23/80

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v KEELEY and ALEXANDER

McInerney, Murphy and Fullagar JJ

1 November 1979 — [1980] VicRp 54; [1980] VR 571

EVIDENCE – IDENTIFICATION – NO IDENTIFICATION PARADE HELD – WITNESS GAVE A MAN A LIFT IN HER CAR – LATER IDENTIFIED MAN FROM A PHOTO – POLICE OFFICERS IDENTIFIED ACCUSED FROM A PHOTO – OBJECTION TAKEN TO FOLDER OF PHOTOGRAPHS AT TRIAL – PRODUCTION OF PHOTOGRAPHS SAID TO BE CALCULATED TO PREJUDICE THE ACCUSED AND THIS PREJUDICE OUT OF PROPORTION TO THE PROBATIVE VALUE OF THE PHOTOGRAPHS – WHETHER SUCH EVIDENCE HEARSAY – EVIDENCE ADMITTED BY TRIAL JUDGE – ACCUSED CONVICTED – WHETHER JUDGE IN ERROR.

HELD: Each application for leave to appeal against conviction dismissed.
1. If the identifying witness has on some occasion prior to the trial identified the accused as the person whom he had earlier seen in the incriminating circumstances, evidence of that prior identification is relevant to resolve the issue of identity which arises at the trial, namely, whether the accused person then present in the dock is the person whom the witness had earlier seen. Evidence therefore of a prior out-of-court identification is and always has been regarded as relevant and admissible to prove the issue of identity, even if the identifying witness goes on to make or has already made an in-court identification of the accused at the trial.

2. It is fallacious to regard evidence by an identifying witness, who has made an in-court identification of the accused, that he has at some previous point of time made an out-of-court identification of the accused, as a self-serving statement, or as offending the rule against hearsay evidence. It is not evidence led by some person other than the identifying witness to prove the truth of statements made out of court by the identifying witness: it is in-court evidence by the identifying witness of an identification of the person seen by him in incriminating circumstances.

3. No question of hearsay is or can be involved if the identifying witness gives evidence at the trial of this prior recognition.

McINERNEY, MURPHY and FULLAGAR JJ: This is the hearing of applications for leave to appeal against convictions of entry as trespasser with intent to steal by Keeley and Alexander. The alleged facts were that the N.B.A. Bank at Belgrave had been burgled in early hours of 15/6/77. Constable Beale later saw a green Nissan Sedan in Rickson's place with two men in it; they fled but Keeley was intercepted by Constables Green and Warren. Keeley admitted he knew Alexander but denied any knowledge of the bank. A Mrs Fedele gave a man a lift in her car near Rickson's place, she identified a photo of that man and later gave evidence that the accused Alexander was that man.

Constables Beale and Williams identified a photo as the man they had seen in the Nissan and evidence was given that the photo was a photo of Alexander. Alexander was intercepted – admitted he knew Keeley but denied any knowledge of the bank. A motor car dealer Connell gave evidence that in March 1977 he had seen two men inspecting a green Nissan and later he identified in Sergeant Duggan's presence two photos as those men. At the trial he could not recall what photos he had identified and was unable to identify any person in Court as being either of the two men. Sergeant Duggan gave evidence that one of the photos identified was Alexander. Constable Dempster gave evidence that Alexander was the man he had chased from the Nissan. It was not disputed that the green Nissan seen in Rickson's place was the same car from Connell's yard. No identification parade was held.

Objection was taken that the folder of photographs should be excluded on the basis that the prejudicial effect of the photograph out-weighed its probative value. It was submitted that the danger of the folder of photographs lay in the fact that the jury must infer from them that the police knew Alexander and worse still that they considered him a professional "breaker". A

folder containing that photograph was tendered as Exhibit "D". Beale at the trial also identified the applicant Alexander in the dock as having been the driver of the Nissan car. It was argued that it must have been obvious to all or at least some of the jury that the photographs were police photographs and that the photographs were photographs of persons with convictions for safebreaking or related offences or photographs of professional criminals specialising in "breaking" offences. It was said therefore that the production of these photographs as evidence before the jury was calculated to prejudice the applicants in the eyes of the jury and that this prejudice was out of proportion to the probative value of the photographs.

