

Dennis v Davis [2010] NTSC 35

PARTIES:

DENNIS, Gregory James

v

DAVIS, Stuart Axtell

TITLE OF COURT:

SUPREME COURT OF THE
NORTHERN TERRITORY OF
AUSTRALIA T DARWIN

JURISDICTION:

SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO:

JA 52 of 2009 (20916544)

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JUDGMENT OF:

SOUTHWOOD J

APPEALED FROM:

WALLACE SM

CATCHWORDS:

CRIMINAL LAW – Appeal against convictions – miscarriage of justice – identification evidence – need for magistrates to expressly warn themselves about identification evidence – circumstantial evidence – verdict not supported by the evidence – appeal allowed – convictions set aside – retrial ordered – appellant acquitted of one count of assault

Criminal Code s 188(1) and (2)(b)(c) and (k)

Criminal Procedure Act 1986 (NSW).

AK v Western Australia (2008) 243 ALR 409

Alexander (1981) 145 CLR 395

Bulejcik v The Queen (1996) 185 CLR 375
Burnett and Others v Director of Public Prosecutions and Another (2007) 21 NTLR 39
Boylan v Farthing (unreported, Supreme Court, SA, Full Court, No 94-1276, 27 April 1995).
Davies (1937) 57 CLR 170
Domican (1992) 173 CLR 555
Fleming v The Queen (1998) 197 CLR 250
Gikas v Police (1999) 202 LSJS 301
Grbic v Pitkethly (1992) 38 FCR 95
R v Green (2001) 78 SASR 463
Harwood v Police (1998) 71 SASR 300
Johnson v Giumelli (2003) 175 FLR 467
Kelleher (1994) 131 CLR 534
Kotz v Police (1999) 705 LSJS 176
Longman v The Queen (1989) 168 CLR 79
M v The Queen (1994) 181 CLR 487
Mifsud v Campbell (1991) 21 NSWLR 725
Mombasa Pty Ltd v Nikic (1987) 89 FLR 411
Moores v Renting [2007] WASC 256
Parker v Espinoza (1996) 85 A Crim R 336
Peacock v The King (1911) 13 CLR 619
Pettit v Dunkley (1971) 1 NSWLR 376
Plomp v The Queen (1963) 110 CLR 234
Ex parte Powter; Re Powter (1945) 46 SR (NSW) 1
Reid v Police [1999] SASC 474
Renehan v Leeuwin Ocean Adventure Foundation Limited (2006) 17 NTLR 124
Sharrett v Gill (1993) 65 A Crim R 44
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247
Stirling v Police (1999) 30 MVR 123
Tatam v Svikart [1999] NTSC 54.

Australian Criminal Trials (Butterworths)

REPRESENTATION:

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Respondent: M Nathan

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Respondent: Office of the Director of Public
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Dennis v Davis [2010] NTSC 35
No. JA 52 of 2009 (20916544)

BETWEEN:

GREGORY JAMES DENNIS
Appellant

AND:

STUART AXTELL DAVIS
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 30 June 2010)

Introduction

- [1] The appellant appeals against his convictions, and a sentence of seven days actual imprisonment imposed on him by the Court of Summary Jurisdiction.
- [2] On 17 December 2009, following a trial in the Court of Summary Jurisdiction, the trial magistrate found the appellant guilty of three counts of assault, each with circumstances of aggravation, contrary to s 188(1) and s 188(2) of the *Criminal Code*. The assaults were found to have been committed in the wave pool in Darwin on 17 May 2009. The victims of the assaults were respectively Miss TE, Miss RH and Miss AH. The circumstances of aggravation of the assault involving Miss TE were that

Miss TE was a female and the appellant was a male; and Miss TE was under 16 years of age¹. The circumstances of aggravation of both the assault involving Miss RH and the assault involving Miss AH were that: the appellant was a male and each of the complainants was a female; each of the complainants was under the age of 16 years of age; and each of the complainants was indecently assaulted².

- [3] The prosecution case was that on 17 May 2009 the appellant, who is an adult male, attended at the wave pool in Darwin with his step-son. While he was in the wave pool he assaulted Miss TE, Miss RH and Miss AH all of whom were young females then 14 years of age. The appellant assaulted Miss TE by placing his hands on her hips. He assaulted Miss RH by grabbing her bottom with one hand; and he assaulted Miss AH by grabbing her hip, her bottom and one of her breasts. The appellant was unknown to the complainants and an important issue in the case was the sufficiency and reliability of the identification evidence of the complainants.
- [4] For the assault against Miss TE the appellant was convicted and fined \$1000. He was ordered to pay a victim's levy of \$40. For each of the assaults against Miss RH and Miss AH, the appellant was convicted and sentenced to three months imprisonment. The sentences of imprisonment were ordered to be served concurrently and the aggregate sentence of three months imprisonment was to be suspended after the offender had served

¹ Section 188(2)(b) and (c) of the Criminal Code

² Section 188(2)(b)(c) and (k) of the Criminal Code

seven days in prison. Under s 40(6) of the *Sentencing Act (NT)*, the trial magistrate specified an operational period of three years during which the offender was to be of good behaviour.

Grounds of appeal

[5] The appellant relies on the following grounds of appeal³:

1. The trial magistrate erred in law by failing to warn or adequately warn himself of the dangers associated with relying upon the identification evidence lead at the hearing.
2. The learned magistrate erred in law by failing to give adequate reasons or any reasons at all for relying on the evidence of identification lead at the hearing in circumstances where he should have warned himself of the danger of relying on such evidence and given reasons that included the identification of the particular dangers inherent in relying on the evidence and reasons why those dangers did not preclude him from relying on the evidence in this particular case.
3. The learned magistrate erred in law in that he failed to give reasons as to why the circumstances alleged supported a conclusion that the two girls had been indecently assaulted.
4. The learned magistrate erred in law in that he failed to give reasons as to why the charge of aggravated assault of Miss TE was made out in circumstances where a reasonable hypothesis consistent with innocence was open.
5. The learned magistrate erred in law in failing to give himself an appropriate direction about the use of circumstantial evidence in the case of each of the three complainants
6. The learned magistrate erred in law in failing to direct himself that each of the complainants respective cases needed to be dealt with separately and in failing to identify the evidence relevant to the determination of each case

³ During the course of the appeal the appellant abandoned ground one in the notice of appeal and he was granted leave to amend the grounds of appeal on two occasions.

7. The learned magistrate erred in law in failing to provide any, or any proper reasons for rejecting the evidence of the appellant.
 8. The learned magistrate erred in law in failing to direct himself about the use that could be made of the applicant's established good character.
 9. The sentence of seven days actual imprisonment was manifestly excessive.
- [6] At the heart of this appeal lies the adequacy of the reasons given by the trial magistrate for finding the appellant guilty; and his obligation to take into account certain relevant directions and warnings about the evidence. Apart from the appeal against the appellant's conviction for the aggravated assault of Miss TE which is based on ground 4 above, the substance of the appeal is a submission that the trial magistrate failed to give adequate reasons for finding the appellant guilty on the basis of the evidence before the Court of Summary Jurisdiction. The appellant also complains that the trial magistrate failed to direct and warn himself about certain matters of law and fact which fell for decision in the course of reaching his verdicts.
- [7] The appellant submits that to find him guilty, the trial magistrate had to make decisions in light of certain principles affecting his assessment and use of the evidence and he had to explain how he dealt with these principles and the evidence. The complaint is that the trial magistrate failed to do so and in the circumstances of this case there has been a miscarriage of justice.
- [8] The appellant's complaint about his conviction for the aggravated assault of Miss TE is that the conviction was unreasonable and could not be supported

by the evidence. Save for the appellant's conviction of the aggravated assault of Miss TE, it was not pressed that, as a matter of law, the appellant could not be convicted of the other two charges against him. The essence of the appellant's complaint was that the trial in the Court of Summary Jurisdiction miscarried.

The trial magistrate's obligation to give reasons and take into account warnings and directions

- [9] In *Fleming v The Queen*⁴ the High Court approved *Pettit v Dunkley*⁵ and affirmed that the failure of a judge, in a criminal trial without a jury, to give adequate reasons for judgment was an error of law. The High Court also held that a failure of a trial judge to give himself a relevant warning about the evidence was an error of law. The High Court did so in circumstances where s 33(2) and s 33(3) of the *Criminal Procedure Act (NSW)* were applicable to the case on appeal. Those subsections state as follows:

(2) A judgment by a Judge in any case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

- [10] In *Pettit v Dunkley* Asprey JA stated that⁶:

[W]here in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the

⁴ (1998) 197 CLR 250 at 260.

⁵ (1971) 1 NSWLR 376.

⁶ (1971) 1 NSWLR 376 at 382.

case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellant tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of facts and his reasons are essential for enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty as part of the exercise of judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error of law in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law.

