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SUPREME COURT OF VICTORIA — FULL COURT

R v HAIDLEY and ALFORD

Young CJ, Kaye and Brooking JJ

19 August 1983

[1984] VicRp 18; (1984) VR 229; (1984) 10 A Crim R 1; noted 8 Crim LJ 248

CRIMINAL LAW – IDENTIFICATION – ADEQUACY OF DIRECTIONS – IDENTIFICATION FROM PHOTOGRAPHS – REFUSAL TO PARTICIPATE IN IDENTIFICATION PARADE – SUBSEQUENT IDENTIFICATION IN POLICE YARD – WHETHER ADMISSIBLE – EVIDENCE OF EXPERT – PSYCHIATRIC EVIDENCE – WHETHER ADMISSIBLE AS TO ACCUSED'S MENTAL STATE AT TIME OF OFFENCE.

H. and A. were both found guilty of armed robbery. In respect of H., the evidence was that a witness Hall, saw H. drop a handgun near the scene of the crime, and then pick it up and disappear from view. Another witness Sharma said that H. came into his shop, had a conversation with him and then left the shop where he was pursued by Police. When H. was taken into custody, he refused to participate in an identification parade. The same day Hall was shown 2 folders of photographs of about 12 persons, and he identified H. in each folder as the man he had seen with the gun. The next day, Sharma accompanied police to a yard forming part of the watchhouse opposite Russell Street Police Station where he saw approximately 10 persons of mixed ages and heights. From among these, Sharma identified H. as the person whom he had seen in his shop; however, at the trial, Sharma was unable to identify as that man any person in the court, explaining that the man he saw had a moustache. It was submitted that the evidence of identification should be excluded; however, the trial judge ruled against this submission. In respect of A.'s case a clinical psychologist was called to give evidence concerning the effect of alcohol on the brain of a chronic alcoholic, such evidence being relevant for the purpose of considering whether A.'s conduct was conscious or voluntary. The trial judge ruled that this evidence was inadmissible. Upon applications for leave to appeal—

HELD: Both applications dismissed.
(A) Haidley's application:
1. An accused's refusal to participate in an identification parade, does not render him immune from any other legitimate form of identification.
2. Accordingly, it did not follow that the subsequent identification by Sharma of the accused – without his consent or knowledge – was, *ipso facto*, unfair or improper.

(B) Alford's application:
1. A psychologist who sees an accused only after the event, has no expertise which will enable him to say what the accused's condition was at the relevant time or whether he had acted voluntarily.
***R v Darrington and McGauley* [1980] VicRp 36; (1980) VR 353; (1979) 1 A Crim R 124, applied.**

2. An expert should not be permitted to give it as his opinion, that an accused person did a given act voluntarily or with the intent requisite to the crime charged.

YOUNG CJ: [1] The Court has before it applications for leave to appeal against convictions for armed robbery by John Albert Haidley and Graeme John Alford. I have had the advantage of considering in draft the judgment to be delivered by Kaye J in so far as His Honour deals with Haidley's application. That judgment sets out the circumstances of the offence and the facts upon which Haidley's application is based. It is therefore unnecessary for me to repeat those facts end circumstances. I agree in the conclusion at which Kaye J has arrived and I agree in substance with the reasons His Honour has expressed. I wish, however, to add some observations of my own.

Much has been written in recent years upon the question of the proper directions to be given by trial judges in what are called "identification" cases. Not all of it has been calculated to assist trial judges in the task that they have to perform and moreover there is a danger that what Mason J **[2]** in *Alexander v R* [1981] HCA 17; (1981) 145 CLR 395 at p431; (1981) 34 ALR 289; (1981) 55 ALJR 355 called "rigid propositions" will be developed. This would not be conducive to the fair and proper administration of justice. To require trial judges to recite or refer to numerous propositions which could by the application of ingenuity be thought to be possibly relevant to the consideration of evidence of identification, tends not only to underestimate the intelligence of the

average jury but also to make a judge's charge appear absurd and thereby to operate against the fair and proper administration of justice.

