial Judge in supervising the conduct of the trial, and in summing up to the jury at its close, arose from a number of sources. Prior to the jury being empanelled, counsel for the prosecution informed his Honour that when proofing the principal Crown witness, Ms Miethke, the day before he had been informed by her that she had seen the appellant and first recognised him as the assailant at the Court of Summary Jurisdiction prior to the committal proceedings in January 1998, that is, about two and a half years after the assault. The prosecutor also informed his Honour that the witness had said that she had told two other potential witnesses who were with her at the time about it. His Honour was alerted to the fact that the style and colour of the appellant's hair differed from that alleged at the time of the offence. The out of court identification was not led in evidence at the committal, but Ms Miethke identified the appellant as the assailant in the courtroom during the committal proceedings.

[7] Upon being informed by Ms Miethke as to the out of court identification, the prosecutor arranged for the police to prepare a "picture board". The photograph of the appellant used was that taken at the time of his extradition

to the Northern Territory in January 1997, and counsel did not know whether the picture depicted the appellant as he was said to have appeared at the time of the assault or not. The potential value of the exercise was problematic.

[8] The point about the alleged changed hairstyle lay in the Crown case that a feature of the assailant's hair at the time of the alleged offence was described as a "rat's tail", and the appellant was the only person present who met that description. He no longer adopted that hairstyle.

[9] According to counsel, the appellant had left the Territory soon after the assault and there had been no identification parade and no photograph taken of him as he had then appeared.

[10] Counsel for the prosecutor at trial informed the court that the evidence as to the out of court identification at committal was proposed to be led presumably to lay the foundation for the appellant to be pointed out in court as the person previously identified. Counsel for the appellant did not then object to that new evidence being led, nor seek a *Basha* enquiry (1989) 39 A Crim R 337. He had had overnight to seek instructions and consider the matter and appears to have reserved his position until trial. This was one of the matters raised against him, but ultimately not pursued.

[11] It appears that Ms Miethke was the only Crown witness invited to look at the photo board. She did not identify the appellant, and her police statements were provided to the defence. The photo board was brought to

court by the prosecution and available to the defence. No evidence was given about that fruitless exercise.

[12] The appellant was arraigned, pleaded not guilty and the jury empanelled. The first witness, Darryl Milton, worked at the nightclub as a security person with the appellant and others. He saw the appellant on the night of the assault and said that the appellant's hair was then "short all round", "neck length on the back"; "covering the neck". Nothing was said about a rat's tail. In cross-examination, he described a "brawl" inside the nightclub, he intervened, as did the appellant. He saw the appellant pick up a man from the floor whom he described as being "out of it", "smashed", "dazed – confused", "wrecked" and incapable of standing unaided. He went on to say that he and the appellant took the man outside where they "let him go". The witness recognised the victim as that person. He thought the victim had sat down on the footpath. Mr Milton then left the area for a few minutes. When he returned some patrons of the nightclub, who were then on the footpath, were "carrying on", the security guards were there to stop them re-entering the premises, but he saw no physical contact between them and the disaffected patrons.

[13] The evidence of that witness was that the security personnel all wore black pants and a white shirt. (That was common ground). He did not see anyone hose the footpath which he said was usually done every night. There was no evidence that he was in a position to observe whether that activity was undertaken at any time during the course of the night.

[14] Re-examined, he said he could not recall whether the victim had any blood on his face when he was picked up and removed from the club and could not recall whether he had any smashed teeth, an injury, which the Crown put was inflicted by the appellant outside.

[15] The victim had been drinking alcohol throughout the evening at various places before going to the nightclub. In his evidence he recalled being drunk, involved in a fight inside and taken outside. His next recollection was getting up from the ground, "spitting teeth out". He said he had blood down the front of his shirt. He did not identify the persons who removed him from the premises. He suffered significant damage to his teeth on the top left hand side and was told that an X-ray showed his upper jaw had been broken. Six stitches were inserted to a wound under his chin. Subsequent X-rays showed his jaw was also broken underneath his chin. He was unable to say when he sustained any of those injuries except that he knew he was getting a "working over" while on the ground outside, but he could not remember feeling anything. In cross-examination, he conceded that he could not dispute that the injuries may have been sustained in the fight inside. His state of intoxication affected his reliability as a witness.