[11] As to the extent of the reasons required, in *Soulemezis v Dudley (Holdings) Pty Ltd*⁷ Kirby P stated:

This decision does not require of trial judges a tedious examination of detailed evidence or minute explanation of every step in the reasoning process that leads to the judge's conclusion. But the judicial obligation to give reasons, and not to frustrate the legislative facility of appeal on questions of law, at least obliges a judge to state generally and briefly the grounds which have led him or her to the conclusions reached concerning disputed factual questions and to list the findings on the principal contested issues. Only if this is done can this Court discharge its functions, if an appeal is brought to it. Where nothing exists but an assertion of satisfaction on undifferentiated evidence the judicial obligation has not been discharged. Justice has not been done and it has not been seen to be done.

[12] In the same case Mahoney JA stated⁸:

If an obligation to give reasons for a decision exists its discharge does not require lengthy or elaborate reasons ... But it is necessary that the essential ground or grounds upon which the decision rests should be articulated. In many cases the reasons for preferring one conclusion to another also need to be given ... the extent of the duty to give reasons is related to the 'function to be served by giving

⁷ (1987) 10 NSWLR 247 at 259.

⁸ (1987) 10 NSWLR 247 at 280.

reasons'. Thus more elaborate reasons are required where legislation gives a right to appeal against a decision than where no appeal lies.

[13] In *Boylan v Farthing*⁹ Olsson J stated:

In my judgment in *Manos v Oates*, I made reference to the principal authorities bearing on the requirement that a judicial officer publish adequate reasons for any decision come to. Those authorities indicate that what is adequate will depend upon the nature and circumstances of the specific case but, as was said by the Full Court in *Lawson v Lee*, the fundamental requirement is that the reasons be coherent, intelligible and comprehensive.

...

A failure to meet this requirement will usually give rise to a mistrial (*Misfad v Campbell*). It certainly amounts to an error of law.

While it is true that some issues were identified and addressed, a failure to make adequate findings of narrative fact, to deal with the issues of credibility in a definitive fashion, and to indicate clearly the basis of arriving at certain conclusions render it exceedingly difficult, if not impossible, to come to terms with the issues arising on this appeal.

[14] In *Kotz v Police*¹⁰ Martin J stated:

The authorities also emphasise that justice must be seen to be done. While adequacy of the reasons in this regard will depend upon the circumstances of each case, in a contested matter where difficult questions arise concerning the use of highly prejudicial evidence, in my opinion the reasons should disclose the use that the magistrate has made of the contentious evidence (cf *Fleming v The Queen*). In such circumstances the failure to give adequate reasons cannot be excused on the basis that the magistrate is presumed to know the law and to have applied it correctly. As mentioned, a presumption of that nature may be a sufficient answer in many circumstances, but not where a number of complicated questions arise that involve the use of highly prejudicial evidence.

⁹ (unreported, Supreme Court, SA, Full Court, No 94-1276, 27 April 1995).

¹⁰ (1999) 705 LSJS 176 at 180.

[15] *Pettit v Dunkley* has been applied by this Court¹¹ and the Court of Appeal of the Northern Territory¹². In *Renehan v Leeuwin Ocean Adventure Foundation Limited*¹³ Mildren J stated, a trial judge is not required to decide and give reasons for every issue that the parties throw up, but must decide and give reasons for those that are necessary for the verdict.

[16] It has also been held that the above principles about the necessity to give adequate reasons apply to the decisions of magistrates where there is a statutory right of appeal. In *Ex parte Powter; Re Powter* Jordan CJ stated¹⁴:

There is another matter which cannot be allowed to pass without notice. As already mentioned, the magistrate has neglected to give any reasons for his order. This was wrong. It has been pointed out time and time again that orders by magistrates made under legislation such as this “are of the gravest moment, and involve life long consequences. They are not like the ordinary kind of orders in other petty cases that come before them every day ... Magistrates should realise, even more than we seem to do, that this class of business is not mere trivial work, and they should deal with these cases with a due sense of responsibility which administration of the Summary Jurisdiction Act and the far reaching consequences of the orders that they make there under entail”: *Barker v Barker*. In *Robinson v Robinson* and again in *Cobb v Cobb* it was said when making orders of this kind, from which appeal lies to other courts, it is the duty of the magistrate, not only to cause a note to be made of the evidence, and his decision, but to give the reasons for his decision and to cause a note to be made of his reasons. Elaborate judgments are not required, but reasons which lead the magistrate to make his order must be explicitly stated.

¹¹ *Renehan v Leeuwin Ocean Adventure Foundation Limited* (2006) 17 NTLR 124.

¹² *Mombasa Pty Ltd v Nikic* (1987) 89 FLR 411; *Burnett and Others v Director of Public Prosecutions and Another* (2007) 21 NTLR 39.

¹³ (2006) 17 NTLR 124.

¹⁴ *Ex parte Powter; Re Powter* (1945) 46 SR (NSW) 1 per Jordan CJ at 4 – 5.

[17] Similar decisions have been made in many other cases including *Gikas v Police*¹⁵, *Harwood v Police*¹⁶, *Kotz v Police*¹⁷, *Stirling v Police*¹⁸ and *Reid v Police*¹⁹.

[18] As to warnings and directions, in *R v Green*²⁰ Doyle CJ stated:

In the present case, the trial judge gave no such warning [a *Longman* warning] to himself. In the case of a trial by judge alone, a warning that should be given to the jury by reference to the aspects of the facts of the particular case, should usually be recorded in the reasons of the trial judge, to ensure that the matter giving rise to the need for the warning is not overlooked, and also to demonstrate that the judge has properly directed himself or herself on the facts. The warning should be recorded in the trial judge's reasons even though there is no statutory requirement to that effect: cf *Fleming v The Queen* at 263-264. If the circumstances of the case call for a warning, then it is necessary for the trial judge to show that the warning has been heeded.

It does not follow that as a matter of course that a failure to give a warning that should be given will result in the appeal being allowed: *Fleming v The Queen* at [32]. Whether the failure to give a warning that should be given will mean that an appeal must be allowed will depend upon whether the failure to give the warning gives rise to a substantial risk of a miscarriage of justice. However, usually a failure to give a warning that is required would give rise to a real risk of a miscarriage of justice.

[19] In a number of cases²¹ it has been held that magistrates are required to expressly warn themselves about the inherent unreliability of identification evidence.

¹⁵ (1999) 202 LSJS 301.

¹⁶ (1998) 71 SASR 300.

¹⁷ (1999) 705 LSJS 176.

¹⁸ (1999) 30 MVR 123.

¹⁹ [1999] SASC 474.

²⁰ (2001) 78 SASR 463.

²¹ See par [72] to par [74] below.

The issues at the appellant's trial

- [20] The only evidence against the appellant was the identification evidence of each of the complainants. The prosecution case against the appellant was a circumstantial case. None of the complainants actually saw the appellant touch them in any manner. Nor did any of the complainants see the accused touch any of the other complainants. The appellant defended the case on the basis that he denied assaulting the complainants and the evidence as to identification was not sufficiently reliable to place him in the vicinity of any of the complainants at the time the assaults were said to have occurred. While he denied touching the complainants in the manner they described his evidence did not exclude the possibility that he may have come into contact with them at some stage. He acknowledged that from time to time he had bumped into people while he was in the wave pool and on one occasion his glasses fell off and he fumbled around in the water to try to find his glasses. Evidence was also led from the appellant and from the complainants that in the ordinary course of using the wave pool people came into contact with each other because of the different activities people were engaged in, the force of the waves and the large number of people using the wave pool.
- [21] Prior to the summary trial commencing, the appellant made an application for separate trials of the counts with which he had been charged. It was submitted that the court should order separate trials where there are multiple alleged victims, the evidence in respect of one alleged victim was not

relevant to the charges involving the other victims and where the joinder of the charges created a risk of prejudice.

- [22] The application for separate trials was refused by the trial magistrate. In the course of his reasons, but without considering any of the actual evidence, the trial magistrate considered if the evidence could be used as similar fact evidence to establish propensity or inclination or coincidence, or to rebut innocence. Ultimately, his Honour determined that he would like to have the evidence of all of the complainants before him in order to be in a position to fairly assess the evidence. His Honour held that such a use of the evidence would not be as prejudicial as using the evidence to establish propensity. I take the trial magistrate to have meant that he considered the evidence may be used to rebut accident. His Honour went on to state that, if counsel for the defence perceives or suspects that the evidence may be incorrectly used, then counsel could address him at length as to the proper use of the evidence.

- [23] In the circumstances the following issues were the principal issues at the trial of the appellant: (1) Was there a reasonable possibility that the appellant was not the person who touched the complainants? (2) Was there a reasonable possibility that the appellants wrongly identified the appellant? (3) Was the evidence of identification so unreliable that it lacked probative value? (4) Was the circumstantial evidence in respect of each complainant sufficiently probative to exclude all reasonable hypotheses consistent with the innocence of the appellant? (5) Was there a reasonable possibility that

the contact with each of the complainants was reasonably needed for the common intercourse of life? (6) Was there a reasonable possibility that the contact with the complainants was accidental?

