Chapter 6: Identification Evidence

In this chapter some of the inherent dangers associated with identification evidence are examined. This chapter also considers the relevant sections of the *Evidence Act 2009* and their procedural requirements.

Forms of Identification Evidence

There are three forms of identification evidence: positive identification as direct evidence, positive identification as circumstantial evidence, and circumstantial identification evidence. Justice McHugh referred to these forms of identification in the Australian case of *Festa v R*.[1] He described the first two forms of identification evidence in the following way:

> Most cases concerned with identification evidence are cases of positive identification. That is to say, cases where a witness claims to recognise the accused as the person seen on an occasion that is relevant to the charge. Positive-identification evidence may be used as direct or circumstantial proof of the charge. A positive identification of the accused is direct evidence of the crime when it identifies the accused as the person who committed one or more of the acts that constitute the crime in question. A positive identification is circumstantial evidence when its acceptance provides the ground for an inference, alone or with other evidence, that the accused committed the crime in question. A witness gives direct evidence of the charge when she testifies that the accused ordered her to hand over the takings. A witness gives circumstantial evidence of the charge when she testifies that the accused was the person who ran out of the bank immediately after other evidence proves it was robbed.[2]

The third form of identification evidence – circumstantial identification evidence[3] – is described by McHugh J in the following way:

> It is evidence that asserts that the general appearance or some characteristic or propensity of the accused is similar to that of the person who committed the crime. It may be evidence of age, race, stature, colour or voice or of a distinctive mark or gait. It differs from positive-identification evidence in that the witness does not claim to recognise the accused as the person who committed the crime or was present in circumstances from which it can be inferred that the accused committed the crime. Although such evidence does not directly implicate the accused in the crime or as being present in incriminating circumstances, it is admissible evidence. It is proof of a circumstance – usually, but not always, weak – that with other evidence may point to the accused as the person who committed the crime. It will be weak evidence, for example, when it merely proves that the perpetrator and the accused are persons of the same ethnic background. It may be nearly conclusive evidence of identity when it proves that the accused and the perpetrator have used a

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1 [2001] HCA 72; (2001) 208 CLR 593; 185 ALR 394; 76 ALJR 291.
2 Ibid [54].
3 Circumstantial evidence is consider in greater detail in Chapter 9.

> unique modus operandi which is admissible in accordance with the principles concerning the admission of similar fact evidence.[4]

There are a series of subsets of the forms of identification evidence described by McHugh J in *Festa*. They include: picture identification evidence, recognition evidence, resemblance evidence, voice identification evidence, descriptive evidence (circumstantial), in-court identification, exculpatory identification evidence, identification of objects, and opinion evidence and identification evidence. Some of these categories are considered below.

Reliability of Identification Evidence

Identification evidence is one of the most unreliable forms of evidence. Identification based on the evidence of a witness, even one who claims to be 'certain' that they saw the accused commit the offence, can ultimately result in the conviction of an innocent person. The reasons for identification evidence being considered unreliable are provided in a number of leading cases. For example, McHugh and Gummow JJ give the following reasons in *Bulejcik v R*:

> Identification evidence is often unreliable evidence because human perception and recollection are prone to error. … The capacities of individuals to remember sights and sounds vary enormously. Some persons may remember sounds that others do not, just as some persons may recollect physical features when others who were present cannot recollect them. Moreover, individuals who witness or are involved in criminal incidents react differently. Some remain relatively calm; others are shocked or confused. [5]

Some additional issues affecting the reliability of identification evidence include: influence from others, which has been a probable factor in a number of tension cases in the Solomon Islands; the 'displacement' effect and 'rogues gallery' effect, which occur when photographs are used as part of the identification procedures; false memories; and difficulties associated with the original observation.

The dangers inherent in identification evidence have long been recognised: Gibbs CJ in *Alexander v The Queen* is critical of dock identification, [6] warns about the dangers of identification evidence, and stresses the need for identification of an accused to be made at the earliest opportunity and for the evidence about the act of identification needing to be given by those who saw it made, stating that:

> Evidence given by a witness identifying an accused as the person whom he saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the

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4 *Festa v R* [2001] HCA 72 at [56]; (2001) 208 CLR 593; 185 ALR 394; 76 ALJR 291 (references omitted).

5 [1996] HCA 50 at [20]-[21]; (1996) 185 CLR 375.

6 [1981] HCA 17; (1981) 145 CLR 395.

> accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused. The reasons for this were explained in *Davies and Cody v The King* [1937] HCA 27; (1937) 57 CLR 170, at pp 181–182. In particular there is the danger that the witness will too readily come to believe, without any true recollection, that the man charged is the man whom he had previously seen, particularly if his own memory has become dim and there is some resemblance between the two men. The courts in England and Australia have long recognised the danger of acting upon evidence of identification made in those circumstances. It has accordingly become established practice for a witness to be asked to identify the accused at the earliest possible opportunity after the event, and for evidence to be given of that act of identification. Such evidence is, in practice, given not only by the person who made the identification but also by persons who saw it made.[7]

Identification Evidence and the Evidence Act

A number of sections of the *Evidence Act* seek to improve the reliability of identification evidence by imposing procedures that should be adopted when identification is an issue.

Section 81 of the *Evidence Act* lists four main identification procedures and requires police to follow procedures when taking identification evidence. It states:

> **81.** (1) A police officer may use one or more of the following procedures to help gather evidence of the identity of a person suspected of having committed an offence –
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> (a) an identification parade;
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> (b) a photo board containing at least 12 photos of people of similar appearance, 1 of whom is the person suspected of having committed the offence;
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> (c) videotape;
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> (d) computer generated images.
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> (2) The police officer must comply with any procedures established for the taking of identification evidence.
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> (3) The police officer may ask a person to take part in an identification parade.
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> (4) The person may refuse to take part in the parade.
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> (5) This section does not limit the procedures a police officer may use to help gather evidence of the identity of a person suspected of having committed an offence.

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7 Ibid [3].

Section 81(1)(a) lists identification parades as one of the means of identification that can be used by a witness. The endorsement of identification parades, the importance of procedural fairness when conducting parades and the use of photographic identification were all topics considered by Gibbs CJ in *Alexander v The Queen*.[8] Chief Justice Gibbs took the view that identification parades, conducted appropriately, are the best method for a witness to use when attempting to identify another. He stated:

> The safest and most satisfactory way of ensuring that a witness makes an accurate identification is by arranging for the witness to pick out from a group the person whom he saw on the occasion relevant to the crime. If an identification parade is held for that purpose, it goes without saying that precautions must be taken to ensure that no prompting, suggestion or hint is given to the witness that any particular member of the group is the suspect. For example, it would be unfair and improper to show to a witness, before the identification parade was held, a single photograph of a person who was said to be the suspect, and it would be unsafe to act on evidence of identification given in those circumstances … Indeed, where a suspect had been arrested, and it was intended to ask a witness to attempt to identify him at an identification parade, it would be unfair to show the witness, before the parade, a number of photographs including that of the suspect … On the other hand it may be necessary for a police officer to show a number of photographs to a witness in an attempt to obtain information as to the identity of an offender; if such witness did identify the offender from a photograph, it would not necessarily be unfair for that witness later to be asked to select the offender from a group at an identification parade, but the fact that the witness had seen the photograph might affect the value of the later identification at the parade …
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> The value of holding an identification parade is not only that, if properly carried out, it provides the most reliable method of identification, but also that it is necessarily held in the presence of the accused, who is thereby enabled to observe, and later bring to light, any unfairness in the way in which the parade was conducted, or any weakness in the way in which the witness made the identification.[9]

Identification Parade Procedure

Sections 82 and 83 of the *Evidence Act* set out the procedure that is to be followed when conducting an identification parade. Section 82 states:

> **82.** (1) The way an identification procedure is conducted must allow only one witness involved in the procedure to see or hear the procedure at a time.
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> (2) After a witness has taken part in the procedure, the witness must, as far as reasonably practicable, be prevented from

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8 Ibid.

9 Ibid [5]–[6] (Judgment of Gibbs CJ).

speaking about the procedure to any other witness until the procedure ends.

(3) The way a witness identifies a person during an identification procedure may be electronically recorded if facilities are available and it is reasonably practicable to do so.

(4) A police officer must not stop a person being present during the procedure to support the witness unless –

(a) the other person is a witness involved in the procedure; or

(b) the officer suspects the person will influence the witness's decision or disrupt the procedure.

(5) If a police officer stops someone being present during the procedure to support a witness, the police officer must –

(a) give to the witness the reasons for stopping the person being present; and

(b) advise the witness he or she may arrange for someone else to be present to support the witness; and

(c) if asked, allow someone else to be present.