[16] Another security person, Mr Mark Diederich, said that he noticed a man on the floor of the nightclub who had blood on his face and appeared to be unconscious. He saw that man being removed by the appellant and Mr Milton and lowered to the footpath, he appeared to remain unconscious. He saw that there was some fighting going on outside, but did not see what

if anything, happened to the victim. He was not asked to give a description of the appellant whether by way of hairstyle or otherwise.

[17] Marika Jones had been at the nightclub, but not drinking, had left and gone to sit at a table on a footpath outside a restaurant opposite. She was not associated with the security people, the victim or any of his friends. She said she saw a fight take place outside the nightclub when "one of the bouncers" hit the victim and knocked him out, the bouncer then "laid into him" by hitting and kicking. In the course of examination-in-chief were the following questions and answers:

> "Did you see him before he was kicked or hit? No.
>
> For any – any period of time at all? No.
>
> OK could you give a description of the bouncer who did the hitting? Yes, but that's – he's changed now. So.
>
> No, I'm not asking you now what anyone looks like, but back on that particular night, what was it that the bouncer looked like? Well, at that time, he had black hair and he had a rat's tail."

[18] She went on to describe that he had on a pair of black pants and a white shirt, he was of solid build and was a white person. She put his height at about five feet eight inches or five feet nine inches.

[19] The other bouncer, whom she identified as the previous witness, was not involved in the assault and there were no other bouncers around she said. The reference to the appellant's changed appearance was not elicited by questioning. It is capable of being construed as a reference to the

appellant's appearance at the time of the assault and in court, thus to serve as a possible identification of him as the assailant.

[20] During an adjournment at this stage of the evidence another matter was raised by counsel for the prosecution. He informed his Honour that Ms Jones had never been given an opportunity to identify the appellant (or anyone else) as the assailant, but he had observed in the course of giving her evidence that she pointed towards the appellant on two occasions. Neither his Honour nor counsel for the appellant had noticed any such thing, apparently not looking at the witness at the time. No mention was made by anyone regarding the evidence given as to the appellant's changed appearance. Having heard short submissions as to whether a direction should then be given to the jury, his Honour said he would wait until the evidence was concluded and direct the jury at that time. He did, however, warn the witness before she resumed her evidence, and in the absence of the jury, that she should not give the jury any indication that she was making an identification. The witness said that she had not done so. None of that was led before the jury. It led to an error in the course of summing up.

[21] In cross-examination, Ms Jones said that her view of the scene was unobstructed. She said she saw the victim walking out of the nightclub unaided and she judged him to be drunk because of the way he was walking. She later appeared to resile from her evidence about seeing the victim walk out of the nightclub, but asserted that he had been walking on the footpath and that some minutes elapsed before he was hit in the face, whereupon he

fell down, started bleeding and the security guard kicked him in the rib area. She could not remember any kicks to the face. Someone assisted the victim to his feet after the assault. She did not know the assailant, and was at a distance estimated to be about 30 feet from the scene of the assault. There was no evidence as to the lighting. Her evidence as to the victim's walking on the footpath for some minutes before being assaulted and being kicked in the ribs as opposed to being kicked in the face is at variance with other evidence and casts doubt upon the accuracy of her observations.

[22] The next witness was Ms Miethke, a friend of the victim who had been in his company together with Les Edmunds, Jenny Christopherson and Richard Fuller. The Crown placed considerable weight upon her evidence both at trial and on the hearing of the appeal. Ms Miethke said she had drunk only two beers, and said the group arrived at the nightclub at about 1.30am. Later in the evening she saw the victim and another man involved in a physical altercation at the bar, the other man threw a punch at the victim hitting him in the head. He was not knocked over and responded by pushing or hitting the other man on the shoulder. She saw no blood. However, she had removed herself from the immediate scene to get her handbag and people had moved so as to partly obstruct her view. She saw a bouncer take hold of the victim, hold an arm behind his back and march him out the door. The other bouncer was next to him, just walking.

