35/86

SUPREME COURT OF VICTORIA — FULL COURT

R v LOCKYER

Crockett, McGarvie and Southwell JJ

20 March 1986

CRIMINAL LAW – THEFT/ARMED ROBBERY – IDENTIFICATION – ACCUSED IDENTIFIED FROM FOLDER OF PHOTOGRAPHS – WHETHER EVIDENCE OF SUCH IDENTIFICATION ADMISSIBLE – WHETHER SHOULD BE EXCLUDED AS PREJUDICIAL EFFECT OUTWEIGHED PROBATIVE VALUE – WHETHER UNSAFE TO PLACE RELIANCE ON SUCH EVIDENCE.

A witness to a bank robbery saw 2 men seated in a car outside the bank. Soon afterwards, 2 masked men committed the robbery, whilst the witness was in the bank. The next day, the witness was unable to select from a folio of photographs either of the men she had seen in the car. However, 4 days later, the witness was shown 3 further folders of photographs, and in one of them, she identified L. Upon trial for the offences, L.'s counsel sought to have the witness's evidence excluded; the Judge ruled against the submission and the evidence was admitted. On appeal—

HELD: Application for leave to appeal dismissed.
The witness's evidence was admissible as relevant evidence. On the assumption that all appropriate warnings were given to the jury concerning the identification evidence, the trial judge's discretion in admitting the evidence did not miscarry nor was the witness's evidence so unsatisfactory that it would have been unsafe for the jury to have acted upon it.

CROCKETT J: (with whom McGarvie and Southwell JJ agreed) **[1]** The Court has before it applications for leave to appeal against conviction and for leave to appeal against sentence.

The applicant was convicted on a count of theft and a count of armed robbery. The latter related to a robbery which occurred on 3rd July 1984, when a National Bank branch was robbed of some $20,000 by two men who were armed at the time of the theft. The car which was stolen and was the subject of the first count was one which the Crown said was used in the course of the get-away following the commission of the armed robbery.

The Crown put forward as a witness on behalf of the prosecution a Miss Hopwood, who was a customer of the bank and who was in the bank at the time of the commission of the robbery. However, only moments before her entering the bank, she had seen two men seated in a car parked outside the bank. **[2]** Her attention was drawn to them both by reason of their appearance and their proximity to the bank and because she thought that they were acting suspiciously. For these reasons she paid particular attention to them. The fact that the bank was robbed very soon afterwards was relied on by the Crown to support the inference that the men whom she had seen in the car outside were the men who had in fact committed the robbery. Whilst in the car prior to the robbery their faces were uncovered whereas when in the bank they were disguised. On the following day, when invited to do so, Miss Hopwood was unable to select from a folio of photographs shown to her at the police station by a police officer either of the men whom she had seen in the car. However, four days later at her home she was shown three further folders of photographs. One of those folders, which became an exhibit in the case, contained a number of photographs of men. One was a photograph which the witness identified as being that of one of the robbers, and is, indeed, a photograph of the applicant.

The evidence of the witness Hopwood was critical to the success of the prosecution. Prior to her testifying, an application was made to the Judge to have her evidence excluded. It was conceded that her evidence was admissible as relevant evidence, but the Judge was invited to exclude it on the basis that its prejudicial effect outweighed its probative value. The Judge ruled against the submission and the evidence was admitted. As I have said, the applicant was convicted.

There is set out in the notice of application the single ground that the Judge's discretion miscarried either because its exercise was against the weight of the evidence **[3]** which it was

said ought to have compelled him to have exercised the discretion adversely to the Crown, or alternatively, the Judge had regard to irrelevant considerations and by reason of that fact his discretion was vitiated and on that account it must be said that the trial had miscarried.