Section 83 of the *Evidence Act* governs the procedures that must be followed. It states:

83. (1) This section applies if a police officer conducts an identification parade that includes a person reasonably suspected of having committed an offence (the 'suspect').

(2) If reasonably practicable and if facilities are available, a police officer must cause the behaviour and position of each person in an identification parade to be photographed or otherwise electronically recorded.

(3) A police officer must explain the procedure for an identification parade to a suspect before conducting the identification parade.

(4) The explanation must include the police officer telling the suspect the following –

(a) the identification parade can not be conducted unless the suspect agrees;

(b) the suspect may have a friend, relative or legal practitioner present at the identification parade if that person can attend within a reasonable time;

(c) anyone present may not interfere with the procedure in any way;

(d) the suspect may choose a position in the parade and change position in the parade after each witness has viewed the parade;

(e) the suspect's identity will not be given to a witness unless the witness identifies the person and a proceeding is started against the person.

(5) A police officer conducting an identification parade must, as far as reasonably practicable, replicate the conditions, described by the witness, when the witness saw a person involved in the offence, including –

(a) changing the lighting in the room; or

(b) varying the distance from which the witness views the identification parade; or

(c) concealing aspects of the participants in the identification parade.

(6) Each witness must view the identification parade separately.

(7) The police officer conducting the identification parade must ask the witness to carefully view the parade and to state whether the witness recognises anyone in the parade.

(8) The police officer must ask the question in a way that does not suggest the identity of any participant in the identification parade.

(9) If the witness indicates he or she recognises a person in the identification parade, the police officer conducting the parade must ask the witness to clearly identify the person recognised, such as, by stating the number of the person identified or describing his or her position in the parade.

Identification parades are rarely conducted in the Solomon Islands and as a consequence there is a dearth of case law.

Photo Board Identification

Section 81(1)(b) of the *Evidence Act* allows for a photo board to be used. In *Alexander v The Queen*, Gibbs CJ confirms this method as acceptable.[10] The sections dealing with the procedure to be followed when attempting photo board identification are contained in sections 84 and 85 of the *Evidence Act*. They state:

Photo identification

84. In a photo identification, to avoid directing the attention of the witness to a particular photograph, the police officer must ensure

[10] [1981] HCA 17 at [7]; (1981) 145 CLR 395.

nothing is marked on any photograph or the backing board on which the photograph is mounted.

Photo boards

85. (1) A police officer showing witnesses a photo board must show the photo board to each witness separately.

(2) The police officer must ask the witness to carefully view the photo board and to state whether the witness recognises anyone whose photo is on the photo board and must ask the question in a way that does not suggest the identity of a person whose photograph is on the photo board.

(3) If the witness indicates he or she recognises a person in a photo on the photo board the police officer must ask the witness to –

(a) clearly state the number of the photograph the witness has identified as being that of the person alleged to be responsible for committing the relevant offence; and

(b) write the photograph number and the date the photo board was shown to the witness –

(i) on the front of an unmarked photocopy of the photo board; or

(ii) on the back of the photo board or the selected photograph; and

(c) sign the photo board, photocopy or photograph where the person has written on it.

The practitioner needs to carefully consider the type of photographs displayed and the way they are used in the identification process. Sections 84 and 85 take account of common law and best police procedural practice. The 'displacement' effect and the 'rogues gallery' effect are two of the matters that the sections attempt to overcome. Gleeson CJ in *Festa v R* refers to these dangers inherent in photo identification.[11] He stated:

> There are two principal dangers associated with identification by means of selection from a group of photographs. These were discussed in *Alexander*. There is the inherent risk of error associated with suggestibility, and what is sometimes called the displacement effect. But there is also a risk of a different kind. The fact that the police have photographs of a suspect might convey to the jury the message that the suspect is a person with a criminal history. A similar risk arises where identification is made in circumstances suggestive of a criminal background, such as where a person is asked to attend a police station and look at a number of people reporting in compliance with bail or parole conditions. This is sometimes called the rogues' gallery effect. Because of

[11] [2001] HCA 72; (2001) 208 CLR 593; 185 ALR 394; 76 ALJR 291.