[23] Ms Miethke described one of the bouncers as about six foot in height, "really big build, olive complexion" and the other had dark hair, a rats tail

and was about five foot seven or five foot eight tall. She said she saw no blood on the victim when he was being taken out. She had not seen him on the floor. Her evidence as to the next series of events was that it was the larger bouncer who had hold of the victim and as soon as they reached the footpath, he pushed the victim – "he just toppled him straight face first onto the footpath". The second bouncer, the shorter of the two, starting kicking the victim in the head. She said she was standing only a metre away and saw three full force kicks. The victim had his hands over his face and was trying to curl up. When the assault stopped the victim got up. He was "very groggy" and she noticed "heaps of blood" for the first time.

[24] The witness returned to her home in Brisbane after the event and later made a statement to police there. She came to Darwin for the committal proceedings, and as related by the prosecutor earlier, told the court at trial that she saw "The defendant. The person were're going to court for. The bouncer". She looked to an upstairs level of the public area of the courthouse, where the committal proceedings took place, and "just recognised the bouncer that had kicked Stefan". She gave no evidence at that stage of having told the other two about it. The prosecutor led her to point out the appellant in the dock.

[25] In cross-examination Ms Miethke conceded that in her police statement made a few weeks after the event she did not mention the dark hair or the rat's tail when describing the shorter of the bouncers. She said she did not then think of those things, but recalled the rats tail probably just before she

was called to give evidence at the committal. In cross-examination she said she told the then prosecutor, Denise Amy, prior to going into court that she recalled the rats tail. She said that when she saw the appellant at the time of the committal his hair was shorter and of a different colour to that at the time of the assault.

[26] She did not know the appellant prior to the events at the nightclub and did not see him again until the committal, but she was firm that he was the same person.

[27] Cross-examined at trial about the identification, she said she told Jenny (Christopherson) and the victim about it when standing downstairs, but did not give evidence of it at the committal as she did not think it was a big deal. The information was not conveyed to the trial prosecutor until he asked her just prior to trial if she could recognise the assailant. It was obvious to her, she said, that the appellant was the person who had been charged when seen in the courtroom during the committal.

[28] As to the assault, her evidence in cross-examination was that the victim may have been on the floor inside the premises before being taken out by the bouncers. Her reaction after the assault was to go back inside the nightclub and seek out the man who had punched the victim there to enquire as to why he had done so. There is no evidence that she or any other person present sought to remonstrate with the outside assailant.

[29] Her adverse attitude to the appellant is revealed in her evidence. When she saw his name on the subpoena served on her prior to committal, and before she saw him at the courthouse, "I knew when I got the subpoena with the name Justin Powers on it that he was the bouncer, I mean it was the gentleman that did it to Stefan". And, again "I knew that this guy had done this to Stefan and I knew that this was the guy we were taking to court …". She also said, "We're going to court to testify against the guy that assaulted Stefan". When she got the summons she thought, "Well this is the guy that did it, this is his name".

[30] Those parts of her evidence indicate that so far as she was concerned, because the appellant had been charged he must have been the assailant and guilty of the assault. Although it was not specifically raised at trial or on appeal, I consider that leads to the possible inference that when she saw him at the courthouse she drew the conclusion that since he was the person charged (as she learned when she entered the courtroom) he must have been the assailant. As to her evidence that she saw him and recognised him outside the courtroom, it will be noted that:

a) it was two and a half years after the event;

b) no time span was put as to the period during which she had him under observation, "I just happened to look up and I just recognised the bouncer that kicked Stefan". She gave no evidence as to any feature that led her to that conclusion;

c) the appellant's hair colour and style had changed in the intervening period;

d) evidence that she had said something about it to the other two potential witnesses was not led from them. In my opinion, the evidence was admissible if it went only to what she said, and the strength of her identification, but not to the truth of what she said:

> "What the identifying witness says or does at the time of the identification may be important in assessing the genuineness of the identification and the confidence with which it is made, and both those factors are important in assessing its reliability"

*R v Collings & Ors* (1976) NZLR 104 at p 114 cited with approval in the judgment of King CJ in *R v Sutton*, unreported Supreme Court of South Australia, Court of Criminal Appeal, 31 August 1990. Cox and Matheson JJ concurring. Reference might also be made to the reasons for refusing the application for special leave in the matter of *Bliesner v The Queen* (1991) 1 Leg Rep p C1. People present at the time of an out of court identification gave evidence of the reaction of a complainant when she identified the applicant as the man who had raped her. Delivering the decision of the court, Brennan J said "… the evidence objected to was in our view admissible to establish the strength of the identifier's identification."