It is particularly important that the judgments of Courts given in "identification" cases should be read *secundam subjectam materiam*. They should not be read as requiring a trial judge to discuss every aspect of the problems of visual identification in every case. The trial judge's directions to the jury should only be those that are necessary for the particular case before him. So in *R v Burchielli* [1981] VicRp 61; (1981) VR 611; (1980) 2 A Crim R 352 in the joint judgment of McInerney J and myself it is said (at p621):

> "We should not be understood as saying that in every case where identification is in issue every one of the matters which we have mentioned should be referred to in the charge. Nor do we mean that even in this case a summing-up which omitted reference to some of them would necessarily be inadequate ..."

In *R v Clune* [1982] VicRp 1; (1982) VR 1; (1981) 5 A Crim R 246 in the judgment of Crockett J, in which Starke J and McGarvie J concurred, it is said (at p6):

> "What precisely it is that the jury should he told must depend upon the circumstances of the particular case. Moreover, it is not necessary that a set formula be followed."

See also *R v Preston* [1961] VicRp 115; (1961) VR 761 in which the joint judgement of Lowe, Smith and Monahan JJ, contained the following passage (at p762):

> **[3]** "There is no rule of law that the evidence of one witness as to identification is insufficient, nor is there any rule of law that there must be a police parade for the purpose of identification, nor is there any rule of law that in every case a warning must be given; it all depends upon the circumstances of the case before the court."

As Winneke CJ said in *R v Boardman* [1969] VicRp 17; (1969) VR 151 at p156:

> "... if there were dangers of misidentification lurking in the evidence given by the identifying witness, then a warning or caution appropriate to the circumstances of the case was called for."

For my part I do not think that it is of much assistance to tell a jury that they must scrutinize evidence of identification with special care, at any rate unless they are also told why they should do so. Much has been written in identification cases because the Courts have learned by experience of the dangers of mistaken identification and because it is felt that the average juror may not without assistance appreciate the danger. Yet when the danger is explained to a jury in simple language they will readily understand. Many of them will have experienced cases of mistaken identification in their daily lives and once the matter is drawn to their attention are likely to recall such experiences. The other matter of fundamental importance which it is thought juries unaided may overlook is that convincing and honest witnesses, however definite, may be mistaken. Again this is something that most jurors will readily understand when it is explained to them and they may well be able to recall from their own experiences instances of such mistakes.

The third matter to which I attach significance is that two unsatisfactory identifications do not support one another in the same way as two primary facts may lead to the **[4]** conclusion of an ultimate fact. As was pointed out in the joint judgment in *R v Burchielli*, *supra*, at p616:

> "... it often happens that two pieces of evidence each in themselves unconvincing, will in combination produce a high degree of persuasion of a particular conclusion. The reason is often that the coincidence of the two pieces of evidence would be unlikely if the ultimate fact or conclusion had not occurred."

Then at p621 it was said that two defective identifications do not necessarily support one another. The words which I have emphasized are important. It is not that the cumulative effect is to be disregarded, but it should be noted that two unsatisfactory identifications do not support one another in the same way as two unconvincing pieces of evidence may produce a high degree of persuasion of a particular conclusion simply because it is thought that the coincidence of the two pieces of evidence would be unlikely if the ultimate fact sought to be established had not occurred. Of course the source of the two unconvincing pieces of evidence will be important and may bear upon the likelihood of the ultimate fact having occurred. For instance, the evidence

of two accomplices implicating the accused would be treated with reservation. But two defective identifications do not necessarily support one another. Cf *Craig v R* [1933] HCA 41; (1933) 49 CLR 429 per Evatt and McTiernan JJ at p449. Each witness may be honest and convincing but mistaken for quite different reasons.

I have made these observations because much of the argument before us proceeded upon the basis that the mere failure of the trial judge to apply some proposition which could be extracted from a judgment in one of the cases **[5]** led to the conclusion that there had been a miscarriage of justice. Yet where there is a miscarriage in an "identification" case, it is not because some rigid proposition or formula has not been applied or recited, but because there is a reasonable possibility that witnesses as to identification have been mistaken. The existence of such a possibility may be inferred from, or at least not be excluded when there has been, a failure to give a direction that is appropriate to the circumstances of a particular case, but it is necessary to guard against elevating the developed rules and practices relating to identification evidence above the end they are designed to produce. The ultimate question for this Court, so far the directions of the trial judge are concerned, is whether the summing-up was sufficient to bring home to the minds of the jury any dangers lurking in the evidence given by the identifying witnesses, to use the phrase of Winneke CJ in *R v Boardman*, *supra*.

