EVANS v R

HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON and CRENNAN JJ

1 August, 13 December 2007 — Canberra

[2007] HCA 59

Criminal law — Appeals — Errors at trial in admission of certain evidence — Whether significant — Whether other evidence, properly admitted at trial, proved guilt beyond reasonable doubt — (NSW) Criminal Appeal Act 1912 s 6(1).

Criminal law — Appeals — Appellant required to perform in-court demonstrations — Admissibility — Whether unfairly prejudicial — Distinction between demonstrations, experiments, inspections, reconstructions and views — (NSW) Evidence Act 1995 s 53.

In February 2002, security cameras photographed an armed man robbing persons of money. The offender wore overalls, sunglasses and a balaclava. A baseball cap was found at the scene. In December 2003 when police searched the appellant's house, they found and seized overalls and a balaclava ("the seized items"). The appellant provided a DNA sample. The profile of his DNA was the same as the profile of DNA recovered from the baseball cap.

The appellant was charged. During the trial, eyewitnesses to the robbery were asked, and agreed, that the seized items were similar to those worn by the robber. The appellant was required by the prosecution to dress in the seized items, which were in evidence, and a pair of sunglasses, which was not in evidence, and walk up and down in front of the jury. The trial judge refused to allow the appellant to call alibi evidence, on the basis that notice ought to have been given to the prosecution. The appellant was convicted of all counts; he appealed.

The Court of Criminal Appeal of New South Wales held that while it was not an error to require the appellant to dress in the seized items, it was an error to require him to put on sunglasses which were not in evidence. Further, the trial judge erred in excluding the alibi evidence. However, the appeal was dismissed, pursuant to "the proviso" in s 6(1) of the Criminal Appeal Act 1912 (NSW) that neither error was significant, and evidence properly admitted at the trial proved the appellant's guilt beyond reasonable doubt.

On appeal to the High Court, the appellant contended that first, it was unfairly prejudicial to admit the eyewitnesses' evidence regarding the seized items. Second, the trial judge erred in allowing the prosecution to require the appellant to dress in the dress in the seized items and walk up and down in front of the jury. Finally, the appellant contended that the Court of Appeal erred in applying the proviso, both because of the identified errors, and also because features of the trial departed from the fundamental assumptions underpinning a fair trial.

Held, allowing the appeal, per Gummow, Hayne and Kirby JJ (Heydon and Crennan JJ dissenting):

(i) There was no error in admitting evidence of the eyewitnesses regarding the seized items: at [16], [61], [154], [164]–[166].

Per Heydon J; Gummow, Hayne, Kirby and Crennan JJ agreeing:

(ii) The "demonstrations, experiments or inspections" permitted under s 53 of the Evidence Act 1995 (NSW) do not apply to what happens in a courtroom at trial. Section 53

did not apply to requiring the appellant to dress in the seized items, walk before the jury and say certain words; common law rules applied to the conduct of these activities: at [30], [63], [64], [195]–[201], [206], [224], [266].

Per Gummow and Hayne JJ:

(iii) It was an error to require the appellant to dress in the seized items, as this tendered no relevant evidence. It was not asserted that the robber could be identified by eyewitnesses or security photographs. Deciding who had worn the disguise was not assisted by dressing the appellant in the items. This provided no information to the jury that could rationally effect (directly or indirectly) the assessment of the probability of the existence of a fact in issue: at [9], [23]–[28].

Smith v R (2001) 206 CLR 650; 181 ALR 354; [2001] HCA 50, mentioned.

Per Gummow and Hayne JJ; Kirby J agreeing:

(iv) The Court of Appeal considered the application of the proviso on an incorrect basis, for in addition to the errors found by the Court of Appeal, it was erroneous to require the appellant to dress in the seized items: at [32], [121], [124]–[127].

(v) The graver the departure from the requirements of a fair trial, the harder it is for an appellate court to conclude that guilt is established beyond reasonable doubt. Here, the errors at trial undermined the appellant's defence and prevented him putting it fully. The Court of Appeal could not determine beyond reasonable doubt that the appellant was the robber: at [10], [42], [48], [49], [54].