[31] The final witness, Jennifer Christopherson did not see any event in which the victim was struck inside or outside, but she did see him lying on the

footpath “covered in blood”, the blood was “everywhere”, including around the eyes, nose and mouth and on the front of the victim’s shirt. She was not asked about the identification incident at the courthouse prior to committal, nor was Mr Watkin.

[32] The first attack upon his Honour’s summing up related to the way in which he dealt with the question of the gesture said to have been made by Ms Jones, drawn to his attention by the prosecutor. During his general instructions to the jury, his Honour pointed out that they could take into account the body language and gestures made by a witness. In turning to the evidence of Ms Jones, his Honour said that she was not asked whether the appellant was the man that she saw, and went on: “Nor did she imply it by anything she said or by any gesture”. I consider that that was a misdirection. They were matters of fact which, as the jury had been informed, fell to be determined by them. In my opinion, Ms Jones did imply that the appellant was the assailant in the course of her evidence, and, if the prosecutor was right, she had so indicated by way of gesture. The direction favoured the appellant, but if the jury recalled the evidence and saw the gesture, they could have properly disregarded the trial Judge’s direction.

[33] Ms Jones’ evidence to his Honour that she had not made such a gesture or pointed out the appellant was not before the jury and she should have been asked when the members of the jury were present as to whether what she had done was intended to identify him. If that had been done, and appropriate directions given by his Honour, then such effect as her oral evidence or

gestures may have had upon the jury could have been dispelled. There is a real possibility that the jury took into account that evidence and the gesture in coming to the finding of guilt.

[34] The giving of proper directions to a jury in cases involving the purported identification of an accused has been constantly insisted upon.

[35] The example given by Evatt and McTiernan JJ. in *Craig v R* (1933) 49 CLR 429 at 445 demonstrates the point:

> "In criminal cases, where the only real issue is the identity of the accused with the person who was performing some apparently innocent act at a time long before the trial, all the surrounding circumstances have to be carefully considered, for we at once enter what has been described as that branch of proof "so notoriously delicate as proof of identify". A short consideration will demonstrate the truth of this description. An honest witness who says, "The prisoner is the man who drove the car", whilst appearing to affirm a simple, clear and impressive proposition, is really asserting:
>
> (1) that he observed the driver,
>
> (2) that the observation become impressed upon his mind,
>
> (3) that he still retains the original impression,
>
> (4) that such impression has not been affected, altered or replaced, by published portraits of the prisoner, and
>
> (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment, not of resemblance, but of identity.
>
> It therefore become necessary, in the present case, to pay attention to the following circumstances:
>
> (1) Whether the witness was a stranger to the driver of the car,

(2) whether the driver had any special peculiarities which, at the time, impressed themselves upon the witness,

(3) the length of time which elapsed between 14 December and (a) the time when the witness first described the driver or (b) the time when the witness saw the accused person,

(4) the description of the driver given by the witness *before* seeing the prisoner, and

(5) the circumstances under which the prisoner was first seen and identified by the witness as the driver."

[36] In *Davies and Cody v R* (1937) 57 CLR 170 at 182 four Justices in the High Court joined in saying:

> "if a witness whose previous knowledge of the accused man has not made him familiar with his appearance has been shown the accused alone 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.
>
> As the responsibility of convicting must rest with the jury their appreciation of the question is an important consideration, and in a case where the method of identification is open to the objections we have discussed, they should be clearly warned of the dangers, which according to the accepted view, do exist."

[37] Reference might also be made to what fell from Gibbs J in *Kelleher v R* (1974) 131 CLR 534 at p550:

> "… It is now well recognised that grave miscarriages of justice are liable to occur in criminal cases by reason of the fact that witnesses, however honest and careful, may make mistakes in identification

particularly where the person identified was unknown to the witness before the commission of the crime. Experience, including recent experience, has shown that such miscarriages can occur even when all the precautions provided by the law as safeguards against mistaken identification have been fully observed. It is therefore obviously necessary that at a trial where the evidence implicating the accused is evidence that he was identified by a witness or witnesses who were not previously acquainted with him, both judge and jury should be constantly alert to guard against the possibility that the evidence may be mistaken and an innocent man convicted. I would respectfully endorse the words of Lord Morris of Borth-y-Gest in *Arthurs v Attorney-General (Northern Ireland)* (1970) 55 Cr App R 161:

> "It is manifest that in cases where the vital issue is whether the identification of the accused person is certain and reliable the judge must direct the jury with great care. However careful is his general direction as the onus of proof, the judge will feel it necessary to deal specifically with all the matters relating to identification."

