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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v CLUNE

Starke ACJ, Crockett and McGarvie JJ

21 July 1981 — [1982] VicRp 1; [1982] VR 1; (1981) 5 A Crim R 246

IDENTIFICATION – WARNING TO BE GIVEN TO JURY – DISCRETION TO EXCLUDE EVIDENCE UNFAIRLY OR IMPROPERLY PROCURED, OR WHERE THE PREJUDICIAL EFFECT OF WHICH OUTWEIGHS ITS PROBATIVE VALUE – SIMILAR ACTS.

Starke ACJ agreed with the reasons and conclusions of Crockett J, and broadly speaking, with the reasons of McGarvie J. Conviction and sentence quashed and new trial ordered.

The applicant was found guilty in the Supreme Court of armed robbery arising out of a theft from a South Yarra jewellery shop. On the pretext of wishing to make a purchase, he gained entry before the shop was due to open, produced a firearm and forced two staff members into a rear room. One of those staff members, a Mrs Carter, whilst admitting the man and moving to the rear of the shop, had a good, though short look at the intruder's face. He wore dark glasses and a moustache. An accomplice entered the shop and gathered watches and jewellery. Both left. The accomplice was not apprehended. Application for leave to appeal.

Prosecution evidence:
(1) that proceeds of robbery found in applicant's flat; that a coat and trousers, identified by Mrs Carter to be similar to those worn by the robber, were found in the flat; that at the time of the flat search, the applicant was wearing a watch taken at the robbery;
(2) identification by Mrs Carter.

The testimony relating to identification, giving rise to the application for leave to appeal against conviction falls into six parts:
(a) Identikit picture from Mrs Carter's description;
(b) An attempted identification by Mrs Carter at Russell Street police station on the day of the applicant's arrest, when, after speaking to his solicitor, the applicant declined a line up. The police brought in 18 men from the street and dispersed them in the office where the applicant was sitting, with his face to the wall, when Mrs Carter entered. The applicant crouched with hands over his face to prevent Mrs Carter seeing his face and called out his disapproval, making it clear that the parade was unlawful, and without his consent; Mrs Carter did not see his face, but said that his voice was very similar to that of the man with the firearm;
(c) Mrs Carter's subsequent selection of a photo from a folder, being the only photo of a man with a moustache and the only passport photo, the remainder reasonably thought to be of men in custody;
(d) Mrs Carter's City Court dock identification, after a side view, that the applicant was "very similar" to the robber;
(e) Mrs Carter's positive identification of the applicant crossing Russell Street and upon their eyes meeting, the applicant quickly covering his face and saying "you cunts";
(f) Mrs Carters dock identification at trial.

A. Direction to jury: The grounds of appeal included the inadequacy of the direction to the jury regarding identification.

CROCKETT J: "What precisely it is that the jury should be told must depend on the circumstances of the particular case. Without accepting the identification evidence, the jury could not have convicted of armed robbery, therefore it was incumbent upon the judge to give the jury a strong and complete warning, which was not done. The jury had been told by the judge that they should exercise caution when examining Mrs Carter's evidence and that her opportunity to see the man's face was limited.

HELD: (a) that the circumstances in which the witness formed her judgement required a detailed and precise discussion:
– opportunity to witness to form judgement;
– whether the capacity to make an accurate judgement is affected by the state of lighting, or a condition of stress or fear;
– whether the circumstances were such as to cause some impression to be left with the witness about the features of the person;
– whether the witness is a perceptive person;
– whether the witness seems a person likely to have the robber's features indelibly printed on her memory;
– whether the time lapse between the sighting and subsequent identification, might have dimmed the memory of the witness;
– whether satisfied of honesty and accuracy of witness.

(b) that the charge to the jury concerning the circumstances in which the actual identification took place, was deficient. The jury should have been told:
– risk that witness tempted to select photo because of only man with moustache and distinguishable from others photographed in a custodial setting;
– risk having selected photo, that in the three subsequent identifications, the witness identifying the man depicted in the photo, and not the man seen in the shop; and
– it is not enough for the judge to offer comments to the jury which they might use or reject as they think fit rather than as questions they should positively consider the judge must give "the weight of his judicial authority" to those considerations.

(c) that it was appropriate to tell the jury that honest mistakes in identifying offenders have occurred in the past, the purpose of so informing the jury, is that knowledge of such mistakes arises from judicial experience and so is probably not one shared by the jury.

B. Whether identification evidence should have been excluded because prejudicial effect outweighed probative value.

HELD: that the exercise of the discretion so that the evidence was admitted had not miscarried.
(a) that the evidence of the police office identification did not call for exclusion.