Haidley relied upon eight grounds of appeal but every one of them concerned in one way or another the question of identification which was the central issue at the trial. So far as most of the grounds of appeal are concerned I do not wish to add to what Kaye J has written. I would observe however in relation to the disadvantage to which Haidley was put by the fact that he did not know that he was being identified in the exercise yard by Mr Sharma that the disadvantage was largely of Haidley's own making. Of course he had a right to refuse to enter an identification parade but he had no right not to be identified: *R v Clune*, *supra* at p10. Provided that there is nothing unlawful, unfair or improper involved in **[6]** the method of identification, an accused cannot in my opinion claim that there has been a miscarriage of justice because his refusal to participate in an identification parade has placed him at a disadvantage. In the present case there was no very full examination of what occurred at the identification but, as Kaye J has pointed out, the evidence of Senior Constable Coates shows that the complaint was without substance.

In conclusion I merely wish to add that having read the learned trial judge's summing-up I am satisfied that in the context of the case it was sufficient to instruct the jury in their task and in particular to bring to their minds any dangers lurking in the evidence of identification.

Although a number of criticisms of the identification evidence was advanced by Mr Francis, it seems to me that in the case of Hall the dangers "lurking" in his evidence are first, that he had only a very short time within which to view the man in Chapel Street whom he now says was Haidley and secondly, that the description which he gave to the police soon after the event differed a good deal from the description of Haidley.

The learned trial judge gave a number of directions to the jury during his summing-up concerning the matter of identification. He warned the jury that experience had shown that honest witnesses do make mistakes in identification evidence, that it was not a "recognition" case for neither Hall nor Sharma were acquainted with Haidley, that Hall in particular only saw the man for a short time in circumstances of some excitement in which there is a greater risk of mistakes in identification. Later in his **[7]** summing-up His Honour summarized Hall's evidence very fairly and reminded the jury that although Hall was very positive in his identification the jury had to be satisfied beyond reasonable doubt that it was Haidley whom he had seen in Chapel Street. Finally when summarizing the submissions of counsel, the learned judge reminded the jury that it had been suggested that Hall's description to the police of the man he had seen differed markedly from the appearance of Haidley. Thus although some of the language used by His Honour might be open to criticism, I think it is clear that he drew to the attention of the jury the matters which they had to bear in mind in considering Hall's evidence. The same is true, I think, in relation to the evidence of Sharma.

Accordingly Haidley's application should be dismissed.

The only ground of appeal relied on by Alford reads as follows:

"That the learned trial judge erred in not putting the evidence of Mr Ian Joblin, psychologist, as to the condition of the appellant, to be called."

The applicant Alford gave evidence on oath. He began by giving evidence of his prior convictions which included having a deficiency in his trust account whilst he was a solicitor and for which he was sentenced to five years' imprisonment. He also admitted six convictions for obtaining property by deception and one for driving a motor car whilst having a blood alcohol content exceeding .05%, as well as charges of theft and forgery. He gave evidence of his early upbringing and of starting to drink alcohol in his second last year at school. During his University course and afterwards his drinking increased. He reached **[8]** a point, he said, when he had never less than 30 or 40 beers a day, sometimes more. Sometimes he had suffered blackouts after heavy drinking sessions. He gave evidence of his movements on the days immediately before the robbery. On the day of the robbery he said that he had a recollection of being in a hotel with one Kevin Anderson and that his next recollection was of being in the watchhouse cells. He had no recollection of what occurred in between. He had no recollection whatever of talking to the police. Other evidence was called of the applicant's drinking and in particular of his drinking on the day before the robbery.