The submissions in support of the contention that, for one reason or another, the Judge's discretion miscarried were these: first, there was to be seen in the photograph of the applicant (unlike that which appears in the remaining photographs) something to suggest that when it was taken the applicant was in a custodial situation and accordingly the jury might infer that he was a person known to the police and consequently had a prior record and thereby consider he was likely to have a propensity to offend. Next it was said that, by reason of the same consideration in relation to the photograph of the applicant, it was more likely that the witness Hopwood would have selected the applicant because of that consideration rather than that she identified the person to be seen in the photograph as the same person as the one she had seen in the car outside the bank immediately before the robbery. Accordingly, it was argued that on that account the value of the testimony was so weakened that to place reliance upon it would be unsafe and that that was a cogent consideration to be borne in mind in the exercise of the discretion.

Then it was said that, without there being any real or satisfactory reason advanced for the failure to conduct an identification parade, no parade was conducted at which Miss Hopwood was invited to be present: although, having **[4]** regard to the initial identification carried out by the photo-identification process during what has been called the "detection process", I think the Crown would invite the inference to be drawn that it would be unwise thereafter to hold an identification parade because of the so-called possible "displacement effect". That is to say, the risk was real that the witness would be identifying a person who was not the person she had seen in the car outside the bank, but the person of whom she had seen a photograph at the time of the photo-identification process. It was said finally that the Judge had paid regard to an incorrect and irrelevant consideration when, in the course of discussion with counsel whilst the submission in support of the application was being made, he said:

> "In other words when you are considering the question whether or not the evidentiary value is outweighed by the prejudicial effect, one of the matters to be taken into account is the strength of the remaining evidence in the Crown case. If it is a strong Crown case otherwise then that may be a good reason for being more inclined to exclude the impugned evidence. But if it is a weak Crown case otherwise that means there is less reason for excluding the impugned evidence, because it is not merely the effect of the impugned evidence that has to be considered, it is the overall effect of all the evidence available to the Crown."

For my part I find it unnecessary to say specifically that I subscribe to the correctness of those propositions stated in the words that the Judge used. It is sufficient to say that I am of the view that the importance to the Crown case of the piece of evidence under consideration is, I think, relevant to be borne in mind at the time that the discretion has to be exercised.

The Court's attention has been invited to a number of the many reported cases in recent years that deal with the **[5]** question of identification evidence. It is unnecessary to refer to them. The principles have now become well known. It appears to me that the Judge was perfectly entitled in the exercise of his discretion to reach the conclusion that he did. Indeed, I would go so far as to say his discretion could be exercised only one way in this matter, that is, adversely to the applicant.

Each of the matters relied upon in support of the contention that the Judge should have exercised his discretion differently from the way he did was a matter that could be the subject of warning to the jury in the course of the Judge's charge. No complaint was made about his charge and in particular no objection was taken to what it was he had to say to the jury in the course of it concerning the question of the identification evidence of the witness Hopwood. It is because I have reached that conclusion that I find it unnecessary to say anything further about the particular passage that I have just quoted – even if one assumes that it formed part of the reasoning process when the Judge came to give his ruling. I have looked at his ruling. It is concise. It does not discuss the various arguments that were relied on. One cannot be sure that what His Honour had to say quite some time earlier in the course of argument was in fact relied upon by him at the time he gave his ruling. However, for the reasons I have given, I am of the view that the exercise of the discretion did not miscarry and that that ground relied upon does not succeed.

Although there was no such ground specified in the notice of application, counsel for the applicant then, **[6]** without objection, contended that, having regard generally to the evidence of the witness Hopwood, the detail of which was expounded to the Court, the Court ought to find that it was so unsatisfactory that it would have been unsafe for the jury to have acted upon it.

A number of criticisms of it was advanced. It was said that, in consequence, the Court ought to reach the view that the verdict was unsatisfactory and unsafe, and accordingly, the Court ought to set aside the verdicts of guilty. For my part, I am content to say I am not so satisfied. The question of the acceptance or otherwise of a witness's testimony, on the assumption that all appropriate warnings concerning it must have been given to the jury, was entirely a matter for the jury. I can see no reason for concluding that were it so to act upon that testimony its verdict should accordingly be characterised as either unsafe or unsatisfactory. That ground too, therefore, must fail.

Accordingly, in my view, the applicant for leave to appeal against conviction should be dismissed ...

[His Honour then dealt with the application for leave to appeal against sentence]