[38] And later at p 551:

> "However, it seems to me that although it is perfectly true that the adequacy of a summing up can only be decided in the light of the circumstances of the particular case, and that where a warning is necessary no particular form of words is required, it is in practice generally desirable that where the case for the prosecution includes evidence of visual identification by a person previously unfamiliar with the accused, an appropriate warning should be given to the jury, since jurors may not appreciate as fully as a judge may do, or even at all, the serious risk that always exists that evidence of that kind may be mistaken. The failure to give an adequate warning where one is required may have the result that the conviction must be quashed – a course that has been taken in a number of recent cases in Australia: *R v Gaunt* [1964] NSWR 864; *R v Preston* [1961] VR 761; *R v Boardman* [1969] VR 151; *R v Maarroui* (1970) 92 WN (NSW) 757; *R v Goode* [1970] SASR 69; *R v Harris* (1971) 1 SASR 447. If a warning is necessary, the duty to give it will not be satisfactorily discharged by the perfunctory or halfhearted repetition of a formula, and a warning in general terms will not alone be sufficient; the jury should be given careful guidance as the circumstances of the particular case, and their attention should be drawn to any weaknesses in the identification evidence."

[39] The position was summarised by the High Court in *Domican v R* (1992) 173 CLR 555 at p 561:

> "… the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that courts of criminal appeal and ultimate appellate courts have felt obliged to lay down special rules in relation to the directions which a judge must give in criminal trials where identification is a significant issue.
>
> 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: *Kelleher v R* (1974) 131 CLR 534 at 551; 4 ALR 450 at 466; *R v Turnbull* [1977] QB 224 at 228; *R v Burchielli* [1981] VR 611 at 616-19; *R v Bartels* (1986) 44 SASR 260 at 270-1. The terms of the warning need not follow any particular formula: *R v De-Cressac* (1985) 1 NSWLR 381 at 384; *R v Finn* (1988) 34 A Crim R 425 at 435-6. But it must be cogent and effective: *R v Dickson* [1983] 1 VR 227 at 230; *Reid (Junior) v R* [1990] 1 AC 363 at 380. It must be appropriate to the circumstances of the case: *R v Aziz* [1982] 2 NSWLR 322 at 328; *R v Allen* (1984) 16 A Crim R 441 at 444-5. 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": *Smith v R* (1990) 64 ALJR 588 at 588. A warning in general terms is insufficient. The attention of the jury "should be drawn to any weaknesses in the identification evidence": *Kelleher v R* (1974) 131 CLR at 551; 4 ALR 450 at 466. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it: *Davies & Cody v R* (1937) 57 CLR 170 at 182-3. 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."

[40] The cases also demonstrate that attention should be paid to an examination of the circumstances in which the identification by each witness came to be made. For example, how long did the witness have the accused under observation? At what distance? In what light? Was the observation

impeded in any way, for example, by passing traffic or other people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? For example, Lord Widgery CJ in *R v Turnbull* [1977] QB 224 at p 228.

[41] In his general directions to the jury concerning matters to be considered in relation to the acceptance of evidence, his Honour touched upon the issue of the position of witnesses to see and hear that about which they were speaking, how far they were from the incident, what were the conditions like, what was the lighting like, were there any other distractions, were there objects or things or people which may have interfered with what they were looking at. He also said that it would be important for members of the jury to bear in mind whether any witness particularly linking the accused as being the person who was said to have punched or kicked the victim was likely to have had a good memory of what it is that they saw and were able to give a satisfactory account in detail of those events, bearing in mind the time which had elapsed from the date of the offence, June 1995 to date of trial, December 1998.

[42] In the light of those general directions, his Honour then turned to outline to the jury the elements of the offence and the alternative charged, and explained the law in relation to proof of each of them.