Next, counsel for the applicant called Ian Joblin. Before the witness entered the Court the Prosecutor asked for the jury to be sent out and when they had retired the Prosecutor raised objection to any evidence from Mr Joblin whom he knew to be a psychologist. Counsel for Alford said that she wished "to get from Mr Joblin evidence to the consumption of alcohol to this degree in relation to the mental state of this particular man and also the effects of alcohol as to a voluntary act". She wanted Mr Joblin to talk about the effects of alcohol on the brain of a person. Mr Joblin was said to be in a position to tell the Court about "the ability of a chronic alcoholic to act purposively at a level he has described as disjointed and out of synchronization". Apparently this psychologist's jargon was intended to mean that a person in the applicant's position was capable of acting as an automaton. His Honour intervened to say that clearly Mr Joblin was not allowed to say that the applicant was acting as an automaton on the occasion in question, but that he was not clear what the witness could sensibly say that fell short of that.

[9] In the end counsel for the applicant submitted that the evidence might be received because the jury simply would not know what the effects of the consumption of alcohol would be upon a chronic alcoholic. His Honour then ruled that having regard to what had been said by this Court in *R v Darrington and McGauley* [1980] VicRp 36; (1980) VR 353; (1979) 1 A Crim R 124, viz. "where the jury are faced with aberrations of human behaviour caused by the intake of alcohol, that is an area they are perfectly able to form a judgment about without being assisted by experts" the evidence was inadmissible. His Honour offered to hold a *voir dire* to see what Mr Joblin would say but counsel said she could not ask him to say more than what she had already indicated.

It is, I think, clear that His Honour's ruling was correct. No basis was shown for the reception of the evidence sought to be elicited from Mr Joblin. Of course, the intended witness's qualifications were assumed rather than proved, but it seems clear that a person trained as a psychologist does not thereby acquire any expertise upon the subject of the intention with which a person has done a particular act or whether he has done it voluntarily. No doubt counsel would have denied any intention of seeking an opinion upon the intention with which the applicant did the acts attributed to him in the robbery or whether he had done them voluntarily, but it is to the element of intention in the crime charged or to the element of voluntariness that Mr Joblin's evidence would have been directed. Those elements will only be established by the Crown if the jury are satisfied that the accused did the acts voluntarily and had the mental state requisite for the crime. Whether the **[10]** accused acted voluntarily and had the necessary mental state is to be deduced from his actions and statements and his condition at the time. The consumption of alcohol is relevant to those questions but a psychologist who sees an accused only after the event has no expertise which will enable him to say what the accused's condition was at the relevant time or whether he had acted voluntarily. Cf. *R v Darrington and McCauley*, *supra*, at p378 where part of the interrogation of a psychologist is set out and the conclusion is drawn that the answers of the psychologist did not suggest that he had a means of forming an opinion whether a man who had consumed the alcohol said to have been consumed by the accused would have had a capacity to form the necessary intention. Far less could the psychologist have said whether the

accused had acted voluntarily. In the present case, where there was no interrogation of Mr Joblin, the conclusion reached in *Darrington's Case* must be reached *a fortiori*.

It was suggested in argument that the present case was not on all fours with *Darrington's Case* because what was sought to be shown was that a person in the condition the applicant was said to be in might act without knowing what he was doing. No doubt a person might act without knowing what he was doing but it was not shown in this case, nor has it been shown in any case of which we are aware, that a psychologist has any expertise which would have enabled him to say whether in a given situation a person acted without knowing what he was doing. Before the evidence sought to be adduced could have been received it would have been necessary first of all to establish to the satisfaction of the trial judge that the witness had such expert knowledge that he was able to express an opinion upon the question **[11]** whether the assumed condition of the accused would have had any bearing upon his capacity to do the alleged acts voluntarily or upon his capacity to form the mental state requisite for the crime charged. Cf. *Clark v Ryan* [1960] HCA 42; (1960) 103 CLR 486; [1960] ALR 524; 34 ALJR 118.

