Hayes v Burgoyne [2003] NTSC 62

PARTIES:	HAYES, Charles
	v
	BURGOYNE, Robert Roland
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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*Criminal Code*1999 (NT), s 212(2), s 277 and s 188(2)

Domican v R (1992) 173 CLR 555 at 561; *Grbic v Pitkethly* (1992) 110 ALR 577 at p 588; *Parker v Espinoza* (1996) 85 A Crim R 336 at p 340, considered; *Alexander v R* (1980) 145 CLR 395 at 426, considered. *Sharrett v Gill* (1993) 65 A Crim R 44, referred.

REPRESENTATION:

Counsel:

Appellant:	S O'Connell
Respondent:	C Roberts

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

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

Hayes v Burgoyne [2003] NTSC 62
No. JA 70 of 2002

BETWEEN:

CHARLES HAYES
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 30 May 2003)

[1] Appeal against conviction. The appellant was convicted after trial before the Court of Summary Jurisdiction at Alice Springs for assault and associated criminal conduct. The identity of the assailant was the issue.

[2] The victim was in a car park preparing to go shopping at Coles and was arranging the handle on a pram in which one of her young children was placed. The other child, a three year old, was standing nearby. The victim looked up and saw the offender who had approached her and then demanded money, which she refused. The offender pulled a knife from a trouser pocket and extended his left arm towards the victim and again demanded money. She was concerned to protect her elder child and placed the child

behind her, but without taking her eyes off the offender. She stood her ground, brushed away the offender's arm and punched him. He fell down and she gathered up the children, departed and reported the matter to the police.

[3] Her evidence was that she had looked into the offender's face when he approached and that he came within a metre of her. The tip of the knife was extended to about 10 centimetres from her chin before she pushed it aside. In her opinion the time which elapsed when he first approached until the incident was over was one or two minutes but accepted it was all over fairly quickly. The event took place in broad daylight.

[4] The victim's evidence of her recollection of the description of the man as she had given it to the police was that she could not remember his footwear; he was slightly taller than she, about a head taller; he had scruffy, pointy, messy, spiky hair, it was all ratty like it had not been taken care of, he had red squinty eyes and a scar on the inside of his left arm. She remembered that distinctly. She said that she thought he was clean shaven, about 19 years of age. She did not remember seeing any facial hair. He was an Aboriginal who had a "big nose, wide nose … like an Aboriginal nose". He had red eyes.

[5] In court the victim described the scar as a result of a "quick glance" because most of the time she was looking the offender in his eyes. She indicated the scar was about four to five inches long, but she was not really paying

attention, having just seen it as he put the knife up to her. She noticed there was a lighter mark of skin on his arm, it was maybe a centimetre or two wide, "I just remember there was a lighter patch of skin". In cross-examination she confirmed that she saw just the one lighter patch of skin that ran lengthways down the arm.

[6] Within a very short time after reporting the matter to police, the victim was taken to the police station and made her statement. Whilst there, a composite representation of the face of the person described by her was prepared -–it is commonly known as a "Comfit". It is compiled by showing to the witness a number of examples of facial features, such as the nose, ears and eyes etc, the witness picks out that which most closely resembles the person being identified and all the parts are then put together by the police. That procedure was followed and when shown the result, the victim noticed two things about it which required to be changed, the representation of the hair and of the eyes. Adjustments were made and she was shown the second example. The police evidence was that when shown the second picture she indicated that she was happy with it and that it was a 90 percent likeness.

[7] The first picture was received as an exhibit before the Court of Summary Jurisdiction, but the second was not. However, the second picture was shown to the victim in the course of the proceedings and she told the court, "I don't know the person. Its got a different mouth and I don't know it, sorry".

[8] A day or two after the attack, police, armed with a description given by the victim and the second picture, but with no additional information as to the identity of the offender, spoke to the appellant in the mall in Alice Springs. They did that because of his likeness to that picture. At that time they also noticed a scar on the inside of his left arm and that apparently caused them to suspect him of being the offender.

[9] The appellant was then arrested and informed that he did not have to say anything, but anything he did say may be given in evidence and that he may communicate with a friend or relative. At the police station enquiries were made as to the language which he spoke and whether he wished to have a person come in as his friend. He nominated his father and unsuccessful attempts were made to locate him. Police also advised the Central Australian Aboriginal Legal Aid Service that the appellant was in custody. He was a juvenile. A person from the Service attended prior to the appellant being interviewed by police and it may be safely inferred that he then received legal advice. The police interviewed the appellant in the presence of a friend and interpreter. There was no evidence as to whether the conditions calling for the presence of an interpreter prevailed or as to whether the interpreter was needed to interpret. It appears that the interpreter, at least, left at the conclusion of the interview. About an hour later the appellant was invited to take part in an identification parade, the nature of it was explained to him and he declined.