[43] Turning specifically to identification evidence, his Honour told the jury that the Crown relied principally on the evidence of Ms Miethke, and, incorrectly, in my view (see par [32] and par [33]), that there was no other witness who specifically identified the accused as the person responsible, although there was other evidence which the jury might think was supportive of Ms Miethke's evidence. He went on to warn the jury of the need to be particularly careful and cautious before convicting the accused in reliance upon the correctness of the evidence which purported to identify the accused as the perpetrator:

> "It is the experience of the courts that grave miscarriages of justice are liable to occur in criminal cases by reason of the fact that witnesses, no matter how careful and honest they are, may make mistakes in identification, particularly where the person identified was unknown to the witness before the commission of the crime."

[44] His Honour referred to one of the dangers in regard to the evidence of Ms Miethke being that she had not seen the alleged perpetrator for two and a half years until the committal hearing, and may have too readily come to believe that the person she saw at the committal was the man that she had seen previously. She may have displaced in her mind the memory of the accused at the committal for the memory of the person that she saw on 10 June 1995. There having been no identification lineup, his Honour told

the jury that it must be especially careful and cautious to guard against the possibility that the evidence of identification relied upon by the Crown may be mistaken and thus an innocent man convicted (*Alexander v R* (1981) 145 CLR 395; *Grbic v Pitkethly* (1992) 110 ALR 577). That may be so even if the witness is both honest and convincing. Going to the evidence of Ms Miethke, his Honour then directed the attention of the jury to the evidence as to how long she said she had the perpetrator under observation at the time of the incident, both inside and outside the nightclub, and reminded them that she was not asked any questions about what view she had of the face of the perpetrator. His Honour then moved on to consider the evidence about how close the witness was to the perpetrator and noted that she said that when outside she was only about a metre away when the kicks were being administered and she had said that she was concerned about the victim, he being a good friend of hers. There was no evidence of the lighting conditions, but no one had said that they could not see what was going on because it was too dark.

[45] His Honour reviewed the evidence regarding whether or not the observations of Ms Miethke or any other witness who may have given evidence going to the identification of the perpetrator at the scene was impeded by traffic or other people. He raised as an important matter the fact that no witness gave evidence that they had known the perpetrator prior to the event on the footpath outside the nightclub. On the question as to whether Ms Miethke may have had some particular reason to identify and remember the

perpetrator, her reply was directed to the fact that her friend was getting his head kicked in and she was watching that. His Honour reminded the jury that it was some weeks after the incident that she gave a statement to police and that in that statement she made no reference to the rat's tail or dark hair and her explanation for that.

[46] As to the identification of the appellant by Ms Miethke as the perpetrator at the committal, his Honour posed the question for the jury as to whether it was possible that she may have guessed that the person she then saw was the accused and therefore assumed it was the perpetrator. His Honour categorised that as "an important question" and relayed to the jury the evidence given by Ms Miethke. Having read the evidence, his Honour made no comment beyond saying that the circumstances were thus identified. No comment was made upon the failure of Ms Christopherson or the victim to say anything to support Ms Miethke's out of court identification.

[47] His Honour posed a further question as to whether it was possible that she identified the accused because he was one of the bouncers that she saw that night, but not necessarily the person who assaulted the victim.

[48] It was not suggested, either at trial or on appeal, that since Ms Miethke had made up her mind that the person named on the subpoena was the perpetrator, and when she saw him in court as the accused she came to the conclusion that he must have been the perpetrator, it was possible that she thereafter recalled seeing him outside. Her evidence that she spontaneously

first recognised him out of court was not challenged in any meaningful way, but was unsupported by the people whom she said were present and whom she told about it.

[49] His Honour spoke to the jury about whether the identification made by Ms Miethke at the scene was supported by any other witness. He referred to the evidence of Ms Jones who had given a description which his Honour said it might be thought, in some respects, supported the evidence of Ms Miethke. He suggested to the jury that they should ask the same sort of questions about the reliability of Ms Jones' observations, that is, how long did she have to observe him, the fact that she only gave a description and did not identify the accused as the person that she had seen.

[50] His Honour then went on to make the remarks to which reference has previously been made, which, with respect, I consider, was in error, that is, that she did not imply identification by anything she said or by any gesture. His Honour reminded the jury that she was sitting across the road at an estimated distance of at least 30 feet, that her observations were not impeded, she did not claim to know the person, but that she was an independent witness who had no particular relationship with either the accused or the victim.