> the evidence as to the circumstances in which the photo-board shown to Mr Hill was prepared, that is not an issue in the present case. The first kind of risk concerns the probative value of the evidence. The second is a risk that the jury will draw an inference about a fact which, even if true, would ordinarily be excluded from evidence. In that connection, some care is needed in the use of the term 'prejudice'. Where it is present, a risk of the second kind is clearly a risk of unfair prejudice. It is a risk that a fact will be suggested which is of a kind that is ordinarily excluded from evidence in the interests of fairness to an accused. But prejudice does not arise simply from the tendency of admissible evidence to inculpate an accused. It is unfair prejudice that is in question. Where evidence is relevant and of some probative value, prejudice might arise because of a danger that a jury may use the evidence in some manner that goes beyond the probative value it may properly be given. If there is relevant prejudice of that kind, it lies in the risk of improper use of the evidence, not in the inculpatory consequences of its proper use. If it were otherwise, probative value would itself be prejudice. All admissible evidence which supports a prosecution case is prejudicial to an accused in a colloquial sense; but that is not the sense in which the term is used in the context of admissibility.[12]

Where more than one witness has given evidence identifying an accused, the common law still takes account of the inherent dangers of identification evidence and requires a jury to be warned that even a number of honest witnesses can be mistaken: see *R v Weeder*;[13] *R v Haidley*.[14]

Surveillance Photographs

Surveillance photographs are considered to be admissible evidence, although they are not referred to in the *Evidence Act*. In *R v Hennessy* Spigelman CJ stated:

> The video and photographs from the security camera constitute real evidence of the robbery. They do not constitute 'identification evidence' of any character, let alone 'picture identification evidence' as defined in s 115(1) of the [*Evidence Act 1995* (NSW)]. To use part of that definition, there was no 'identification made wholly or partly by the person who made the identification examining pictures …'. No witness gave any evidence of identification – or indeed of any character – based on the photographs.[15]

Police officers often give evidence as to the identity of individuals shown in surveillance photographs. However, in *Smith v R*,[16] the High Court of Australia held that such evidence was not relevant and that police officers were in no better position than members of the jury to identify an accused person from such photographs. In a joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that:

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12 Ibid [22] (references omitted).
13 (1980) 71 Cr App Rep 228, 231.
14 [1984] VR 229 at 231, 251–252.
15 [2001] NSWCCA 36, 3.
16 [2001] HCA 50; (2001) 206 CLR 650; 181 ALR 351; 75 ALJR 1398.

> The question of the relevance of the evidence of the police officers may be approached in this way. The fact in issue was, as we have earlier said, 'Is the person standing trial the person who is depicted at the right-hand side of some of the photographs tendered in evidence?' Is an assertion, in evidence, by a witness that he now recognises, or has previously recognised, the person who is depicted in those photographs as the accused, relevant evidence? That is, in the language of s 55 of the *Evidence Act* [*1995* (NSW)], could that evidence, if accepted, rationally affect the assessment by the jury of the probability that it is the person standing trial who is depicted in the photographs?
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> Because the witness's assertion of identity was founded on material no different from the material available to the jury from its own observation, the witness's assertion that he recognised the appellant is not evidence that could rationally affect the assessment by the jury of the question we have identified. The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury. The process of reasoning from one fact (the depiction of a man in the security photographs) taken with another fact (the observed appearance of the accused) to the conclusion (that one is the depiction of the other) is neither assisted, nor hindered, by knowing that some other person has, or has not, arrived at that conclusion. Indeed, if the assessment of probability is affected by that knowledge, it is not by any process of reasoning, but by the decision-maker permitting substitution of the view of another, for the decision-maker's own conclusion.
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> In this case the evidence of the police was irrelevant and should not have been received. No question of admissibility had to be considered.[17]

The use of surveillance photographs is also considered in *R v Gardner*,[18] in which the New South Wales Court of Criminal Appeal discussed and followed *Smith v R*. In *R v Marsh*,[19] it was held that *Smith v R* does not prevent evidence being led of a relative identifying an offender from photographs taken of a bank robbery. Further, in *R v Drollett* it was held that a police officer who was familiar with a suspect's manner of movement would be able to give evidence identifying the suspect from video footage of the offence.[20]

Once photograph evidence has been tendered, the image or images become available for the tribunal of fact to compare with the accused.

Section 81(1)(c) of the *Evidence Act* allows for video tape identification. Presumably, this section is referring to a form of identification that is different to surveillance photographs. The method to be employed is not

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17 Ibid [10]–[12].
18 [2001] NSWCCA 381.
19 [2005] NSWCCA 331.
20 [2005] NSWCCA 356.

described in the *Evidence Act* and will need to be clarified by the courts over time.