Next, it would have been necessary to prove by admissible evidence the facts upon which such an expert may base his opinion before the opinion can he received. An expert could not, for instance, take a history from an accused parson and then give evidence of his opinion upon that history unless the history had first been proved by admissible evidence. In the present case the application had not proceeded far enough to reveal precisely upon what basis Mr Joblin was to be asked to express an opinion. It was said to be upon the basis of the "consumption of alcohol to this degree" although the last phrase was not precisely explained. It is, however, unnecessary to pursue this matter, for the absence of expertise was a sufficient reason for rejection of Mr Joblin's evidence. Further, it would have been necessary for the expert to explain the basis of theory or experience upon which the expert conclusions are said to rest: see *R v Jenkins: ex parte Morrison* [1949] VicLawRp 51; (1949) VLR 277 at p303; [1949] ALR 411, per Fullagar J.

Finally, the common law rule was that an expert might not be asked the very question which falls to be decided by the Court. Although that rule may not be so firmly established as once it was see *Cross on Evidence*, 2nd Australian Edition pp430-433 and certain relaxations of it have become common, it should not be relaxed so as to permit an "expert" to give it as his opinion that an accused person did a given act voluntarily or with the intent requisite to the crime charged. Cf. *R v Darrington and* ***[12]*** *McCauley*, *supra*, at pp381-2. Any such relaxation would strike at the root of our system of the administration of justice and would tend to transfer the determination of the guilt or innocence of an accused person from the jury to the so-called "expert" witness. Alford's application should accordingly fail.

KAYE J: *[After setting out the facts, His Honour continued]:* ... **[8]** Although not expressed in these terms, I understood Mr Francis QC, senior counsel for Haidley, to have contended in support of the grounds of appeal that Mr Hall's evidence of his identification ought to have been excluded because prejudice attracting from matters and circumstances associating with the evidence outweighed its probative value. It is recognised that prejudice may be suffered by an accused person by the admission of evidence of identification of him made by a witness from photographs. His absence at the time of the identification placed Haidley in a position of disadvantage in that he had no direct knowledge of any unfairness in the procedure followed and of the readiness or otherwise with which the witness made his identification.

Nevertheless, such evidence was admissible if the investigating police officers were precluded from conducting an identification parade by the accused exercising his right to refuse to **[9]** participate; *Alexander v R* [1981] HCA 17; (1980-1981) 145 CLR 395 at 400-403; (1981) 34 ALR 289; (1981) 55 ALJR 355 per Gibbs CJ and 430 per Mason J. Nevertheless, notwithstanding its admissibility, the trial Judge was required to consider and balance the prejudice flowing from the evidence of identification from the photographs with its probative value. In my opinion, on the material then before him, the trial Judge took into consideration all matters proper for him to do so.

However, it was contended on behalf of Haidley that His Honour's discretion miscarried in that certain features inherent in the two folders of photographs rendered identification by such means both unsatisfactory and unfair. Firstly, reliance was placed on the circumstance that

Haidley vas the only person whose photograph appeared in both of the two folders. It was argued that this circumstance would have suggested to Mr Hall that the person in both folders was the person whom the police wished him to identify as the man with a gun whose movements he had observed outside the bank shortly after the robbery. Be that as it may, Mr Hall swore that it was not until counsel for Haidley, in the course of cross-examination, drew his attention to the fact that he noted Haidley's photographs were the only ones which appeared in both folders.

Secondly, it was contended that the form of the photographs would have led the jury to conclude that the police had photographs of Haidley because either he was known to them or he was a man with a criminal record. There was evidence that at the time of the bank robbery the person identified as Haidley bore a moustache. The two photographs numbered (4) in the first folder were of a man with a beard and those numbered (1) in the second folder were of a clean **[10]** shaven man. Those differing facial characteristics of Haidley's appearance on the day of the bank robbery would have indicated that the photographs in both volumes were taken before the robbery. Again, the appearance of other men in the photographs and the fact that each of them was shown from a front view and in profile might have suggested that all the men were known criminals.

If the features of the photographs referred to by counsel were observed, the jury might have formed the suggested conclusion about Haidley and about the others shown in the photographs. In that event, prejudice would indisputably have been attached to him. Yet, there are two observations pertinent to this submission. Firstly, in the course of cross-examination of Detective Senior Constable Geoffrey Creese by counsel for Haidley, it was established that some nine days before the robbery Haidley had been spoken to by police officers when a photograph was taken of him and that he then had a beard.