Weiss v R (2005) 224 CLR 300; 223 ALR 662; [2005] HCA 81; *Quartermaine v R* (1980) 143 CLR 595; 30 ALR 616; *Wilde v R* (1988) 164 CLR 365; 76 ALR 570; *Libke v R* (2007) 235 ALR 517; 81 ALJR 1309; [2007] HCA 30, mentioned.

Per Kirby J:

(vi) The test of relevance must necessarily be given an extremely broad ambit and it was relevant to require the appellant to dress in the seized items. However, the evidence was inadmissible as any probative value was outweighted by the danger that it might be unfairly prejudicial to the appellant: at [95], [100], [133].

Per Heydon J (Crennan J agreeing):

(vii) It was relevant to require the appellant put on the seized items and only in one respect did this create a danger of "unfair prejudice to the accused", but in a way which was brief and insignificant, so bears on the application of the proviso. Further, the Court of Appeal was correct in applying the proviso: at [181], [184], [260]–[264], [266], [268].

Appeal

This was an appeal from a judgment of the Court of Criminal Appeal of the Supreme Court of New South Wales.

T A Game SC and *G A Bashir* instructed by the *Legal Aid Commission (NSW)* for the appellant.

D C Frearson SC and *M M Hobart* instructed by the *Solicitor for Public Prosecutions (NSW)* for the respondent.

[1] Gummow and Hayne JJ. In February 2002, security cameras photographed an armed man robbing persons of money. The offender was wearing overalls, sunglasses and a balaclava which covered all of his face except eyes and mouth. After the robbery, a baseball cap and a tissue were found on the floor near where the robber had stood. The security photographs, taken at intervals, show where these items were found. The photographs tendered in evidence were not very clear. In some of the photographs something that could be a cap can be seen on the floor; in other earlier photographs that item cannot be seen.

[2] In December 2003, nearly 2 years after the robbery, police went to the appellant's house. They found a red full-faced balaclava in his bedroom and a pair of blue overalls in the laundry. They were directed to a box of similar balaclavas kept in the basement of the house.

[3] The appellant provided a DNA sample. The profile of his DNA was the same as the profile of DNA recovered from the cap found at the scene of the robbery. The particular profile is expected to occur in fewer than one in 10 billion individuals in the general population. Whether DNA recovered from the tissue was shown not to be his was disputed.

[4] In the District Court of New South Wales, the appellant was charged with, and convicted of, two counts of armed robbery and one count of assault with intent to rob while armed with an offensive weapon.

[5] The appellant appealed to the Court of Criminal Appeal of New South Wales against his conviction. He advanced several grounds of appeal and the Court of Criminal Appeal (James, Hidden and Hoeben JJ) held[1] that two of the grounds were made out.

[6] The first concerned the appellant being required, in the course of cross-examination by the prosecutor, to put on not only the balaclava and overalls that had been found at his house but also a pair of sunglasses which were not in evidence but were produced by the prosecutor. The court concluded[2] that although there was no error in requiring the appellant to put on the balaclava and overalls, he should not have been asked to put on sunglasses that were not in evidence.

[7] Secondly, the court concluded[3] that the trial judge had wrongly excluded evidence which the appellant proposed to call from his brother and father concerning the appellant's practice of preparing for display vehicles used in his brother's business. The evidence was intended to demonstrate that the appellant prepared the vehicles at the same time and on the same day each week, at a place far from where the robbery occurred, and that the time at and day on which he regularly did this coincided with the time and day of the robbery. The trial judge rejected the evidence on the basis that no notice had been given of alibi evidence in accordance with s 150 of the Criminal Procedure Act 1986 (NSW). The Court of Criminal Appeal concluded[4] that "the exercise by the trial judge of the discretion under s 150 of the Criminal Procedure Act did miscarry". The correctness of this conclusion was not put in issue in this court.

[8] The Court of Criminal Appeal concluded[5] that neither of the errors it had identified was significant, and that[6] "the evidence properly admitted at the trial proved the guilt of the appellant beyond reasonable doubt". Accordingly, the Court of Criminal Appeal applied the proviso to s 6(1) of the Criminal Appeal Act 1912 (NSW) and dismissed[7] the appellant's appeal to that court. By special leave, he appeals to this court. The appeal should be allowed.