- [24] At the summary trial of the appellant the defence argued that the following factors were relevant factors to be taken into account when assessing the reliability of the evidence of identification given by the complainants: the complainants did not see the man touch them; the complainants' observations of the man they believed touched them were fleeting and it is unknown how much time elapsed between each of the observations each of the complainants made of the man; the complainants were traumatised by what occurred; the man was unknown to the complainants and all they essentially saw of the man was his head above the water; at the time that each incident occurred the wave pool was crowded; the man was not kept under constant observation and the evidence of the complainants did not establish the time when each incident occurred or how much time elapsed between each incident; for Miss TE and Miss RH a number of hours may have elapsed between the first and second sighting of the man; the evidence of each of the complainants was contaminated as a result of the conversations they had with each other and with other people about who was the man who touched them and the original image that the complainants had of the man may have been displaced by these later conversations and observations; and the complainants were young and immature women.

[25] In order to resolve the fourth principal issue at the trial of the appellant it was necessary to identify and analyse the precise evidence that was relevant to each charge of assault.

Admitted facts

[26] The following facts were admitted by the appellant during the course of his trial in the Court of Summary Jurisdiction. The appellant attended the wave pool on Sunday 17 May 2009 from approximately 10.30 am to approximately 2.00 pm. The appellant is the person who was seen by various witnesses eating lunch at the Curve Café²² adjacent to the wave pool during the period of approximately 1.00 pm to 1.30 pm on 17 May 2009. The appellant returned to the wave pool complex after eating lunch in the Curve Café and returned to the water. The appellant is the person who was confronted by one or more males in the wave pool between approximately 1.30 pm and 2.00 pm. The defendant is the person who was confronted by Eleftherios Hatzismalis and others as he attempted to leave the wave pool complex at approximately 2.00 pm. The appellant is the person who was seen by various witnesses speaking with police members Stanislaus and Russell immediately following the confrontation with Mr Hatzismalis, and the person arrested shortly after that by another police officer on 17 May 2009 and the person who remained in police custody on that day until he was charged with the offences which came before the Court of Summary Jurisdiction. The complainants Miss RH, Miss TE and Miss AH were each

²² The Curve Café is also referred to as the Hotel Vibe Café.

aged 14 years on 17 May 2009. The appellant had no prior convictions. The appellant was previously of positive good character.

The evidence of Miss TE

[27] Miss TE gave the following evidence.

[28] On Sunday 17 May 2009, Miss TE went to the wave pool near the Darwin Convention Centre with Miss Jessica Agung and Jessica's mother, stepfather, stepbrother and little brother. They arrived at the wave pool at 9.50 am. The wave pool opened at 10.00 am.

[29] After they went into the wave pool enclosure, Miss TE and Jessica picked up a tube and got into the water. During the first set of waves, they caught waves on the right hand side of the wave pool which is the side of the wave pool near the Convention Centre. When the second set of waves started Miss TE caught a wave which took her down to the bottom end of the wave pool. She then felt two hands grab her around her waist for a couple of seconds. It was a very quick grab. It lasted until she turned around to see who grabbed her. When she turned around the person said sorry and let her go. She looked around and there was this guy kneeling down and he said, sorry, and then he went away.

[30] Miss TE could not say if the man, who said sorry, was the same person who grabbed her on the waist. She did not see who grabbed her. The man was simply there when she turned around. She could see his head and shoulders. She did not know the man. She looked at him for a couple of seconds at the

most. After he said sorry, she turned and swam away and she told Jessica what occurred. She was not under the water when the incident occurred. The height of the water was somewhere between her waist and her chest.

[31] Although there were plenty of other children and adults using the wave pool at the same time, the man was by himself. There was no young boy with him when he grabbed Miss TE.

[32] Miss TE gave the following description of the man. He had greyish short spiky hair and he was of a medium build. She estimated he was 46 years of age. The man was a white fellow. He had pale white skin with freckles. He was a white guy, pasty white, pale white. He had freckles on his arms. She cannot remember if he was hairy or not. The man was wearing light grey board shorts with a pattern. He was not wearing a shirt or a hat and he did not have any glasses on. There was nothing else peculiar about him.

[33] The wave pool was crowded and sometimes people had to duck under each other in order to avoid being hit while surfing. There were plenty of people there enjoying a Sunday in Darwin on the Wharf. There were young people, old people and lots of kids. There were lots of kids screaming and laughing and engaging in all the usual activities that occur in a wave pool. There was lots of noise and people screaming. The waves were loud as well. There was a bit of an echo. Sometimes boogie boards or tubes collided with people while some people were surfing and other people were doing other things in the wave pool.

[34] About 20 minutes after the incident involving her occurred she met up with Miss AH. They swam to the wall on the left side of the wave pool near the lane ropes and the Vibe Hotel. They were in the deep part at the end of the wave pool. The waves were going. They were treading water near the wall when the man who grabbed her on the waist appeared again. He was right next to them. She looked at him long enough to know that he was the person who grabbed her. She was 100 per cent sure he was the same man who grabbed her. This was the second time she had seen him. He was right next to them against the wall. He was within arms reach. He was the only person next to them. The man was not standing up. It was too deep to stand. There were some other people around but they were not that close to them. There was just Miss TE, Miss AH and the man in close proximity to each other. The man kept smiling and looking at them really weirdly.

[35] Miss AH's head was bobbing up and down in the water. Miss TE pushed Miss AH away a bit. She pointed out the man and she told Miss AH to stay away from him. She had to tell Miss AH three times before Miss AH started to follow her. They swam a little bit away from him and that is when Miss AH told Miss TE that she had also been grabbed by the man. Miss TE told Miss AH that the man had grabbed her before and she thought he was following her. Miss AH replied that while they were swimming the man had grabbed her on her bottom and on one of her breasts.

[36] It was a bit quieter at that location where Miss TE saw the man on the second occasion than elsewhere in the wave pool, but an occasional person

still went past them. The closest people to them were about five metres away. There may have been one or two people swim past them.

[37] Later on, Jessica pointed to a man who was sitting in the Vibe Hotel café with a boy who appeared to be about 13 years of age. The man was wearing a pink shirt. Miss TE was not that close to him when he was pointed out. She was not 100 per cent sure he was the man who grabbed her. He vaguely looked like him but she was not 100 per cent sure.

[38] Miss TE did not see the man again at any other stage during the day. She left the wave pool with Jessica's family and went home before the police arrived. At no stage was she asked by the police to identify the accused from a board of photographs or at an identification parade or at all.

The evidence of the complaint made by Miss TE

[39] Miss RH gave evidence that soon after she arrived at the wave pool, which was at about 10.30 am, Miss TE told her that while she was in the shallow area of the wave pool a man had touched her or grabbed her when she went under water. Miss TE made the complaint to Miss RH soon after the incident occurred. She said let's go, that man over there just grabbed me.

[40] Miss RH asked Miss TE who it was who grabbed her. She was told to turn around and Miss TE pointed at the man. The man was standing up in the water. He was about one to two metres away. Miss RH estimated that the man was 36 years of age. He had white skin, grey and white hair with sideburns and he had a bit of a belly. He was of medium height. He had a

stocky build and he was wearing blue board shorts with white stripes on the side. The board shorts went to his knees. The man was not wearing anything on the upper part of his body or on his head or on his face.

The evidence of Miss RH

[41] Miss RH gave the following evidence.

[42] On 17 May 2009, Miss RH went to the wave pool with her father, sister and brother and her brother's friend and her friend. She arrived at the wave pool at 10.30 am and she met Miss TE and Miss Jessica Agung. When she arrived at the wave pool Miss AH was not there. She arrived later on. Miss RH and Miss TE went for a swim. They were swimming on the left side of the wave pool which is the side near the Vibe Hotel. She and Miss TE swam together.

[43] Miss RH got dunked under the water and as she came back to the surface she got touched on her bottom. The man who touched her said, "Are you alright, chick?" She did not reply. When she was touched she was half way down the left side of the wave pool. She was touched on the side of her bottom. She cannot remember if it was the right side or the left side of her bottom. It was like a grab, like all hands on my bum. It was only one hand that grabbed her bottom. It did not hurt. It was a light grab. The grab did not even last for two seconds.

[44] She turned around as soon as it happened. She saw a man's head. He was about one metre away from her and he was smiling at her. The man was

within touching distance of her. There were other people in the wave pool but no-one else was close by. There was just her and Miss TE. Miss TE was further away than touching distance. She looked at the man and then she swam away. She swam back to her friends and she told them she had been touched.

[45] The man was the man who she described before²³ as the man who Miss TE pointed out to her. He had grey hair and white sideburns with a bit of a belly and he was about 36 years of age. The man had white skin. He was pale. He was of stocky build.