[51] Turning to her evidence as to identification, he reminded the jury that Ms Jones said that she had seen the previous witness, Mark Diederich "grab the hose and wash blood off the concrete". No further remark was made

about that, but it seems to me that if that evidence were accepted by the jury it would be prejudicial to the accused, and unfairly so, because there was evidence that the hosing down of the path was a regular event. It might also be thought that at the distance she observed that action, it would be difficult for the witness to have identified the substance, if any, that was being hosed off the footpath.

[52] Ms Jones gave a description of the bouncer which is set out above. His Honour also relayed the evidence given by Ms Jones that the victim had been on the footpath walking around for five or ten minutes before he was assaulted. I note that that evidence was not consistent with any other version of the events.

[53] The learned trial Judge then directed his attention to other issues in the trial, such as whether the injuries the victim sustained may have been caused in the altercation inside the nightclub, and especially the victim's own evidence that he could not entirely dispute that his jaw could have been broken in that incident. The jury was reminded of the evidence of some of the witnesses concerning the appearance of blood on the victim's face.

[54] Concluding his summing up to the jury, his Honour reminded the jury of the submissions made by counsel for the prosecution and the appellant.

[55] The Crown case was particularly dependent upon the rat's tail identifying feature of the assailant's hairstyle. Assuming that evidence to have been accurate, there was no evidence as to the extent of that hairstyle at the time

of the offence, either generally, or amongst security personnel. There was no other distinguishing feature of the assailant described, except that he was the shorter of two security personnel seen to be there.

[56] It is trite that it is for the Crown to prove its case beyond reasonable doubt, and that it is not upon the accused by cross-examination of witnesses or otherwise to fill in the gaps which it is for the Crown to fill. In my opinion, Ms Miethke, having given evidence as to what she did when she identified the appellant out of court, it was for the Crown to endeavour to adduce evidence from the other two witnesses on the point. I think it was an error for the prosecutor to come to the view, expressed to his Honour in the absence of the jury, that Ms Miethke's telling the others was "neither here nor there".

[57] I agree, with respect, with the observations of Duggan J in *R v Gorham* (1997) 68 SASR 505 at p 509:

> "If it is alleged that an identification has taken place outside the courtroom but in the precincts of the court at about the time of the hearing, it is important for the prosecution to lead evidence of all the relevant circumstances. The dangers associated with this type of identification include the element of suggestion by reason of an expectation that the accused will be attending court and the possibility that he or she will be in the presence of persons associated with the case such as fellow accused or counsel acting in the case: *Grbic v Pitkethly*; *R v Martin* [1994] Crim LR 218. It is also important to know the details of any conversation which might have taken place at the time of the identification between the witness and police officers or other persons associated with the prosecution."

[58] Ms Miethke's state of mind, and the lack of detail of the identification out of court at the committal, the possibility of her having recalled seeing the appellant out of court after identifying him in court, were all factors which, in my opinion, should have created doubt in the minds of the jury as to her reliability.

[59] No other witness made a satisfactory identification. In so far as the rat's tail was said to be a feature, those who knew the appellant best gave no evidence of it, although it must be conceded they may have been biased. If he had one at the time of the assault, it was gone when he was next seen by any of the witnesses. There was no evidence as to just how common that hairstyle was at the time of the offence.

[60] Counsel for the Crown upon the appeal, in his typically thorough manner, provided the court with detailed submissions, orally and in writing, as to the law and by way of review of the whole of the evidence, urging the court to accept the verdict of the jury, they having the benefit of observing the witnesses.

[61] Notwithstanding the errors and deficiencies I have identified, it is necessary to consider whether, bearing in mind the provisions of s 411 of the *Criminal Code* 1983 (NT), the verdict should be set aside. It is in similar terms to s 6(1) of the *Criminal Appeal Act* 1912 (NSW). Speaking of that and similar provisions in *M v The Queen* (1994) 181 CLR 450, Mason CJ, Deane, Dawson and Toohey JJ at p 492-493 said:

"Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as "unjust or unsafe", see *Davies and Cody v The King* (1937), 57 CLR 170, at p 180, or "dangerous or unsafe" see *Ratten v The Queen* (1974), 131 CLR, at p 515. In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict, see *Raspor v The Queen* (1958), 99 CLR 346, at pp 350-351; *Plomp v The Queen* (1963), 110 CLR 234, at pp 246, 250. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence *Morris v The Queen* (1987) 163 CLR 454 and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand", see *Hayes v The Queen* (1973) 47 ALJR 603, at p 604. But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be "unreasonable" or incapable of being "supported having regard to the evidence". A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside. In speaking of the *Criminal Appeal Act* in *Hargan v The King*, (1919) 27 CLR 13, at p 23, Isaacs J said:

> "If [the appellant] can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance."