Section 81(1)(d) of the *Evidence Act* allows for the use of computer generated images. The range of possibilities for this approach is extensive. However, this section may be referring to the identification of a suspect by a witness creating an image of the suspect's face. It probably is not referring to 'facial mapping' or 'body mapping'.

Section 81(4) allows a suspect to 'refuse to take part in the parade'. The refusal to take part in a parade is a legal right that cannot be used to show consciousness of guilt: *R v Reeves*.[21]

Section 81(5) of the *Evidence Act* provides that a police officer may use other methods to help gather evidence of the identity of a person suspected of having committed an offence. For example, a witness could be shown a single photo or use a photo board for the purpose of identification for investigative purposes. However, this non restrictive section does not allow such evidence to be admissible at trial where it would otherwise be inadmissible, for example because of procedural irregularity, or in the exercise of discretion by the trial judge.

Voice Identification Evidence

Section 86 of the *Evidence Act* allows for voice identification. It states:

> **86.** Voice identification evidence offered by the prosecution in a criminal proceeding is inadmissible unless the prosecution proves on the balance of probabilities that the circumstances in which the identification was made were likely to have produced a reliable identification.

In *Regina v Riscuta and Niga*,[22] Heydon JA commented on the matters referred to by Toohey and Gaudron JJ in *Bulejcik v R* finding that they were relevant to determining the probative value of the evidence, rather than going to admissibility.[23] He stated:

> It is not entirely clear what Toohey and Gaudron JJ were meaning to assert in the passage relied on by the appellant. Were they stating threshold criteria for admissibility? Were they stating matters relevant to the exercise of a power to exclude? Or were they stating matters relevant to an assessment of weight? The case concerned New South Wales law before the enactment of the *Evidence Act* 1995 [NSW]. In *R v Smith* [1984] 1 NSWLR 462 the law of New South Wales had been stated as requiring the witness to have prior familiarity with the voice identified, or requiring the voice identified to be distinctive. That case has been much criticised or questioned in other jurisdictions, and the American authorities relied on in it have lost favour in their original jurisdictions. In *Bulejcik v R* at 382

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21 (1992) 29 NSWLR 109, 115.
22 [2003] NSWCCA 6.
23 [1996] HCA 50; (1996) 185 CLR 375.

> Brennan CJ said *R v Smith* was wrong and at 406 McHugh and Gummow JJ said it was arguably wrong. **This debate about the common law does not matter, because this Court held** in *R v Adler* [2001] NSWCCA 357; (2001) 52 NSWLR 451 **that under the *Evidence Act* there are no preconditions for the reception of voice identification evidence apart from the requirement in s 55(1) that it be relevant;** if the evidence is relevant, it is admissible unless a positive order is made excluding it under ss 135, 137 or 138.
>
> The appellant's reliance on what Gaudron and Toohey JJ said is best regarded as a means of drawing attention to factors which may be relevant to probative value. (Emphasis added.)[24]

In the Solomon Islands the requirement for the admission of voice identification is that 'prosecution proves on the balance of probabilities that the circumstances in which the identification was made were likely to have produced a reliable identification': section 86. Accordingly, matters such as the distinctiveness of the voice and familiarity are tests that can be applied.

In-Court Identification

The identification of an accused by a witness in court is known as in-court identification. The prosecutor will ask a witness questions like: 'Do you see the person you saw was present in court?' If the answer is yes, then a further question can be asked: 'Would you point that person out?' If the witness identifies the accused it is usual for the defence lawyer to acknowledge and say, 'Identifies accused [name]'.

When working with in-court identification, it should be noted that the witness is still required to give testimony describing the person sufficiently before attempting in court identification. The lawyer adducing the evidence needs to get the witness to describe the physical characteristics of the person they are claiming to identify. This type of identification evidence has traditionally been regarded as having limited probative value because the accused is sitting in the dock and can clearly be observed as the person accused of the crime. However, at common law it is admissible: *Alexander v The Queen*.[25] The relationship between in-court identification and the relevant sections of the *Evidence Act* is unstated. The *Evidence Act* is not a code, and therefore in-court identification has not been excluded as an admissible procedure.