[46] After the incident involving Miss RH occurred, she and Miss TE went and spoke to her sister who was near the shallow end of the wave pool. She told her sister that both she and Miss TE had been touched. Miss TE did not speak to her sister. After they spoke to her sister they kept swimming at the back of the lane rope.

[47] Eventually, she got out of the pool and she had some lunch. When she went back into the wave pool after lunch she was with Miss AH. She and Miss AH went swimming on the left side of the wave pool. That is, the Vibe Hotel side of the wave pool. They were at the back of the wave pool near the lane rope.

[48] After they had been swimming for a while, Miss AH told Miss RH that she had been touched by a man and Miss RH went and spoke to her sister again.

²³ See par [40] above.

Her sister and her father then went and spoke to the lifeguard. Miss RH was asked by the lifeguard to point out the man if she could. She could not see the man in the wave pool. However, she and the lifeguard walked closer to the gate in the enclosure surrounding the wave pool and she noticed the man was sitting eating lunch in the Vibe Hotel café and she pointed him out to the lifeguard. When she noticed the man she was inside the wave pool area near a blue umbrella under a palm tree. She saw a man sitting down eating his lunch. She could see the whole man. She knew it was the same man because she had previously pointed the man out to her sister. Her sister had identified him as someone who was wearing a pink shirt and the man in the Vibe Hotel café was wearing a pink shirt. Her sister was with her and the lifeguard when the man was identified. She was also able to identify the man because he was wearing the exact same board shorts he had been wearing when she saw him in the wave pool. They were blue with white stripes. She also observed his sideburns and the colour of his hair. She was 100 per cent certain that it was the same man. The lifeguard said he could not do anything because the man was no longer in the wave pool complex.

[49] Miss RH said when she saw the man seated in the Vibe Hotel café she was about eight to ten metres away. The man looked like the person who she saw in the pool. She did not think she had made a mistake in identifying him.

[50] After Miss RH saw the man in the Vibe Hotel café, she and Miss AH went for a swim in the wave pool again and they noticed that the man was back in

the wave pool. Miss AH said, "There he is". The man was in the middle of the wave pool. He was wearing blue board shorts. She was 100 per cent certain that it was the same man. Miss AH got very anxious when she saw the man back in the wave pool and the waves swept her closer to him. Miss AH yelled out to Miss RH's sister and Miss AH's cousins then swarmed him.

The evidence of Miss AH

- [51] Miss AH gave the following evidence.
- [52] On Sunday 17 May 2009, she went to the Darwin wave pool with her grandfather and her three cousins. They arrived at the wave pool at about lunch time. After she arrived she met Miss RH and later on Miss TE. They are friends of hers from school. She put her bags down and she went into the water for a swim with Miss RH. After they had a swim they met Miss TE. Initially, they were swimming on the side of the wave pool closest to the Convention Centre.
- [53] After she had been in the wave pool for about 15 to 20 minutes, she went for a swim near the wall of the wave pool which is closest to Vibe Hotel. She was about a metre to a metre and a half away from the wall of the wave pool. It was during a wave session. There were lots of people in the water on that side of the wave pool. She was standing up in the water. There was a little bit of water over her head. She was swimming with her back to

towards the wall. She was looking at Miss TE who was about one metre away from her.

[54] Miss AH felt a hand grab her left hip and then grab the right hand side of her bottom. It was just a touch, a grab, and then the person let go. Next, she felt a hand go up onto her right breast. She was grabbed on her breast straight after she was grabbed on her bottom. It occurred within a second of her bottom being grabbed. She was grabbed by one hand. She described the grab in the following way: "Even as long as just enough to grab and let go but to get a feel, that's it. It wasn't very hard but it wasn't like a brush. Like – they were like to have a feel, like a grab but not hard." The grab came from behind the left hand side of her body.

[55] Miss AH did not see the hand that grabbed her because she was under water. She turned around straight after she was grabbed and she saw the man who she thinks grabbed her. He was about a metre to a metre and a half away. There was no-one else that close to her at the time. She looked at Miss TE and then looked straight back at the man. The man asked, "Are you alright, Babe?" She did not respond to his question. She swam away. She had never seen the man before.

[56] The incident happened very quickly. There were three very quick grabs. She was standing up when she was grabbed. She had just ducked under the water and she was coming back up. No-one went over her as she was coming to the surface of the water. When she surfaced she looked at

Miss RH and Miss TE to see if they had been mucking about and had grabbed her. She thought they may have grabbed her. However, she did not talk to them. She turned around and there were some other people behind her who were not far away. One of them was a man. She only paid attention to the man. All she could see of the man was his head. She looked at him for a very short period of time. She had a quick look at the man and then she turned away and swam over to her friends. They were about another metre away from her. She did not pay attention to the other people. There were other children around but she wasn't really paying attention to them. All around her there were people screaming and giggling. She took her eyes off the man at least for the period of time she spoke to her girlfriends.

[57] Miss AH told Miss TE that the man had touched her. Miss TE told her that, earlier on, he also touched her. They were in the middle of the shallower part of the wave pool when they had this conversation. She spoke to Miss TE straight after the incident occurred. She knew the man who touched her was the same man who touched Miss TE because when they were swimming together they both looked at him. She knew who Miss TE was talking about. She observed the man before the incident with her occurred. Miss TE looked at the man and said, "That guy over there, the one that's grinning, that's the one who touched me." He was in the water at the time. Miss RH was not present when Miss AH spoke to Miss TE about this. Miss RH was not near Miss AH when the man grabbed her.

[58] The man had short greyish coloured hair. He had a beard but it wasn't long and it wasn't really short. It was neat and tidy. He had no moustache. He was not a big man but he wasn't scrawny. He was 'skinnyish'. She does not recall the colour of the man's eyes. His skin was a light colour but not really white. It was like a light brown colour. The man was a bit tanned. His skin was a little bit lighter than olive skin. He was not someone who she would describe as a coloured person. The man had light olive looking complexion and grey hair. She did not see what he was wearing. He did not have a shirt on when he grabbed her. He was not wearing spectacles or swimming goggles or any earrings.

[59] After she was grabbed, Miss AH hopped out of the water and she and Miss TE went and spoke to Jessica Agung and her mother. They told Mrs Agung what had occurred. Towards the end of this conversation Miss RH said that she was also touched by the same man. Miss RH and her sister then went and made a complaint to one of the lifeguards.

[60] Miss AH also reported the incident to her grandfather. She told her grandfather and Nick about it. Her grandfather asked her if she could point out the man but she could not because he had left the wave pool area. She did not see the man step out of the wave pool. Later on, she was told that the man had been spotted in the Vibe Hotel café. Miss RH told her the man was in the café. She went around and looked at the café to see if she could observe the man.

- [61] Miss AH saw the man in the Hotel Vibe Café. He was wearing a pink shirt. She saw the colour of his pants. However, at the time she observed him in the café, she was not 100 per cent sure he was the man who touched her in the wave pool. With hindsight she is pretty sure that it was him because she saw him come back into the wave pool in the same shirt he was wearing in the café. After the man went back into the wave pool she recognised him as the man who had touched her. She remembered his face. She recognised his board shorts and his shirt. His board shorts were white and blue on the side and his shirt was pink.
- [62] Later on, the man was confronted by her grandfather and, ultimately, he was arrested by the police. Miss AH observed the confrontation with her grandfather and also the man being arrested by the police. When her grandfather confronted the man she was about two metres away. She looked at the man when he was being confronted. It was the same man with the same coloured board shorts and shirt. She recognised the man who was taken away by the police as the same man who had touched her. She could see his face when he was with the police and she remembered what he looked like. He was also wearing the pink shirt and the board shorts.
- [63] There were about 100 people in the wave pool. It was a busy morning and people were having fun in the wave pool. On some occasions she hit other people while she was on a boogie board. On some occasions she bumped into people when she did not mean to. Sometimes she accidentally kicked someone with her foot. She was asked if she got accidentally kicked and she

answered, "I'd been kicked once, but that's about it." She tried to stay away from everybody else. She agreed that it was inevitable that she was going to have some sort of contact with other people who were out having a good time.

- [64] She was not asked to identify the man either from a photo board or in a line up. She said she was 150 per cent sure that they got the right person. The man her grandfather confronted was the same man who touched her in the pool.

Evidence of the complaint made by Miss AH

- [65] Miss RH gave evidence that when she and Miss AH went swimming after lunch Miss AH told her she got grabbed on her boobs.

- [66] Miss AH told her that the guy over there just grabbed my boobs. Miss AH was very upset. She could see where Miss AH was pointing. She was pointing to the man who Miss RH previously described. He was towards the back of the wave pool, a bit further into the lane rope. He was near the wall. The man was about a metre to two metres away from them. She knew it was the same man she had seen before because he was smiling at them. She was quite sure it was the same man who had touched her. After he touched Miss AH they went and spoke to her sister, Ashley. This was the second time that she spoke to Ashley about the man.