Secondly, from the appearance of at least some of the men, the jury equally might have concluded that the photographs were taken for passport or other innocent purposes. In that event, without having attention drawn to the features of the photographs on which counsel relied, it might not have been obvious that the photographs were of known criminals. Moreover, as I have already noted, the evidence included an explanation of the police being in possession of Haidley's photograph, namely that he had been questioned by them a short time previously. The risk of prejudice to Haidley from those features and circumstances was, in my opinion, no more than slight. Furthermore, such peculiarities did not detract from the **[11]** efficacy of Mr Hall's identification of Haidley from photographs.

It was further urged that the probabilities were that at the time in question Haidley was in custody, and that the police had delayed his presentation before a Magistrate because they were not in possession of evidence to sustain a charge against him. It was contended that consequently his detention was unlawful and his identification by Mr Hall was acquired by an unfair, if not unlawful, means. If the facts were that at the relevant time the police were holding Haidley in custody while deferring his presentation before a Magistrate to assemble evidence of his complicity in the bank robbery to be found, the procuration of his identification during that period would have constituted a misuse of his detention: *Clune's case* at pp10-11 per Crockett J. However, no investigation was made at the trial of when Haidley was brought before a Magistrate or whether at the time of Mr Hall's identification the police were without evidence upon which he could have been properly charged. It follows that counsel's submission was based on assumptions and therefore without proper foundation.

Again, it was said that if at the time in question Haidley had been charged, the detection process ought to have been completed and that Mr Hall's and Mr Sharma's identifications of him were made for evidentiary purposes. Authority for rejection of Mr Hall's and Mr Sharma's evidence in those circumstances was said to be found in the judgment of Stephen J in *Alexander v The Queen*, at pp417-420. His Honour's judgment, however, was a dissenting one, and what he wrote about the propriety of identification **[12]** after an accused has been charged was contrary to the opinions of the majority of the court.

[His Honour then referred to Alexander's case *and continued]:* Complaint made under ground (2) was based on the assertion that identification of Haidley was made by Mr Hall in the court during the course of his trial and that it was made, pursuant to a ruling or liberty otherwise granted by the learned trial Judge that he might do so. Examination of the transcript shows, however,

that this was not so. Mr Dunn, who appeared as counsel for Haidley at the trial, submitted to the learned trial judge that dock identification was not permissible, asserting that on a number of occasions **[13]** the court has expressly disapproved of this form of identification. In the course of his reply, Mr Hassett, the Crown Prosecutor, submitted in substance that dock identification should not he permitted if the witness has not previously made some acceptable form of out-of-court identification. The Prosecutor further conceded that if His Honour were to preclude Mr Sharma's evidence of his identification of Haidley made at the watchhouse, if would not be proper for the Crown to question the witness whether he could see Haidley in the court. It is recorded that, in reply to the Prosecutor's submission, Mr Dunn said:

> "In relation to the statement about dock identification, I agree entirely with what Mr Hassett told Your Honour. Indeed, we are on the one channel, and I think he has properly explained the distinction as to identification."

In any event, when asked by the Crown Prosecutor whether he could see in court the man who dropped the gun, Mr Hall failed to identify Mr Haidley. The witness explained that he could not see clearly the face of the man in the dock, whom he indicated, because half of the man's face was covered. It appears from the transcript that thereafter neither the Crown nor Mr Dunn sought to rely on Mr Hall's attempted dock identification of Haidley, and that the learned trial judge, in the course of his charge to the jury, made no reference to the incident. On the other hand, when recapitulating defence counsel's final address, the trial Judge reminded the jury that Mr Dunn relied on Mr Sharma's failure to identify Haidley in the court during the trial. Thus, not only did Haidley's counsel accept that, in the circumstances of his trial, dock identification of him was permissible but also counsel sought to utilise for the **[14]** advance of his defence, the witness's failure to make this particular form of identification of Haidley. For these reasons, the ground of complaint was without substance.