In *R v Le*,[26] the New South Wales Court of Criminal Appeal considered the possible dangers of in court identification, and commented on the role of defence counsel who ask questions in cross-examination without knowing the answer. In *Le's* defence case counsel obtained in-court identification from a witness which did not advance his client's interests. There had been no previous identification of the accused in examination-in-chief. In such

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24 [2003] NSWCCA 6 at [34]–[35].
25 [1981] HCA 17 at [23]; (1981) 145 CLR 395, 427.
26 [2002] NSWCCA 193.

circumstances the best approach for the defence is to avoid asking the witness questions about identification. With the concurrence of Levine and Simpson JJ, Sheller JA stated:

> Mr Banks identified the appellant in answer to a direct question from the appellant's counsel: 'You know who had the knife. Who was that?' Such a question carried high risk. Counsel no doubt thought that Mr Banks would identify somebody other than his client, the appellant. Had he done so he would have significantly improved the appellant's chance of an acquittal. The answer he got was possible though unexpected. A decision then had to be made whether to cross-examine further by pressing Mr Banks on his failure previously to identify the appellant as the person who had the knife with which the deceased was stabbed, the lateness of the identification twelve months after the events and the very limited description Mr Banks had given in chief of the person with the knife. Such cross-examination may have demonstrated that the answer was false or unreliable. But it involved further risk that Mr Banks would stand by his evidence and the jury would accept it. Counsel preferred to make these points about the unreliability of the evidence in argument rather than by cross-examination. Such decisions are part and parcel of the adversarial contest. Counsel did not seek any immediate direction, no doubt not wishing to emphasise the significance of the answer.
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> Had the evidence of identification by Mr Banks been led by the Crown and had there been no other identification of the appellant as the person who stabbed the accused the trial Judge may have been justified in discharging the jury; see *R v Saxon* (1998) 1 VR 503 at 513. But the evidence was led by counsel for the appellant in an attempt to exclude the appellant as the person who had stabbed the accused. If that risk is run by counsel with the legitimate intention of getting an acquittal I do not think an unexpected answer entitles the accused to have the answer taken from the jury or the jury discharged. However, as Mason J said in *Alexander v The Queen* [1981] HCA 17; (1981) 145 CLR 395 at 427, a court or dock identification is of little probative value when made by a witness who has no prior knowledge of the accused; see also JD Heydon, *Cross on Evidence,* 6th Australian ed (2000) at 1410.
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> In the course of his directions to the jury in summing up, when dealing with this evidence of identification by Mr Banks, McClellan J twice said:
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> 'It will be apparent to you that evidence of identification of the accused as the person committing the crime, when he has obviously been identified by others and is on his trial, should be approached with the greatest of caution.'
>
> His Honour was directing attention to what Mason J in *Alexander* at 427 called 'the trial circumstances (which) conspire to compel the witness to identify the accused in the dock'. Counsel for the appellant claimed that what his Honour suggested was that the appellant had been identified by others as the person who had stabbed the deceased. However counsel at the trial apparently did not so understand the expressions and sought no redirection. I am not persuaded that any part of McClellan J's direction on

> this identification by Mr Banks calls for the Court to intervene. This passage aside, it was unexceptionable.[27]

Defence advocates can also simply point out the accused in the dock to a witness and say words such as, 'You didn't see him did you?' The result can be the identification of the accused. Where the witness knows the accused well and identification is not an issue it is permissible for the witness to point out the person being identified.

Particular care has to be taken by the investigative police and practitioners to ensure that, as far as possible, that evidence of identification is reliable. This is assisted by adopting accepted pre-trial identification procedures.

The case of *R v Turnbull* lists a number of factors for the tribunal of fact to consider when determining the reliability of identification evidence.[28] These factors are also relevant for the police when gathering evidence and for lawyers when preparing questions for examination-in-chief and cross examination. The Privy Council stated:

> [T]he judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.
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> [i] How long did the witness have the accused under observation?
> [ii] At what distance?
> [iii] In what light?
> [iv] Was the observation impeded in any way, as for example by passing traffic or a press of people?
> [v] Had the witness ever seen the accused before?
> [vi] How often?
> [vii] If only occasionally, had he any special reason for remembering the accused?
> [viii]How long elapsed between the original observation and the subsequent identification to the police?
> [ix] Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?[29]

The Need for Caution

The need for caution before convicting on identification evidence is emphasised in *Domican v R* in the joint judgment of Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, where it was stated that:

> 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 …

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27 Ibid [86]–[89].
28 [1977] QB 224.
29 Ibid 228.