Grounds 1 and 2 - The warning about identification evidence

[67] The common experience of criminal courts over many years has demonstrated that identification evidence, however honestly given, may turn out to be unreliable evidence because human perception and recollection are prone to error²⁴. Moreover, individuals who witness crimes often react differently. Some remain relatively calm; others are shocked and confused²⁵. Consequently, reliance upon such evidence requires special caution.

[68] In *Domican v R* the majority of the High Court stated:

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 judges 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. 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 weaknesses in the identification evidence" (23). 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.

²⁴ *Bulejcik v The Queen* (1996) 185 CLR 375 per McHugh J at 406; see also: *Davies* (1937) 57 CLR 170; *Alexander* (1981) 145 CLR 395; *Domican* (1992) 173 CLR 555; *Kelleher* (1994) 131 CLR 534.

²⁵ *Bulejcik v The Queen* (1996) 185 CLR 375 per McHugh J at 406

[69] The majority of the High Court further stated at p 564 of *Domican v The Queen* that if the matters to which counsel have referred may reasonably be regarded as undermining the reliability of the identification evidence, the trial judge must direct the jury that they are bound to take those matters into consideration in determining whether they will rely on that evidence.

[70] The following important remarks appear in a suggested trial direction in Tilmouth²⁶:

The reliability of an identification of a person depends upon the circumstances in which the witness observed the person whom he or she identified as the accused and any one of those circumstances may possibly lead to error. For example, how long was the period of observation? In what light was it made? And from what distance was it made? Was there anything about the person observed which would have impressed itself upon the witness? Was there any special reason for remembering the person observed? How long afterwards was the witness asked about the person seen? How did the description then given compare with the appearance of the accused? Each of those matters must be considered in every identification case.

...

Because the witness who gives evidence of identification honestly believes that his or her evidence is correct, that evidence will usually be quite impressive, even persuasive. The issue at this stage, however, is not whether the evidence is honest. The issue is whether the evidence is reliable.

The fact that more than one witness has identified the accused is a matter which you may take into account in determining the weight which you may place upon their evidence, but you must clearly understand that such a fact does not mean that there is necessarily less chance that a mistake has been made. Two or more honest witnesses can be just as mistaken as one.

²⁶ Australian Criminal Trials (Butterworths) at par 3-020.

- [71] Where an accused is being tried by a magistrate alone the magistrate must warn himself about why identification evidence in general may be unreliable; and why the identification evidence in the particular case may be unreliable by pointing to any matters of significance in the case which may reasonably cause the evidence of identification to be unreliable²⁷. The magistrate must then take those particular matters into consideration when determining if the evidence is reliable and probative.
- [72] In *Grbic v Pitkethly*²⁸ the appellant was convicted of two charges of assault by a magistrate in the Australian Capital Territory. Identification evidence was pivotal and as in this case no identification parade was conducted by police. In the course of his reasons for allowing the appeal Sheppard J, who was in the majority, stated²⁹:

I think that cases which are tried by judicial officers alone may sometimes present more difficulties in their analysis than do cases which are tried by juries. The jury is the tribunal of fact and determines issues of fact guided by the directions of the trial judge. The judge and the jury have separate and distinct functions. If identification is in issue, it is for the judge to determine whether or not to admit the evidence of identification. If it is admitted, the judge's task is to give the jury the appropriate directions and warnings about the way they should deal with the evidence. 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

²⁷ *Domican v The Queen* (1992) 173 CLR 555 at 562; Tilmouth, Australian Criminal Trials (Butterworths) at par 3-010.

²⁸ (1992) 38 FCR 95.

²⁹ At 107 - 108.

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. Finally, it has to determine whether it is satisfied of the guilt of the accused. Inevitably these considerations will tend to overlap and resolve themselves into one overall question. At the heart of that question will be the degree of satisfaction which the tribunal has with the strength of the identification evidence. An appellate court called upon to review a conviction on the ground that it is unsafe or unsatisfactory because of the nature of the identification evidence in the case, must also give close attention to that matter. In doing so it will need to consider whether, in all the circumstances, the court below could safely have arrived at a conclusion of guilt.

- [73] The statement of Sheppard J has been followed and applied in a number of cases including *Sharrett v Gill*³⁰, *Parker v Espinoza*³¹, *Tatam v Svikari*³² and *Johnson v Giumenti*³³. In *Parker v Espinoza* Anderson J stated:

This was not a jury trial, but there is now a body of authority in support of the proposition that these rules apply to non-jury trials: *Grbic v Pitkethly*; *Sharrett v Gill*. 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.

In this case, counsel for the applicant submitted that the magistrate's decision that the applicant was the person attempting to steal the vehicle in question, cannot stand because the magistrate failed expressly to identify the weaknesses in the identification evidence and failed to expressly warn himself of the danger of convicting the applicant in the light of those weaknesses.

In my opinion, supported as it is by *Grbic v Pitkethly* and *Sharrett v Gill*, this submission should be accepted. I think the combined effect of the cases to which I have referred is that the law now is that judicial officers sitting without juries who are invited to convict an accused person on the basis of identification evidence containing any

³⁰ (1993) 65 A Crim R 44.

³¹ (1996) 85 A Crim R 336.

³² [1999] NTSC 54.

³³ (2003) 175 FLR 467 at 471.

weaknesses must expressly recognise those weaknesses and must expressly recognise the dangers of convicting on that evidence.

- [74] In *Tatam v Svikart*³⁴ Mildren J stated, it is well established that the principles in *Domican v R* apply equally to any case where identification is in issue including a court which is constituted by a magistrate rather than a judge and a jury. His Honour then went on to state:

Riley J then proceeded to decide whether or not there was any miscarriage of justice. In other words, he applied the proviso. It was submitted that, in doing so, his Honour erred. His Honour's ultimate conclusion was that, having reviewed the evidence and taken into account the suggested weaknesses and dangers, the quality of the identification evidence in the case was such as to exclude any reasonable possibility of mistake. His Honour said that the evidence of identification was clear and strong and came from a witness who was truthful and reliable and that he therefore considered there had been no miscarriage of justice arising out of the matters addressed above.

It is clear from the judgment of the High Court in *Domican v R* (supra), as well as other authorities to which we were referred, that once error has been established by the failure of the learned trial judge or the magistrate to give himself the appropriate warning and to identify relevant weaknesses that need to be considered and taken into account, that amounts to a miscarriage of justice and, therefore, there can be no application of the proviso. So much was conceded by Mr Wild QC and we think rightly so. In those circumstances, the order that should have been made by Riley J was that the appeal ought to have been allowed and a new trial ordered.

- [75] The above statement of Mildren J was questioned by Gray J in *Johnson v Giumelli*³⁵. However, in the particular circumstances of *Tatam v Svikart* it seems to me that the statement of Mildren J is correct and, in any event, it is

³⁴ [1999] NTCA 146.

³⁵ (2003) 175 FLR 467 at 473.

binding on me. In *Domican v The Queen* the majority of the High Court stated³⁶:

As the learned Acting Chief Justice pointed out, the adequacy of a warning in an identification case must be evaluated in the context of the evidence in the case. But its adequacy is evaluated by reference to the identification evidence and not the other evidence in the case. The adequacy of the warning has to be evaluated by reference to the nature of the relationship between the witness and the person identified, the opportunity to observe the person subsequently identified, the length of time between the incident and the identification, and the nature and circumstances of the first identification -- not by reference to other evidence which implicates the accused. A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused. The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence. If a trial judge has failed to give an adequate warning concerning identification, a new trial will ordinarily be ordered even when other evidence makes a very strong case against the accused. Of course, the other evidence in the case may be so compelling that a court of criminal appeal will conclude that the jury must have convicted on that evidence independently of the identification evidence. In such a case, the inadequacy of or lack of a warning concerning the identification evidence, although amounting to legal error, will not constitute a miscarriage of justice. *But unless the Court of Criminal Appeal concludes that the jury must inevitably have convicted the accused independently of the identification evidence, the inadequacy of or lack of a warning concerning that evidence constitutes a miscarriage of justice even though the other evidence made a strong case against the accused.* [emphasis added]

[76] In *Tatam v Svikart* the Northern Territory Court of Appeal expressly did not decide if it was always necessary for a trial magistrate to enunciate the fact that he or she had provided themselves with an appropriate warning about

³⁶ (1992) 173 CLR 555 at 565 - 566.

matters of identification evidence. In *Fleming v The Queen*³⁷, in the context of a discussion about whether the trial judge should have given himself a warning of the kind discussed *Longman v The Queen*³⁸, the High Court stated that there may be cases where an examination of the reasons given, although they do not contain express reference to a warning, sufficiently discloses that the judge has had regard to the warning. However, an animating principle which lies behind the requirement of s 33³⁹ is that criminal justice not only be done but also be seen to be done. The judgment must show expressly or by necessary implication that the warning was taken into account. It is no answer that the trial judge is an experienced judge who was well aware of the requirement of the warning and that he or she must have taken the warning into account.