It was also said that since none of the identifying witnesses had been asked to attend an identification parade and no satisfactory explanation of this failure to hold an identification parade had been advanced, there was thus disclosed a course of conduct on the part of the police which was inconsistent with the views expressed by the High Court in *Davies & Cody v R* [1937] HCA 27; (1937) 57 CLR 170 and that this court should not countenance a procedure which was in defiance of or in disregard to the views expressed by the High Court in that case.

Concerning the evidence of the witness Connell, it was argued before us that a witness may not give evidence of a prior out-of-court identification made by him unless he has first made an in-court identification during the course of the trial of the person concerned. It was said that Sergeant Duggan should not have been allowed to testify that the photograph which Connell had identified from the photographs produced to him was in fact a photograph of the applicant Alexander. It was said that this evidence offended the rule which excludes hearsay evidence.

If the identifying witness has on some occasion prior to the trial identified the accused as the person whom he had earlier seen in the incriminating circumstances, evidence of that prior identification is relevant to resolve the issue of identity which arises at the trial, namely, whether the accused person then present in the dock is the person whom the witness had earlier seen. Evidence therefore of a prior out-of-court identification is and always has been regarded as relevant and admissible to prove the issue of identity, even if the identifying witness goes on to make or has already made an in-court identification of the accused at the trial.

It is, however, fallacious to regard evidence by an identifying witness, who has made an in-court identification of the accused, that he has at some previous point of time made an out-of-court identification of the accused, as a self-serving statement, or as offending the rule against hearsay evidence. It is not evidence led by some person other than the identifying witness to prove the truth of statements made out of court by the identifying witness: it is in-court evidence by the identifying witness of an identification of the person seen by him in incriminating circumstances, an identification made by him prior to the trial. The admissibility of evidence by the identifying witness of a prior out-of-court identification made by him was accepted as settled law in *Christie's case* (1914) AC 545; [1914-15] All ER 63; (1914) 10 Cr App R 141.

It is therefore everyday experience that a witness may give evidence that he saw a person in incriminating circumstances, that subsequently on a specified date he saw a photograph of a person and that the photograph was a photograph of one and the same person whom he had earlier seen in incriminating circumstances. Evidence must then be led to prove what photograph was identified so as to link the prior identification with the accused. If the witness himself can give evidence that the man whom he identified from the photograph is one and the same man as the accused in the dock, that evidence is admissible.

On principle, the admissibility of the evidence in court of a prior identification out of court of the accused is not affected by the circumstance that the prior identification was not made in the presence of the accused. No question of hearsay evidence is or can be involved if the identifying witness gives evidence at the trial of this prior recognition.

It was contended for the applicants that evidence by persons other than the identifying witness of statements or declarations made by the identifying witness at the time of an out-of-court identification prior to the trial was inadmissible as being a hearsay statement. It is our respectful but considered view that such opinions misconceive both the nature of the evidence offered and the purpose for which it is offered. When an identifying witness makes an out-of-court identification – whether from inspection of photographs or of an identikit, or at an identification

parade – of a person whom he has previously seen in incriminating circumstances, he performs a mental process, and only the identifying witness can give direct evidence of his having performed that mental act of recognition.

Where the identifying witness himself gives evidence of having identified a person or a photograph, the purpose of tendering evidence from another person as to what person was identified or what photograph was selected or indicated by the identifying witness is simply to identify that person or that photograph. That evidence is tendered to establish the link between the person identified by the identifying witness and the accused person in court.

Sometimes the link between the photograph and the person in the dock will be sufficiently established by the production of the photograph itself – as, for instance, when distinctive features make it plain to the jury beyond argument that the photograph is a photograph of the accused. On other occasions – as for instance, where the appearance of the accused has changed – e.g. by his having grown a beard, or undergone plastic surgery – further intermediate evidence may be required from witnesses who between them can prove the changes of appearances and thus establish the link between the photograph identified and the accused.

We are here considering only those cases where the identifying witness testifies in Court that he saw a person in incriminating circumstances and that he performed an act of identification on some occasion prior to the trial, even if he cannot at the trial state what photograph it was he identified or what person it was whom he identified at the time. Provided the witness says he identified a particular photograph it is relevant and admissible for some other person present at the time of the prior identification to state what photograph was identified and to produce that photograph for the inspection of the jury. The same conclusion follows where the prior identification was of a person taking part in an identification parade.