> Consequently, the jury must be instructed 'as to the factors which may affect the consideration of (the identification) evidence in the circumstances of the particular case': Smith v The Queen (1990) 64 ALJR 588. A warning in general terms is insufficient. … The attention of the jury 'should be drawn to any weaknesses in the identification evidence' … Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction 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.[30]

Where a judge alone is determining both the law and the facts it is important for him or her to identify any areas where the identification evidence is unreliable and refer to the areas in any judgment.

Discretions to Exclude

A number of discretions to exclude evidence are contained in Part 10 of the *Evidence Act* (ss 136–139) and they are relevant when considering the admissibility of identification evidence. The discretion to exclude evidence has been considered in some Australian cases. In *R v Mundine* the court found that providing the identification evidence could rationally effect a fact in issue, then the assessment of the reliability of the evidence and the credibility of the witnesses were matters for the jury.[31] In *Qoro v R*, Johnson J stated that for identification evidence to be excluded:

> There must be a real risk that the evidence will be misused by the jury in some way and that that risk will exist notwithstanding the proper directions which it should be assumed the Court will give.[32]

However, section 138 of the *Evidence Act* uses the words 'must refuse to admit evidence' when the probative value is outweighed by the prejudicial effect, which in its ordinary meaning and legal sense is the same as the word 'shall'.[33] The use of the word 'must' in the relevant section can therefore be taken to mean mandatory rather than discretionary in application especially where it relates to a fundamental principle of justice.[34] When admissibility of evidence is raised this becomes relevant.

Resemblance and Recognition Evidence

It has been held in a number of Australian cases that to sustain a conviction, identification evidence must be of positive identification, as distinct from mere resemblance evidence (where a witness may say, 'It looks like him').[35]

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30 [1992] HCA 13, 11; (1992) 173 CLR 555(references omitted).

31 [2008] NSWCCA 55 at [37]–[38]; (2008) 182 A Crim R 302.

32 [2008] NSWCCA 220 at [64].

33 See *Petch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 at 738.

34 'Must' is a word of absolute obligation and occurs in a section which is concerned with a fundamental principle of justice. It is not merely directory: Williams J in *Posner v Collector for Inter-State Destitute Persons* (Vic) [1946] HCA 50; (1946) 74 CLR 461.

35 *Pitkin v R* [1995] HCA 30; (1995) 69 ALJR 612; 130 ALR 35.

However, evidence of similarity of the accused as an offender may be admitted as a piece of circumstantial evidence.[36]

Recognition evidence describes the evidence given when an accused is identified by a witness who knows or is familiar with the accused. The *Evidence Act* does not deal with this type of evidence, however, an Australian court has found the *Evidence Act 1995* (NSW) does extended to recognition evidence although it is not referred to: *Trudgett v R*.[37]

General Points for Practitioners

When questioning a witness who is giving visual identification evidence in either evidence-in-chief or cross-examination the practitioner should consider, *inter alia*, the following.

1. The applicability of the *Evidence Act*.
2. Relevant case law.
3. The pre-trial procedures adopted by the police in the identification process.
4. The familiarity of the witness with the person being identified.
5. The length of time the witness had to make the identification.
6. The circumstances of the initial identification. For example: time of day, weather conditions, lighting and distance.
7. Any physical characteristics of the witness that may have limited the ability to accurately observe. For example, any vision impairment (this may be discernable by simply asking about whether the witness needs glasses) or whether the witness was under the influence of alcohol or drugs. A not insignificant number of people suffer from prosopagnosia (the inability to recognise faces).
8. Any mental health problems that may make the identification unreliable.
9. The ability of the witness to describe clothing or physical characteristics prior to making the identification. A distinction can be drawn between a positive identification and one that provides identification evidence that could be described as circumstantial.
10. Whether it was possible to make the observations claimed at all. Practitioners should view the scene of the identification to ensure that identification was possible.

It may be some time before the police in the Solomon Islands correctly apply the rules for identification of suspects contained in the *Evidence Act*.

Chapter 7 considers propensity evidence, which is an area of law covered in the *Evidence Act* but very rarely relied upon in the Solomon Islands.

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[36] See, eg, *R v Adams* [2004] NSWCCA 279 at [18].

[37] [2008] NSWCCA 62 at [23]–[31]; (2008) 70 NSWLR 696.