[77] Having reviewed the authorities it seems that, in relation to a warning about identification evidence, the law has progressed to a stage where, if identification evidence is the only evidence which implicates an accused, it is necessary for a magistrate to warn himself about the special nature of identification evidence and those matters which might weaken the identification evidence. There should be a reference to the possibility that an honestly mistaken witness can be a convincing witness and that two or more honest witnesses can be just as mistaken as one. The magistrate should then act on the warnings and explain why, after taking account of the

³⁷ *Fleming v The Queen* (1993) 73 ALJR 1 at 9-10 [36] - [37].

³⁸ (1989) 168 CLR 79.

³⁹ *Criminal Procedure Act 1986 (NSW)*.

warnings, the evidence nonetheless satisfies the magistrate. In this regard I agree with the remarks made by McKechnie J in *Moores v Renting*⁴⁰. His Honour's remarks are applicable even though in the Northern Territory there is no equivalent statutory provision to s 31 of the *Magistrates Court Act 2004 (WA)*.

[78] As to the identification evidence of Miss AH, the trial magistrate made the following remarks:

At the time [Miss AH] was grabbed, she was standing or floating or near and looking in much the same direction as her friend, [Miss TE] and [Miss AH's] evidence is that she looked around straight away after the touching had happened and saw, above the water close by, a man's head and perhaps his shoulders or parts of his shoulders but not much more than that and that the man spoke to her and said 'Are you all right, babe?'

The circumstances as exposed in cross-examination are that there were some other younger people not too far away. How close is hard to say. But it doesn't seem that there was any doubt in [Miss AH's] mind right from the start that this person who was speaking to her from the water was, as far as she could guess, estimate, infer, work out from the circumstances as she knew them, the person who must have grabbed her.

She, [Miss AH] that is, told [Miss TE] that she'd been touched and [Miss TE] immediately told her that the same man had touched her earlier. Both of them were no distance away from the chap in question and both had a good view of what they could see of him which was really his face, neck perhaps, part of his shoulder and chest and that was the view that [Miss AH] had of the person she was confident had offended against her and no doubt her confidence was accentuated and increased by what [Miss TE] told her.

In her evidence, [Miss AH] gave a description of the face of the man and that description matches Mr Dennis' features in most respects, the grey hair, the colour of the skin and a beard without a moustache,

⁴⁰ [2007] WASC 256 at [41].

the neatness and tidiness of the hair and beard. I'm not sure how much weight can be placed upon that description as such because, of course, [Miss AH] saw Mr Dennis again in the café and after the café in the course of events and one could argue perhaps that her memory of the facial features of the person she came to believe was the offender against her might have been formed as much by the later views that she had of someone who was certainly Mr Dennis as opposed to the first view for not very long that she had of this head in the wave pool. There's no getting away from that possibility.

On the other hand, [Miss AH's] care in speaking of the degree of certainty she had about the identification of the man she'd seen in the pool was remarkable. When she was told the chap was in the restaurant, apparently by [Miss RH], she looked at that person who, by then, was wearing a shirt and, of course, had much more of the body visible than had been the case in the pool and was also sitting with a boy, all circumstances which might have caused one doubt about the identification of a lone man seen in the pool and head only.

And [Miss AH] was far from certain - well, fairly sure but not certain as to the identity of the person in the restaurant with the person she'd seen in the pool. It's later on in the proceedings that she again saw a face close up, this time without doubt Mr Dennis' face, that she became convinced that the face was the same as the one she had seen in the pool.

So much really for [Miss AH] whose identification of Mr Dennis as the offender is based upon a quick look immediately after she's been touched and is possibly mixed up with suggestions she may have picked up from [Miss TE's] telling her that, 'I too have been touched', that others have pointed – [Miss RH] has pointed out Mr Dennis in the restaurant and that others have been challenging Mr Dennis in a way that would suggest to anybody that he might've done something wrong. And consequently the identification is imperfect in the sense that it is subject to various forces from outside [Miss AH's] own memory.

Again, nobody could have a complete grasp of just how much chatter, discussion, exchange of ideas there had been, even between the time [Miss AH] was touched until the time Mr Dennis was spotted at the café, but conversations have taken place between [Miss AH] and [Miss TE]. [Miss RH] has got involved. Jessica Agung has somehow got mixed up in it. I haven't heard from Jessica Agung, so I don't know quite what she's got to say.

Jessica's mother, Mrs Agung, has been involved. Ashleigh, a sister of one of the girls has been involved. The grandfather has been told and somehow the boys have found out complaints had been made to the lifeguards and the lifeguards speak of about five girls at once talking to them. There's been a fair bit of chatter happening and in that one cannot deny that there's an obvious possibility that one witness's impression as to who might be the offender could be reinforced in a way that that witness would be unaware of to the point where a fairly confident, but fundamentally doubtful, identification becomes shored up and secured by the interference of other people's ideas and other people's apparent certainty.

Nevertheless, it has to be said that [Miss AH] was, as far as I could see, a careful witness, a witness who spoke of her degrees of certainty from time to time, the identification and who didn't seem either particularly infantile for then age, 14, nor especially grown up and knowing, and appeared to have no particular malice against Mr Dennis apart from that arising from the fact that she was upset by the circumstances and very upset by giving evidence.

[79] As to the identification evidence of Miss TE the trial magistrate made the

following remarks:

If one moves then to a time at least an hour before that, and perhaps two hours before that, and to the evidence of [Miss TE], the first person of these three young women touched and the second to give evidence, as it happened. [Miss TE] was playing around in the wave pool in the not particularly deep area of the pool, it seems, when having been not so much knocked down as having caught a wave and driven down towards the end of the wave pool, she was suddenly grabbed by the waist by two hands by someone from behind, looked around and saw a man kneeling, as she put it - perhaps squatting might be more the term - standing, kneeling or squatting and the chap said, 'Sorry', and then went away.

...

She gave a description of the man which is like Mr Dennis in relation to the hair. She was able to give a colour for his shorts which might or might not be something like Mr Dennis' shorts which were white, I gather, with a blue stripe or pattern of some sort on it. [Miss TE] describes them as grey with some sort of pattern on them.

...

[Miss TE] remarks that, '... about 20 minutes later after that I met up with [Miss AH] and we swam over to the left-hand side of the pool near the hotel and he appeared. He was right next to us.' And it was at about that time that [Miss AH] had her event.

So Jess has been informed early on. [Miss RH] has apparently been given some sort of inkling of what's going on and [Miss TE] has then gone over and joined [Miss AH]. And time, as I say I think at least an hour but perhaps more than that, has passed before she's together with [Miss TE]. And then, according to [Miss TE], when she notices the man in close proximity, the same man, she's in no doubt about that, the same man who grabbed her by the waist and said, 'Sorry'.

She says, 'Well, [Miss AH's] head was going under the waves and then he kept smiling at us and just looking at us in a really weird and I told - I pushed [Miss AH] away a bit and said, "stay away from that man". I had to tell her like three times before she started to follow me.' And a little later on, 'I told her, "stay away from that man", and we swam away and I said, "that man grabbed me before and I think he's like following me", and then she said, "yeah, he grabbed me on the bottom and breast as well."' And then they again meet up with Jess and [Miss AH] and so on and so forth.

The evidence of [Miss TE] is clear and she was sure that the man she was first warning against and then told (inaudible 9.28.33)
[Miss AH] was the same man who had grabbed her by the waist and said, 'Sorry'.

...

According to [Miss TE] it was Jessica Agung who was the first person to spot the man in the café and that man was Mr Dennis. How Jessica knew who to spot is not clear on the evidence, but given that more than one girl had talked to her more than once about these events before that happened perhaps one or more of them had pointed him out, I don't know, or perhaps somebody else other than Jess was, in fact, the first person to spot the person in the café.

On page 50 of the transcript it's clear that [Miss TE] was in no doubt whatsoever that the person [Miss AH] was complaining about was the same person who had grabbed her earlier on. In the middle of that page asked: 'And how do you know she was talking about the person', [Miss TE's] answer was, 'Because he was the only one next

to us and I pointed him out and then she told me.' So again it doesn't seem that there's any reason to suspect that the man in the pool has been wrongly picked out as the offender against [Miss AH]. The evidence of [Miss TE's] is that he's the only chap in the vicinity at the time that they're discussing him.

As to the man in the café, again [Miss TE] was careful in her evidence after Jess pointed out the man in the café - this is at the bottom of page 49 - she describes the man sitting with a boy and says as to her degree of conviction that that was the same man as in the pool, she says, 'I wasn't that close to him. I'm not 100% sure it was exactly like him, but, yeah.' And again, 'But jess was pointing him out and saying that was him and I saw him and it vaguely looked like him but I'm not 100% sure.' Carefulness is to be contrasted with [Miss TE's] certainty that the man seen after her waist was grabbed and the man seen after [Miss AH] was grabbed were one and the same man for sure.