[10] Nothing further appears to have been done relating to investigation of the matter until the day before the commencement of the trial when it was recognised that identification of the appellant as the offender was an issue. Steps were taken to prepare a photo board. Upon receiving a digital photograph of the suspect or defendant it is inserted into a photo board containing persons of similar likeness. The boards are pre-prepared and contain 12 photographs in a computer generated folder. A selection is made of the board which contains photographs closely resembling the description of the suspect. The photograph bearing the least likeness is removed and that of the suspect inserted. If there are any features of the suspect that are quite unusual or distinguishing, then those are added to all other persons depicted on the board. In the case of the appellant, the distinguishing features comprised his hair, a cut above his left eye and a light moustache. Those features of the appellant were simply transferred onto the face of the other persons depicted on the board. The result was that all persons had exactly the same hair, a cut over the eye and light moustache. An examination of the board shows that not all the persons depicted could be described as full blood Aboriginal and not all had broad or big noses.

[11] The victim was invited to attend at the police station late on the afternoon prior to the day fixed for the commencement of trial and there shown the photo board. She had her three year old daughter with her, but does not appear to have been distracted by the child's activities whilst the process of examination proceeded. She was told that the person involved in the

incident may or may not be amongst the photographs. The process was recorded on audio and videotape which was placed into evidence.

[12] The victim appears to have looked at the photographs, and after a short interval pointed to the one which, it is common ground, was that of the appellant. She gave the appearance of being confident in her identification and said that she was sure the person depicted in the photograph, to which she had pointed, was the offender.

[13] There was no other evidence to connect the appellant with the offences charged.

[14] Cross-examined about the photographs on the board, the victim said that she would describe about nine of the men as being full blood Aboriginals. They all had the same hairstyle which she figured must have been something the police had done. She also noticed that each of the men depicted had scratches above his eye and said that that had nothing to do with her. None of the men were depicted as squinting and it was noted that all the faces shown had light moustaches. An attempt was made at an in court identification of the appellant but the learned Magistrate refused to permit that to be done.

[15] A number of questions were put to the police officer who prepared the photo board directed at showing features of the photographs which would make someone stand out as not fitting the description of the offender, such as, slightly misplaced arrangements of the hair, facial colouring and facial hair.

The suggestion made was that because of the various differences a number of the photographs could be immediately disregarded thus limiting those to be taken into account by the victim to somewhat less than 12. However, much of what was put to the police officer had not been put to the victim and thus she was not given the opportunity to consider whether or not those matters had any influence upon her identification of the appellant. Furthermore, in so far as the questions in cross-examination were leading and thus directing the concentration of the police witness upon what may be called exclusionary factors, they do not carry much weight. Whether those factors had any influence upon the mind of the victim is not known.

[16] It is not suggested that at any time after the incident the victim had seen the appellant in a situation where it might occur to her that he was the accused person. Indeed, there is no evidence that she saw him at any time before the offences were committed or thereafter, until she gave evidence. There was no "displacement effect". There was nothing which would convey to the observer that the photograph of the appellant stood in any different class to any of the others, concern about the "rogues gallery" effect may also be discounted. Although the accused was not present when the identification was made, there was the audio and videotape recording of the process which clearly discloses what was said and what was done. There is no suggestion that anything occurred as between the police and the victim at any time prior to that which could have influenced her identification.

[17] What is suggested by the appellant is that notwithstanding the apparent credibility of the victim when she identified him by reference to his picture on the photo board, she should not be regarded as being reliable.

[18] In *Domican v R* (1992) 173 CLR 555 at 561-2 Mason CJ, Dean, Dawson, Toohey, Gaudron and McHugh JJ said:

> "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. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed "as to the factors which may affect the consideration of (the identification) evidence in the circumstances of the particular case". A warning in general terms is insufficient. The attention of the jury "should be drawn to any weakness in the identification evidence". 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. 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."

[19] Here, the only proof of guilt directed to the appellant was the identification evidence. There is nothing to support it. The same principles have been held to apply to a Magistrate sitting alone. In *Grbic v Pitkethly* (1992) 110 ALR 577 at p 588, Sheppard J said:

> "In a case tried without a jury, the tribunal will not usually reject the evidence, but it will be faced with the question whether, in the light of the totality of the evidence, it can safely conclude that it has been established beyond reasonable doubt that the crime was committed by the accused. In reaching its conclusion, the tribunal must give itself the appropriate warnings of the dangers inherent in identification evidence in cases where the accused was not

> previously known to the witnesses. It then needs to consider those warnings and to be sure that it has heeded them. This does not mean that it is to be overawed by them, but it needs to pay them real attention".

[20] In *Sharrett v Gill* (1993) 65 A Crim R 44 Miles CJ (from whom the appeal was brought in *Grbic*) followed what was there said on this subject and see also *Parker v Espinoza*, a decision of Anderson J of the Supreme Court of Western Australia (1996) 85 A Crim R 336 at p 340:

> "Where there are points of weakness in the identification evidence in a non-jury trial, these cases hold that the tribunal is required to identify those weaknesses and expressly warn itself of the relevant dangers. Where the tribunal does not expressly do so, it commits an error of law."