CROCKETT J: "In the first place, the identification parade clearly had great probative weight. If the only identification arising from its conduct was that based on recognition of the applicant's voice, the question of the admission of the evidence might have been debatable. However, the real strength of the testimony rests upon the inference open to be drawn by the jury that the applicant's behaviour was designed to prevent his being identified which he feared would very possibly occur for the very reason that he was the culprit. Such an inference, if drawn, could afford cogent proof of the applicant's culpability, Accordingly, the discretion to exclude on this ground could properly have been exercised only adversely to the applicant."

(b) that the evidence concerning the photographs did not call for exclusion but did require a careful warning as to its dangers:
– if the photographs are not a good selection for comparison purposes, or include photographs of men in circumstances that plainly indicate the probability of those men having been law breakers.

(c) that the evidence regarding the identification in the Magistrates' Court and Russell Street, did not call for exclusion but required the appropriate warning as to its adoption given to the jury:
– if identification takes place in circumstances making it plain that the person identified is in custody so that his status is obviously that of a suspect;
– if identification takes place after the witness is shown the photo of the suspect, so that the risk is that the identification is not that of the offender but that of the man seen in the photograph;
– a conviction resting upon such evidence must be treated as unsafe unless the accused person's identity is further proved by other evidence, direct or circumstantial: *R v Davies & Cody* [1937] HCA 27; (1937) 57 CLR 170.

C. Whether the identification evidence should have been excluded because it was unfairly and improperly procured.

HELD: that such discretion as was exercised must be treated as having miscarried. The trial judge had admitted evidence of the police office identification without considering whether it should have been excluded on the ground of having been unfairly obtained.

It was conceded having regard to the decision of the High Court in *R v Alexander* [1981] HCA 17; (1981) 145 CLR 395; 34 ALR 289; (1981) 55 ALJR 355, that even if the evidence is to be characterized as having been unfairly or improperly procured, it was not on that account to be treated as a matter of law as inadmissible.

In relation to the identification parade, it was submitted that the impropriety arose from the police persisting to conduct the parade, despite the applicant's stated unwillingness to participate, and that he could take advantage of his right not to participate only by drawing attention to himself as he did.

CROCKETT J: "It may be said that the distinction between an identification conducted in conformity with the Chief Commissioner's Rules and an identification sought to be made in circumstances when "the parade is brought to the applicant" is one only of form. In a sense this is true. But the former is conducted pursuant to requirements designed to, and which may be thought to, achieve complete fairness. This can not be guaranteed about the latter ... If there is to be a new trial it is unnecessary finally to express a concluded view on how such evidence if tendered by the Crown at the re-trial should be treated. It is sufficient to observe that the strongly inculpatory effect of the applicant's behaviour that resulted from his attempt to avoid participation in an impermissible procedure would seem to weigh very heavily in favour of the exclusion of the evidence."

[In relation to the identification parade, Starke ACJ and Crockett J limited their decision to the fact that the exercise of the discretion miscarried, whereas McGarvie J went further and considered that the evidence of the identification parade should have been excluded. The power to arrest cannot be used for the purpose of facilitating police enquiries: *R v Banner* [1970] VicRp 31; (1970) VR 240 referred to. Ed.]

"On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful and unfair acts may be obtained at too high a price. Hence the judicial discretion" – per Barwick CJ at 335 in *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 referred to. If no consent is given to participation in a line-up, that fact may be proved by the Crown, in order to meet any adverse comment based on the failure to conduct a parade – *Marcoux & Solomon v R* (1975) 60 DLR (3d) 119 referred to.]

D. Similar Acts – This ground of appeal related to whether the trial judge erred, when he ruled irrelevant, a question asked by Counsel in cross-examination of a police witness, being, if while the applicant was in custody, the jewellery robbery was carried out, in identical circumstances. The trial judge refused to hear argument to justify the questions.

CROCKETT J: "....It is not possible to defend the refusal to hear Counsel ... evidence was being sought to be elicited that would render less probable a fact in issue, namely the identity of the applicant as one of the South Yarra jewellery shop robbers: Cf *R v Neale* (1977) 65 Cr App R 304. Of course, whether the evidence the witness under cross-examination could provide would be sufficient so as reasonably to carry the matter far enough to allow its consideration by the jury would be a matter for investigation – preferably, I should have thought, on the *voir dire* or by a disclosure from the Bar table of the available material. Then again it might be that proof of a similarly executed robbery of jewellery in circumstances that excluded the applicant as one of those responsible may not be probative of the applicant's non-participation in the earlier robbery simply because his accomplice, having remained undetected, could have organized with a different partner the commission of a further robbery in conformity with the earlier pattern. These would all be matters for consideration and determination by the judge at any new trial.