The submissions made that a witness is not permitted to testify to an out-of-court identification unless he in the same case testified to, or makes an in-court identification must fail. It is however equally clear that unless his out-of-court identification is linked in some way with the accused, it is useless. The objection to the reception of Connell's evidence would therefore fail even if the jury formed the view that Connell did not make any in-court identification of Alexander (see transcript pp316-7). Each of the identifying witnesses Peale, Williams, Mrs Fedele and Connell was entitled to give evidence of having identified a photograph produced to him or her on an occasion prior to the trial, as a photograph of the person seen by each of them in the circumstances deposed to.

In *R v Doyle* [1967] VicRp 82; [1967] VR 698 this court held that evidence that an identifying witness identified a photograph of the accused out of court from a collection of police photographs shown to him, was both relevant and admissible in court and that the probative value of the photograph in that case outweighed its prejudicial effect.

The task of the learned trial Judge when considering whether or not to admit the photograph in Exhibit "D" was to weigh the competing; factors of probative value and prejudicial effect. As to the first of those factors, if photograph No. 6 inhibit "D" was, in the jury's opinion, a photograph of the accused Alexander, then it had probative value of a most damaging kind. The competing factor was the prejudicial effect of the photograph itself looking as it did like a police photograph of a criminal and produced so soon after the commission of the crime.

The learned trial Judge apparently did not accept, when exercising his discretion to admit the photograph of Alexander in Exhibit "D", that the jury would be likely to think that it was a photograph of a man known to the police. In our view His Honour's judgment on that matter was wrong and we think it altogether unlikely that the jury would not have drawn the conclusion that the photograph was one of a man known to the police.

However, even if His Honour's failure to appreciate the likelihood of the jury forming a conclusion that the photograph was a police photograph vitiated the exercise of His Honour's discretion, it appears to us that the proper exercise of the judicial discretion, weighing all the relevant facts, would have been to admit the photograph and therefore that no miscarriage of justice is shown to have occurred as a result of the admission of the photograph into evidence.

Accordingly His Honour's error does not lead to a new trial. For those reasons we are of the view that the main grounds of appeal relied on by Alexander so far as they relate to the identification of the photograph of Alexander out of court by Beale and the original admission into evidence of Exhibit "D" fail. Nevertheless, it should be said here that if a police practice were to develop of using police photographs in circumstances where it is practical to hold an identification parade, it might be necessary for the courts to reject evidence of identification based on recognition of a police photograph either because of the prejudice inherent in the production of police photographs or in order to put a stop to a practice which has about it such an unsavoury and unnecessary element of unfairness that to countenance it would be likely to encourage dishonesty and to pollute the stream of justice.

It was submitted that there was a distinction in principle between an identification of the corporeal presence of the accused, as at a line-up, and the identification of the accused from a photograph. In the former case the accused was present. We do not accept the suggested distinction in principle between an identification of the corporeal presence of the accused and the identification of an accused person from a photograph.

The suggestion that an out-of-court identification is admissible only where an in-court identification is made would defeat reason and justice in many cases where for any one of an almost infinite variety of reasons an identifying witness may be unable in court to link his out-of-court identification of a person or a photograph with the accused person in the dock. The witness' memory may have failed, he may have lost his sight, the accused may have changed in appearance, his hair may have changed colour or have fallen out or he may be scarred, or his appearance changed by plastic surgery or otherwise – the possibilities are without number.

Evidence of changes in appearance of the accused person is clearly admissible, but only for the purpose of linking the accused person as he is at the date of the trial with the person seen in some incriminating circumstance by the identifying witness. The identifying witness may not know of the changes in appearance. His acquaintance with the person seen in incriminating circumstances may be of fleeting character only. But the identification of the accused person in the dock with a photograph identified by the identifying witness, who states that he saw that person in incriminating circumstances may be deposed to in court by persons other than the identifying witness. As long as the purpose of the evidence is to link the accused man with the photograph or person identified as having been the person seen in incriminating circumstances it does not matter how many witnesses are involved, provided that their evidence is given in court and is not otherwise inadmissible. Each application for leave to appeal against conviction should be dismissed.