[21] In *Alexander v R* (1980) 145 CLR 395 at 426 Mason J said:

> "Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognising on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection … ".

[22] In *Grbic* at p 593 Vondoussa J added:

> "A confident and credible witness who makes an unequivocal identification is no less subject to these variable factors than any other person".

[23] Apart from these general observations there were two particular features of the evidence of the victim which cast doubt upon her reliability. The first goes to the conflicting opinion as to the second of the Comfit pictures. She thought it was a 90 percent likeness when shown it at the police station, but

disavowed any recognition of the same pictorial representation of the alleged offender when shown it at trial. That was the picture upon which the arresting police relied in detaining the appellant.

[24] The second matter concerns the scar on the inside of the left forearm which was variously described by the appellant in court. It is difficult to determine just what it was that she had seen. That may well be accounted for by the circumstances in which she saw it, including the little time she had to observe, when she was concentrating on the offender's eyes. The observation made by police at the time of the arrest was that of a scar on the inside of the appellant's left forearm of three centimetres in length. The appellant showed his arm in open court and the police officer who observed it agreed in his evidence that there were a number of scars in that area and not just running down.

[25] In her ruling on the admissibility of the photo board evidence, the learned Magistrate reminded herself of the law to be found in *Alexander's* case and referred to the decision of Mildren J in *R v Dawson* (1994) 3 NTJ 1725 where his Honour reviewed a number of authorities to do with the admissibility of identification made out of court by the use of photographs.

[26] Her Worship then undertook a review of the manner in which the photographs on the board were produced and of the criticisms made as to the methodology employed and the type of argument, to which I have referred, advanced before her. Her Worship ruled:

> "I consider that the images which have been generated in this case are realistic and that they are a reasonable likeness to the defendant to be a reasonable representation."

On that basis the evidence was admitted. But having admitted the evidence the question arose at the conclusion of the hearing of all of the evidence in the case as to the weight which should be attributed to it.

[27] When giving reasons for her finding the offence proved, dealing with the second Comfit picture and the conflict of evidence about it, her Worship said:

> "Whatever the case, the fact is that it was not a photograph of any person. It was a document prepared of a person with similar features. That document merely forms the basis of Constable Kinghorn's belief that the defendant was of similar appearance. It also provides a pictorial representation of the description of the offender, which was given by (the victim)".

I consider that observation as to the usefulness of the second Comfit picture overlooks the conflicting opinion of the victim at the police station and then in court. The lapse of time between those opinions was just a day longer than that between the incident and the identification from the photo board.

[28] As to the scar, her Worship reminded herself of the evidence of Constable Kinghorn that he noted a scar on the appellant's left arm when he spoke to him in the mall, and he was aware that the victim had mentioned a scar in her statement. Her Worship also noted there was nothing in the evidence as to any exact description that the victim may have given to the police. Her Worship proceeded:

> "He noted the defendant had a scar on the inside of his left forearm, about three centimetres long and travelling down the arm. He says that the scar was on the underside of the arm. Constable Kinghorn agreed in court that the defendant did not have such a scar as at 27 February 2002."

[29] Later in her reasons her Worship turned to the evidence of the victim:

> "The description of the scar by (the victim) places it in the same location as Constable Kinghorn, although he says it was three centimetres long, whereas she indicated about four to five inches in court. She says that she saw it only briefly. She recalls it and she saw it when the offender raised the knife to her and the knife was in his left hand. It is quite apparent from her evidence that her viewing of the offender was brief and that it occurred in circumstances where she must have been very frightened. It also occurred in circumstances where she must have been concerned for the welfare of her children. Nevertheless, I am satisfied beyond reasonable doubt, the defendant had such a scar on the date when he was seen by Constable Kinghorn, that is two days after the offence. Further, despite the variation in the description of the length of the scar I am satisfied that there is a very close correlation in the evidence of Constable Kinghorn and (the victim) as to the scar that they observed."

[30] Her Worship does not appear to have taken into account in her reasons what was disclosed by the appellant when he displayed his arm in court. Her Worship continued by expressing herself satisfied that the scar corroborates the victim's evidence of identification:

> "Allowing for the inherently unreliable nature of identification evidence I am nevertheless satisfied, beyond reasonable doubt, that the prosecution has established the guilt of the defendant and accordingly I find him guilty as charged."

[31] In my opinion her Worship discounted the conflicts in the evidence concerning the scar. The evidence, in my opinion, is in such disarray as to make it difficult to accept that the victim and the police noticed the same

mark on the inside of the appellant's left forearm. It provides a tenuous basis for making a finding of guilt of a criminal offence especially where there is no other reliable evidence linking the accused with the commission of the offence. I can only conclude that, with respect to her Worship, she did not pay sufficient heed to the warning required to be observed.

[32] Further arguments were addressed by counsel for the appellant in regard to what was said to be unfairness in relation to the failure to conduct an identification parade, but given the view I have taken as to the identification evidence, it is unnecessary for me to consider that issue.

[33] The conviction is quashed.