1. *Evans v R* (2006) 164 A Crim R 489; [2006] NSWCCA 277 (*Evans*).
2. *Evans* at 508–12 [163]–[197].
3. *Evans* at 516–19 [222]–[242].
4. *Evans* at 518 [236].
5. *Evans* at 523 [285].
6. *Evans* at 524 [288].
7. *Evans*.

[9] In addition to the errors identified by the Court of Criminal Appeal, that court should have held that the appellant should not have been required to put on the balaclava and overalls found at his house. Having the appellant dress in those items tendered no relevant evidence.

[10] The Court of Criminal Appeal should not have applied the proviso. Consideration of that issue will require examination not only of the error constituted by requiring the appellant to dress in the balaclava and overalls found at his house (and to put on sunglasses) but also two other issues. The first concerned the trial judge's rejection of the alibi evidence which the appellant proposed to call from his brother and father. The second concerned features of the trial which, the appellant submitted, showed that the trial so departed from the fundamental assumptions underpinning a fair trial that the proviso could not or should not be engaged. Because of the possible prejudice worked at trial by having the appellant dress up like the robber, and the exclusion of the alibi evidence, the Court of Criminal Appeal erred in deciding that, on the material before it, the appellant was proved to be guilty beyond reasonable doubt. It will not be necessary to decide whether there was such a departure from the fundamental assumptions of a fair trial that the proviso could not or should not be engaged.

Showing the balaclava and overalls to other witnesses

[11] In this court, the appellant made two distinct points about the uses to which the balaclava and overalls found at the appellant's house were put at trial. The first concerned witnesses, who had seen the robber, being asked whether the articles produced at the trial were similar to those the robber had worn. The second concerned the appellant being required by the prosecution, in the course of cross-examination, to do three things: to put on the balaclava and the overalls (together with a pair of sunglasses that were not in evidence); to walk up and down in front of the jury; and to say some words the robber was said to have used.

[12] The appellant submitted that "the trial miscarried as a result of the admission of evidence of eyewitnesses" to the robbery concerning the items of clothing. The items were described in the notice of appeal as having "been randomly seized from the [appellant's] home 22 months after the offence".

[13] At the trial, two witnesses were asked, without objection, whether the items shown to them were similar to those they had seen that day, and in general terms each agreed they were. It is as well, however, to say a little more about the evidence of the first of these witnesses. Immediately before the robbery she had seen a man walking towards the place where it occurred. She said the man was wearing overalls, a bright red beanie and sunglasses. The beanie had excess material sitting above the man's head. The witness described the man, when slightly hunched over, as about her height (which she gave as 5 feet 6½ inches), of normal build, and having smooth, well-tanned skin. She was not asked, and did not profess to be able, to identify the appellant as the man she had seen. She did say that the balaclava she was shown "could be the same beanie" and that the overalls she was shown "look a lot dirtier than what the man had worn and probably a little faded as well but they look exactly the same style … the man was wearing".

[14] When the prosecution sought to show the balaclava and the overalls to a third witness, trial counsel for the appellant objected on the basis that the witness had given a description of the items that differed in some respects from the items

that were to be shown. The objection was overruled but the subject was revisited later in the trial. Trial counsel for the appellant submitted that evidence should not be received of the police finding at the appellant's house the balaclava and overalls that had been shown to the witnesses or of their finding a box of similar balaclavas. It was submitted that the evidence lacked probative value and that its reception would be prejudicial.

[15] In this court the appellant submitted that the items that had been produced at the trial were not then said or shown to have been worn by the robber. They were mass-produced items. (The statement in the grounds of appeal that the items had "been randomly seized" is to be understood as implying that the balaclava tendered in evidence was not different in any relevant way from the others found at the house.) The appellant submitted that the Court of Criminal Appeal should have held that "the procedure adopted [in showing the items to witnesses and asking for their comments] was unfairly prejudicial".

[16] The short answer to the point is that the procedure followed at trial was not unfair. It may be accepted that the witnesses did not assert that what they were shown was what the robber had worn. The highest point this aspect of the evidence reached was that the items were similar to those the robber had worn. But there was no unfairness to the appellant in proving, as the prosecution did, that he had access to items of clothing like those worn by the robber. There were two steps in that proof. First, it was necessary to show that the items in question had been found at the appellant's house. Secondly, it was necessary to demonstrate how similar the items discovered were to those that had been worn by the robber. That second step required the eye witnesses to examine what had been seized and say whether and how the items were like those the robber had worn. Further, in the forensic setting of this trial, where the DNA evidence relating to the cap that had been found at the scene loomed so large, it may be thought that the finding of not just one balaclava but a whole box of them at the appellant's house, and the finding there of an otherwise unremarkable pair of mass-produced overalls, was not very damaging to the appellant. This ground of appeal fails.