And that's again reiterated in cross-examination towards the bottom of page 57 where she says, 'Yeah, I looked at him long enough to know' - this the [Miss AH] incident - 'I looked at him long enough to know that I realised he was the same guy who had grabbed me earlier and that's when I pushed [Miss AH] away. Yeah, I pushed her away to tell him and her to get him away from him and she didn't hear me the first few times, she kept going under water

- [80] As to the identification evidence of Miss RH the trial magistrate made the following remarks:

And the third person - the second person touched and the third to give evidence was [Miss RH] whose evidence spanned the two hearing dates and her evidence was in many ways awfully similar to that of [Miss AH] except it related to a different incident in a slightly different place at an earlier time. The first interesting item in [Miss RH's] evidence - perhaps I should call her [Miss RH] since there's another H around the place - is that on page 62 she gives evidence of being informed by [Miss TE], as [Miss TE] said, that a complaint by [Miss TE] of [Miss TE's] earlier incident.

And [Miss RH's] evidence is that, 'She, [Miss TE], told me that a man had touched her, grabbed her when she went under water. She said, "[Miss RH] let's go, that man over there just grabbed me" and indicated a man.' On page 63 [Miss RH] says that she saw the person that [Miss TE] was indicating, grey and white hair with side boards

and a bit of a belly, looked about 36.' I don't know about the belly, but the hair and side burns are not all that dissimilar from Mr Dennis's appearance. He has short grey hair and neat grey beard, no moustache and the beard goes under his chin largely. So even before anything happens to [Miss RH] herself this man has been pointed out to her, the offender against [Miss TE].

Some time after that her own incident occurs and this is described in the transcript at page 65. She says, 'I got dunked under water and then I came back up and then I got touched on my bottom, on my bum and the man said to me, "are you all right, chic". This happened in the middle of the wave pool on the left-hand side and the touch was like a grab.'

...

The man in question was the man she says she described before, the man [Miss TE] had pointed out to her. And that was her evidence and it did not change. And the same man, she says, was seen by her later on - this is on page 73 of the transcript - right towards the end of events when the man was again in the pool and he was surrounded by [Miss AH's] cousins, the young man, and she was sure it was the same man and that was her evidence.

She also spotted the man in the café and was, it seems, at least fairly sure that it was the same man even though he was wearing a pink T-shirt. But again her certainty about that seems far less - seemed at the time far less than her degree of certainty about the identity of the various men or the man seen at various times in the course of her splashing around in the pool and his splashing around in the pool. Indeed, her identification of the chap at the café seems to be based to some degree on what her sister had said about the man wearing a pink T-shirt and how her sister got into the picture. As to how Jessica Agung got into the picture is something of a mystery in the evidence before me.

[81] As to the identification evidence generally the trial magistrate made the following remarks:

[T]he evidence in the matter covers a fairly short space of time from numerous viewpoints of the alleged victims in the matter, three girls aged 14 at the time and of Mr Dennis and a few other people around and about the place, Mrs Agung, a couple of lifeguards and one

police officer who was the only witness who spoke who was not present that day, 17 May, at the wave pool in the Darwin Waterfront Development which, I understand, had been opened for a few weeks before this particular day.

...

The events before that involved all parties apart from the lifeguards, as far as I can tell, going into and out of the water at the wave pool and some parties, particularly Mr Dennis and his step-son, I think it is, with him going to the restaurant on one side of the wave pool.

As far as I know on the evidence, the cycles are fairly regular but I don't really know how long they are and Mr Maley said in his address, and he's quite right, that this succession of cycles, which are not timed, and about the times at which there's no evidence makes it very hard to relate the evidence of some witnesses to the evidence of others since, other things being equal, one cycle of waves is very much the same as the next or the one before.

The identification of Mr Dennis as the person who allegedly committed the offences of assault that were complained of by three girls was pretty well completed by the time Mr Dennis was in the café. Someone – and it's not entirely clear on the evidence – spotted him and asserted that he was the man in question.

Various names are put forward as the person who may have been the spotter. Of those names put forward only [Miss RH] is one of the three victims. Otherwise, the man is said to have been spotted by others who were informed of the matter. It's not clear how either of those people would have known who the alleged offender was.

After that time the defendant, Mr Dennis, seems to have gone back into the pool and it was there he was confronted with by these young men and feeling uncomfortable, on his own evidence, decided to leave - and who could blame him, particularly if any of those young men were built like the young man who walked into court the other day and sat at the back, a very heavily muscled young fellow who nobody, I think, would feel comfortable to have glaring at you and accusing you of anything, but I don't know if he was in the motorbike.

...

The strength of the prosecution case as to the identity of the offender falls to be considered in my view on the strength of the evidence of the girls concerned and to a much, much lesser degree the other people with those girls.

...

What I have here is evidence of individual complaints by individual complainants, each of whom claims to have seen the person who assaulted her, to have later recognised that person with differing degrees of certainty, less certain when he was eating lunch, more certain when he was back in the pool.

Each of those persons has seen that man in the pool at a time when one of the other complainants has been with her and speaking of the same person. So there is no isolated complainant here. It's not the case that [Miss TE] saw her assailant and nobody else saw that person in the pool. She's seen her assailant, she's pointed out that assailant to someone else and that someone else has spoken of that happening. Similarly, the person who assaulted [Miss AH] is the person seen by [Miss TE] when [Miss AH] speaks of it and there's no doubt the two of them are speaking about the same bloke there and [Miss TE] is of the view it's the same man again.

The case is not one that calls for inferences to be drawn, it's one that depends upon the credibility of the evidence in the circumstances where one's dealing with the evidence of immature, but not childish, witnesses who are at least slightly upset by what's happened to them and said enough to confabulate or to confer among themselves eventually to convey their complaints to other girls who convey them to adults.

The evidence altogether is, in my view, extremely strong.

...

Indeed, because I had a cold and had a day off I've had much more time than I expected to have to consider this matter up and down. And in the end it seems to me, sadly, that the chain of recognitions between the girls is so strong that their evidence as to their individual identification of the man who offended against each of them and the identification of that man with Mr Dennis is so strong that ultimately I have no doubt whatsoever that Mr Dennis was the man who touched each of them.

...

I'm not having regard to anything in the nature of similar fact doctrine in coming to this conclusion. I'm considering the evidence of each of the girls as they gave it and as they gave it to each other as the events of the day wore on. I've warned myself as far as I can about the possibilities of contamination of their identification and there's no doubt that was happening. Everyone was talking to everybody else time and again through the hour and a half or so, perhaps two hours, once this thing started to become spreading public knowledge when [Miss TE] told the first of her friends what had happened to her.

But given the care with which the girls gave evidence and the matters I've already eluded to as to their certainty at various points or lack of certainty at other points, I can't have any doubt about that identification. I find charges 1, 2 and 4 proved.

- [82] It is apparent from the remarks of the trial magistrate which I have set out above, that although his Honour discussed aspects of the identification evidence of the complainants, his Honour only warned himself about the possibility of contamination of the identification evidence of each of the complainants. Neither expressly nor by necessary implication did his Honour give himself a warning such as the one referred to in par [77] above. While his Honour acknowledged that contamination was occurring he did not give reasons which coherently, intelligibly and comprehensively explain why the contamination, which he identified, had not caused any displacement and had not resulted in the evidence of identification of the complainants being undermined. For example, his Honour asserts that there is a chain of recognition between the girls yet he does not identify the evidence which is said to establish the chain. His Honour does not do so in circumstances where he acknowledges that the evidence about times is such

that it is very hard to relate the evidence of some witnesses to the evidence of others, the man identified by Miss TE did not have a beard or sideburns, and Miss TE gave evidence that she was not 100 per cent sure the man in the Hotel Vibe Café was the man who grabbed her. She said he vaguely looked like him but she was not 100 per cent sure.

- [83] The trial magistrate did not identify which of the factors raised by the defence he considered to be matters of significance that may undermine the reliability of the identification evidence. Nor did he warn himself about any such factors and then proceed to evaluate the adequacy of the evidence of each of the complainants by reference to their identification evidence. Nor did he explain why, after taking account of the warning, the evidence satisfied him that the appellant had been correctly identified as the person who committed the offences against the complainants. The trial magistrate appears to have had regard to a lot of hearsay evidence and irrelevant evidence about the state of mind of the complainants. His Honour wrongly took account of the evidence, that there was more than one complaint, as evidence which confirmed the identification evidence of each of the complainants. He did so in circumstances where he stated he was not using the evidence of the complainants as similar fact or coincidence evidence.