And as the Court observed in *Davies and Cody v The King* (1937) 57 CLR 170, at p 180, the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers:

> "not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner

in which it has been reached, the jury may have been mistaken or misled."

Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty, see *Whitehorn v The Queen* (1983) 152 CLR, at p 686; *Chamberlain v The Queen [No 2]* (1984) 153 CLR, at p 532; *Knight v The Queen* (1992) 175 CLR 495, at pp 504-505, 511. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations" *Chamberlain* at p 621.

[62] Bearing in mind this guidance, I am of the opinion that upon the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In coming to that view I do not disregard or discount the jury's primary responsibility or the consideration that the jury had the benefit of having seen and heard the witnesses. I have paid full regard to those considerations.

[63] I would allow the appeal, quash the finding of guilt and order a new trial.

**ANGEL J**:

[64] The central issue at the trial was one of identification. The evidence of the Crown witness Miethke was central to the Crown case. She identified the appellant as the assailant within the precincts of the lower court house prior to giving evidence at the committal. She did so in the presence of two other witnesses to whom she spoke at the time of the identification. Neither of

those witnesses gave evidence of the circumstances of identification at the trial. All the relevant circumstances of the identification were thus not put before the jury as they ought to have been: *Gorham* (1997) 68 SASR 505 at 509. As in that case, so here; the whole topic of Miethke's out of court identification of the appellant was left in a most unsatisfactory state and the jurors were given no assistance as to the manner in which they should assess Miethke's evidence in relation to the value of that identification, absent what she said and did at the time. The unsatisfactory state of the evidence and the lack of adequate direction in this regard means the appeal must be allowed, the jury verdict set aside and a re-trial ordered.

**RILEY J**:

[65] The facts and issues to be decided in this matter are set out in the judgment of Martin CJ which I have had the benefit of reading. I agree with the conclusion of his Honour that the appeal must be allowed and I agree with the orders he proposes.

[66] In my view it is sufficient to resolve this matter by reference to two issues raised in the course of argument. The first centres upon the "in court identification" of the appellant as the assailant by the witness, Marika Jones. Ms Jones was not invited to make an identification of the appellant. However, during the trial, and in the absence of the jury, counsel for the prosecution advised his Honour that he had observed the witness and "when she talked about the bouncer who did it she pointed towards the accused".

She did that on two occasions, neither of which was observed by his Honour or counsel for the appellant. When asked, the witness denied having indicated that the appellant was the person she had seen assault the victim. His Honour warned the witness to be careful that she should not "give the jury anything to believe that (she was) making an identification." Nothing was said in the presence of the jury.

[67] Nothing further was said on the topic until his Honour gave his directions to the jury at the conclusion of the evidence. At that time, his Honour indicated to the jury that Ms Jones did not identify the appellant as the assailant and "nor did she imply it by anything she said or by any gesture". This, of course, was a matter of fact for the jury to determine. I agree with Martin CJ that there was a real possibility that the jury took into account the evidence of identification that resulted from Ms Jones pointing towards the appellant in the manner described by the prosecutor. That evidence was not the subject of any direction or warnings to the jury as to the dangers associated with that particular identification. In this regard error occurred.

[68] Further, it was an error on the part of counsel for the prosecution to fail to lead evidence regarding all of the relevant circumstances of the identification of the appellant by Ms Miethke in the precincts of the Court at the time of the committal hearing. I agree with the observations of Duggan J in *R v Gorham* (1997) 68 SASR 505 at 509. Those observations are set out in the judgment of the Chief Justice.

[69] For these reasons the appeal must be allowed and the finding of guilt quashed. I agree that a re-trial should take place.

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