It is therefore not necessary to express any concluded view about the efficacy or propriety of identification of an accused person seated in the dock made by a witness. Nevertheless, I am mindful of reasons which would support permission for a witness to make a court identification of an accused provided the witness has, at a point of time reasonably close to the criminal conduct in question, made an out-of-court identification of him. If identification were made pursuant to permission so granted, it would be necessary for the trial Judge to direct the jury that there might be a risk of the witness identifying the accused from his previous identification of him rather than from his recall of the person involved in the criminal conduct. For these reasons, I do not consider that grounds (1), (2) and (6) were made out.

[His Honour then considered the ground of appeal relating to the identification by H. by Sharma, and continued]:
... **[17]** The first submission made by counsel in support of this ground was that the trial Judge had failed to exercise his discretion correctly because he neglected to take into account that, at the relevant time, Haidley's detention was unlawful and that Haidley had expressly refused to make himself available for identification. It was argued that those circumstances rendered Mr Sharma's evidence inadmissible, and that, if it were admissible, the trial Judge, in the exercise of his discretion, ought to have excluded the evidence by reason of their gravity.

Examination of the transcript of the trial reveals that Mr Dunn, in submissions in support of the exclusion of Mr Sharma's evidence of his identification of Haidley, made no reference to the circumstances associated with the charging of Haidley. In particular, counsel made no suggestion that there was anything irregular about the manner in which Haidley had been charged, and no investigation was made during the trial about those circumstances. Furthermore, it was not contended by Mr Francis that there was any material **[18]** before the learned Judge which might have brought to his attention any such irregularity. It is therefore understandable that His Honour did not refer to this matter. Above all, in view of the foregoing matters, it was not competent for the applicant Haidley, on the hearing of his appeal, to rely upon any such omission from the learned Judge's ruling.

From the cited passages of his ruling, it is clear that the learned Judge took into account that Mr Sharma identified him after Haidley had exercised his right to refuse to participate in an identification parade. His refusal, however, did not render Haidley immune from any other legitimate form of identification, and it did not preclude the police from thereafter seeking to have him so identified. By the exercise of his right, Haidley deprived himself of the safeguards and any

advantages for him provided by the regulations concerning, and the procedures of, the conduct of an identification parade. It does not follow, however, that any subsequent identification made of him without his consent or knowledge was, *ipso facto*, unfair or improper.

Identification made of Haidley without his knowledge was lawful and evidence of it was admissible in the same way as evidence of a witness who might have overheard an admission of guilt made by an accused person while in custody albeit in confidence to another prisoner. There was no evidence suggesting that Haidley was brought into the yard for the purposes of being identified by Mr Sharma. On the contrary, the identification was made while Haidley was present with others at a place where he was required to be detained. Thus, he was not brought to Mr Sharma to be identified: Mr Sharma was brought to where Haidley was and there identified by the witness. In my opinion, there was **[19]** nothing improper about the form of the identification sought to he made.

It could not be disputed by the Crown that identification of him made without his knowledge put Haidley at a position of disadvantage. Because he was unaware that he was being identified, Haidley had no direct means of knowledge of whether any unfair methods were adopted or any unfair suggestions were made to Mr Sharma by the police officers. Again, he was unable to give instructions concerning the police and others present in the yard at the relevant time. Nevertheless, this evidence had strong probative value in that it implicated Haidley with the bank robbery. The circumstances associated with Mr Sharma's identification and the disadvantages and prejudice which Haidley would suffer in consequence of this form of identification were taken into account by the learned Judge. Although he did not expressly state that he was doing so, it is clear that His Honour considered the prejudice to Haidley and the probative value of the evidence, and thereby exercised his discretion in the manner which, in my opinion, was open to him.

The complaint made by this ground of appeal that no evidence concerning the height, weight, age and appearance of the other prisoners present when Mr Sharma made identification of Haidley was irrelevant to the admissibility of his evidence and to the exercise of the learned judge's discretion. Those were matters which, as His Honour observed, are relevant only to the weight which the jury might attach to Mr Sharma's evidence of his identification of Haidley. In any event, when reference is made to the evidence of Senior Constable Coates, it becomes **[20]** manifest that the complaint was without substance. Senior Constable Coates, while on duty at the watchhouse, took Mr Sharma to a grille door leading into the exercise yard. The police officer swore that there were ten persons in the yard, and that there was a fair spread of age and general spread of height and size among the men present. When cross-examined by Mr Dunn and in answer to counsel's question, Senior Constable Coates swore that there was a record book held in the watchhouse which contained the names of the ten persons who were in the yard and that the ages of the persons ranged from above 10 years to elderly men. The complaints embraced by ground (3) were therefore not substantiated.