- [84] Further still, the trial magistrate did not warn himself that an honest witness may be mistaken or that two or more honest witnesses can be just as mistaken as one. In my opinion he should have done so. It was particularly important that the latter warning be given in circumstances where the trial

magistrate had refused an application for separate trials of the charges against the appellant and the evidence of the complainants was not being used as similar fact evidence.

- [85] In my opinion, there has been a miscarriage of justice. The proviso does not apply and the appeal should be allowed on these grounds. The appellant's convictions for each of the counts of assault and the circumstances of aggravation should be set aside. It is appropriate that there should be a retrial in relation to each of the counts of assault involving Miss RH and Miss AH.

Ground 5 – the direction as to circumstantial evidence

- [86] During the course of his reasons for decision the trial magistrate made the following remarks:

The case is not one that calls for inferences to be drawn; it is one that depends upon the credibility of the evidence in circumstances where one is dealing with the evidence of immature, but not childish, witnesses who are at least slightly upset by what has happened to them ...

- [87] When dealing with the evidence of Miss AH the trial magistrate made the following remarks:

At the time [Miss AH] was grabbed, she was standing or floating or near and looking in much the same direction as her friend, [Miss TE] and [Miss AH's] evidence is that she looked around straight away after the touching had happened and saw, above the water close by, a man's head and perhaps his shoulders or parts of his shoulders but not much more than that and that the man spoke to her and said 'Are you all right, babe?'

The circumstances as exposed in cross-examination are that there were some other younger people not too far away. How close is hard to say. But it doesn't seem that there was any doubt in [Miss AH's] mind right from the start that this person who was speaking to her from the water was, as far as she could guess, estimate, infer, work out from the circumstances as she knew them, the person who must have grabbed her.

- [88] In my opinion the learned magistrate erred in making the statement referred to in par [86] above. As none of the complainants saw the appellant assault them the case was very much a case which depended on the drawing of inferences about who assaulted them. Not only was the trial magistrate required to draw inferences about who assaulted each of the complainants but he was required to warn himself that he must be satisfied there were no other co-existing circumstances that could weaken or destroy the necessary inference; and that the proven facts were such that the only rational inference was that the appellant assaulted each of the complainants⁴¹. Before he could convict the appellant, the magistrate was required to be satisfied that evidence was such as to exclude any reasonable hypothesis consistent with innocence⁴².

- [89] Further, the evidence about Miss AH's state of mind is irrelevant and inadmissible⁴³. Likewise, any conclusion that the trial magistrate drew about Miss AH's state of mind is irrelevant. The evidence about Miss AH's state of mind does not logically assist in identifying the accused nor does it logically assist in determining who assaulted Miss AH. It is simply not a

⁴¹ *Plomp v The Queen* (1963) 110 CLR 234.

⁴² *Peacock v The King* (1911) 13 CLR 619.

⁴³ *AK v Western Australia* (2008) 243 ALR 409 per Heydon J at par [114].

relevant circumstance. It is not a circumstance which could be relied on by the trial magistrate to make an inference beyond reasonable doubt that it was the appellant who assaulted Miss AH. That inference can only be drawn if the evidence establishes that the appellant was the only person who was sufficiently proximate to each of the complainants to have assaulted them or, if there were other people in the vicinity, that it was nonetheless the appellant who assaulted each of the complainants.

- [90] The trial magistrate should have identified the intermediate facts which led to his conclusions that the appellant had assaulted each of the complainants and the evidence which established those intermediate facts. He should also have explained why the evidence established the necessary intermediate facts and led to the ultimate conclusions that the appellant assaulted the complainants. In the circumstances the magistrate has failed to give adequate reasons for coming to the conclusion that it was the appellant who assaulted each of the complainants.
- [91] In my opinion, there has been a further miscarriage of justice⁴⁴. The appeal should also be allowed on this ground.

Ground 4 - The verdict about count 4 was unreasonable and was not supported by the evidence

- [92] The Court may allow an appeal against a finding of guilt if the Court is of the opinion the verdict of the Court of Summary Jurisdiction is unreasonable or cannot be supported having regard to the evidence. This ground of appeal

⁴⁴ *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 – 729.

requires the Court to examine whether, upon the whole of the evidence it was open to the Court of Summary Jurisdiction to be satisfied beyond reasonable doubt that the accused was guilty⁴⁵. In so doing, the Court must pay full regard to the Court of Summary Jurisdiction's advantage of seeing and hearing the evidence. However, 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 the Court of Summary Jurisdiction ought to have experienced⁴⁶.

[93] In *M v The Queen* Mason CJ, Deane, Dawson and Toohey JJ stated⁴⁷:

If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such away as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the [the Court of Summary Jurisdiction], there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based on that evidence.

[94] As to the assault against her Miss TE gave the following evidence:

After they went into the wave pool enclosure, Miss TE and Jessica picked up a tube and got into the water. During the first set of waves, they caught waves on the right hand side of the wave pool which is the side of the wave pool near the Convention Centre. When the second set of waves started Miss TE caught a wave which took her down to the bottom end of the wave pool. She then felt two hands grab her around her waist for a couple of seconds. It was a very quick grab. It lasted until she turned around to see who grabbed her. When she turned around the person said sorry and let her go. She looked around and there was this guy kneeling down and he said, sorry, and then he went away.

⁴⁵ *M v The Queen* (1994) 181 CLR 487 at 493.

⁴⁶ *M v The Queen* (1994) 181 CLR 487 at 494.

⁴⁷ *M v The Queen* (1994) 181 CLR 487 at 494.

Miss TE could not say if the man, who said sorry, was the same person who grabbed her on the waist. She did not see who grabbed her. The man was simply there when she turned around. She could see his head and shoulders. She did not know the man. She looked at him for a couple of seconds at the most. After he said sorry, she turned and swam away and she told Jessica what occurred. She was not under the water when the incident occurred. The height of the water was somewhere between her waist and her chest.

[95] The evidence of the appellant was that he did not touch Miss TE in the manner that she claimed she had been touched and he did not speak to her. If the evidence of the appellant is accepted that is the end of the matter. If the evidence of the accused is rejected it is still necessary to consider what inferences can be drawn beyond reasonable doubt from the evidence of Miss TE. Further, it is not possible to reject the appellant's evidence that he touched Miss TE but accept his evidence that he did not come into accidental contact with Miss TE.

[96] In my opinion the evidence of Miss TE is not sufficient to exclude the reasonable possibility that Miss TE was grabbed by accident or that it was reasonably necessary for the person who grabbed her to grab her on the waist as part of the common intercourse of life. The wave pool was in motion, it was crowded, the surface of the water was between Miss TE's waist and shoulder height, the grab was momentary and it occurred after she had been swept along by a wave, Miss TE did not see the person grab her, the person who may have grabbed her was on his knees and he said sorry as soon as she turned around. There is a reasonable possibility that the wave

may have swept Miss TE into the path of the other person or that he may have lost his balance in the waves and grabbed her as a result or both.

[97] Further, Miss TE's description of the person who grabbed her was not of a person who had a beard and she was not certain that the man in the Hotel Vibe Café was the person who grabbed her.

[98] Having reviewed the evidence and given due regard to the advantage enjoyed by the trial magistrate, I am of the opinion that the inadequacies of Miss TE's evidence are such that there is a significant possibility an innocent person has been convicted of the crime of aggravated assault upon her. The verdict of the magistrate cannot be supported by the evidence. I entertain a reasonable doubt as to the appellant's guilt of the charge of assault against Miss TE.

[99] The appeal against the appellant's conviction for the charge of assault against Miss TE should also be allowed on this ground. The conviction should be set aside and the appellant should be acquitted of the charge of assault against Miss TE and of each of the circumstances of aggravation.

Ground 8 – Good character

[100] The trial magistrate made the following remarks about the appellant's good character:

His account is one which carries particular weight and needs to be taken with particular seriousness because it is put forward and accepted by the prosecution that he's a man of positive good character, that a number, more than one, citizen of good standing was

ready to give evidence in the normal form as to that good character. That is, there were at least a couple of people outside the court ready to come in and say the usual words which are that know Mr Dennis, they know many people known to Mr Dennis and Mr Dennis' reputation among the people who knows him is a reputation of a good citizen.

He has no convictions for anything at all and is a person of character whose testimony, therefore, needs to be more respect than a person not of that character. And a person who, just as a matter of commonsense having no previous convictions at all, is less likely to commit an offence than a person taken at random. And one should be, therefore, careful and consider the matter hard before rejecting his evidence and before coming to the conclusion that he was guilty of these actions.

[101] In the circumstances it cannot be said the trial magistrate erred in law, in failing to direct himself about the use which was made of the applicant's established good character. This ground of appeal is not made out.

The other grounds of appeal

[102] As I have decided that the appeal should be allowed on other grounds, it is unnecessary to determine grounds of appeal three, six, seven and nine. These will be a matter for the trial magistrate upon the re-trial of the charges of assault in relation to Miss RH and Miss AH. It is sufficient to note that there is some force in the appellant's contentions about these grounds.