[After referring to other grounds of the accused's appeal, His Honour continued]: ... **[31]** For it to intervene and set aside Haidley's conviction, this Court would have to be satisfied that the evidence of Haidley's identification was so unsafe and unsatisfactory that the jury's verdict amounted to a miscarriage of justice. Having regard to the totality of the evidence, the jury's verdict was not shown to be so. It follows that I would disallow Haidley's application for leave to appeal.

2. Alford's Application

I have had the advantage of reading in draft form the Chief Justice's judgment concerning Alford's application. Substantially for the reasons stated by the Chief Justice, I agree that the evidence of Mr Ian Joblin was properly excluded by the learned trial judge. There was, in my opinion, further reason in addition to the lack of expertise or specialised knowledge of the witness for the exclusion of the evidence. I refer to the circumstance that the preliminary requirement of verification of the facts upon which the opinion evidence was based was not satisfied, thereby rendering his evidence inadmissible; cf. *Ramsay v Watson* [1961] HCA 65; (1961) 108 CLR 642 at 640-649; 35 ALJR 301. *[After further discussion, His Honour concluded]: ...* **[33**] It follows, therefore, that the evidence did not contain the required foundation for the admission of opinion evidence of any qualified person concerning the matters proposed to be led from Mr Joblin. For the foregoing reasons, I would dismiss the application of Alford for leave to appeal.

BROOKING J: *[Being in substantial agreement with Young CJ and Kaye J, His Honour made the following observations]: ...* The present case also illustrates the problems that can arise when a suspect will not take part in an identification parade. Haidley was asked to participate in a parade but declined to do so. He now complains that he was not given the benefit of a proper identification parade but was instead subjected to what is inelegantly described **[4]** in Ground 2 "as an unfair and improper quasi type line up in the Melbourne City Watchhouse". This is said to have been a highly unsatisfactory procedure, in that (as it is submitted) Haidley was in custody and so immune from inspection for the purpose of identification. It is also put that the parade was unfair because Haidley did not know that it was being held (and so had no opportunity to observe deliberately what was done) and because his companions in the parade had been determined not by judicious selection but by that morning's turn of the Wheel of Fortune at the watchhouse. Quite apart from the alleged illegality, it was said that this sad promenade of sinners and suspects compared so unfavourably with a properly conducted parade that the Judge should have excluded it.

In the same way, we were reminded that "identification from police photographs is undesirable" and much was said about how poor a substitute any identification from photographs, and this one in particular, was for the parade. To one not used to the occasional whimsies of the criminal law it might seem strange that an accused man, having refused the best possible means of identification, should then rest his appeal on the ground that the substitute methods actually used were not as fair as the one he chose to reject. Unaided by authority, I should have thought there was much to be said for the robust retort that an accused cannot invoke the discretion to reject admissible evidence by complaining of unfairness he has brought upon himself: self-inflicted unfairness is not unfair.

On this approach, he would still be left with his comments to the **[5]** jury on the weight of the evidence. The matter can be dealt with along conventional lines, however, by saying that, to the extent to which identifications made at the watchhouse and by photograph can be criticised in comparison with a properly conducted identification parade, the probative force of the evidence is affected, but the evidence does not come to have a prejudicial effect in the sense required for the balancing of probative force against prejudicial effect. "Prejudice" means improper prejudice and I do not think it can be said that the fact that the witness picked a photograph from a folder of a man from those assembled in the exercise yard can be said to be improperly prejudical in the sense that the jury might be irrationally impressed by the fact of the identification and give it an importance unaffected by what is said by the trial Judge and by counsel as to considerations affecting its weight. The jury must be regarded as heeding the warnings contained in the charge ...

Solicitors for the applicants: Isaac Brott and Co. Solicitor for the Crown: D Yeaman, Crown Solicitor.