Dressing the appellant in the balaclava and overalls

[17] Other aspects of the use made at trial of the balaclava and overalls present more fundamental questions. In his notice of appeal, the appellant alleged that the Court of Criminal Appeal should have held that "the prosecutor should not have been permitted to require the [appellant]" to put on these items, walk up and down in front of the jury and say words which it was alleged that the robber had used. The grounds gave no particulars of why the prosecutor should not have been permitted to make these requirements but the respondent, correctly, understood the ground as challenging both the relevance and the admissibility of what was done. The respondent's written submissions sought to demonstrate that the relevance of what was done "lay in the comparison of what the jury saw and heard with the descriptions of the witnesses" and the respondent amplified that proposition in those submissions in a number of ways. The appellant, in his written submissions in reply, joined issue with the respondent's analysis.

[18] The chief weight of oral argument in the appeal to this court was directed at whether asking the appellant to put on these items, and show himself to the jury, constituted a "demonstration, experiment or inspection"[8] and whether, and how, Pt 2.3 of the Evidence Act 1995 (NSW) (the Act) was engaged. Argument was also directed to whether any common law rules of evidence applied. But counsel for the appellant, in oral submissions, returned to the issues of relevance that had been debated in the written submissions and submitted that "none of these exercises [with the balaclava and overalls] were relevant".[9] The particular reason then advanced by counsel for the appellant was that "no … adequate foundation existed in the evidence for [these] exercise[s] to be conducted"[10] but the whole question of relevance was plainly in issue between the parties as one of the several bases for the appellant's argument that the prosecutor should not have been permitted to require the appellant to put on these items.

[19] These reasons will demonstrate that the logically anterior question raised by the appellant — whether what was done was relevant — is determinative. It is as well, however, to begin by noticing a variety of steps sometimes taken in the course of a witness giving evidence that may be thought to provide (but on examination do not provide) the basis for sound analogical reasoning supporting what happened at the appellant's trial.

[20] Items of real evidence are often tendered and received in evidence. The balaclava and overalls found at the appellant's house are but one example of the tendering of such evidence. The photographs taken by the security cameras, and the cap found at the scene of the robbery, are other examples. As Wigmore explained,[11] there are many circumstances in which a tribunal of fact is asked to act upon what the tribunal itself perceives, rather than upon acceptance of testimonial evidence or inference from either testimonial or circumstantial evidence. Wigmore classified this as *autoptic proference*. (A party proffers something which the tribunal perceives for itself; Wigmore refers to the tribunal's self-perception of the thing as its autopsy of that thing.)

[21] Tender and reception of real evidence is one example of what Wigmore described as autoptic proference. But it is not the only example. Thus the tribunal of fact, asked to consider evidence about what kind of bladed weapon inflicted wounds, may look at a weapon found at the scene and tendered in evidence when considering evidence given that wounds were inflicted by a weapon with two sharp edges. In such a case the tribunal of fact may act, in part, upon what it observes for itself about the knife. Likewise, the tribunal of fact may act upon its own observation when a physically injured plaintiff is asked to show the tribunal of fact the injured part of the body.

[22] Why then not dress the appellant in this case in the same way as the robber? Why then not let the jurors observe for themselves how the appellant looks, and compare that with not only what the witnesses have said about the robber's appearance, but also what the jurors can see for themselves in the security photographs?

8. Section 53 of the Evidence Act 1995 (NSW) (the Act).
9. [2007] HCA Trans 368, p 1507.
10. [2007] HCA Trans 368, pp 1507–9.
11. J H Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev), Little, Brown & Co, Boston, 1972, vol 4, § 1150.

[23] The answer to the questions just posed is provided by proper application of the test of relevance. As this court's decision in *Smith v R*[12] demonstrates, questions of relevance require careful analysis. In particular, they require careful identification of the process of reasoning that is invited. Only then can it be seen whether the evidence in question could "*rationally affect* (directly or indirectly) the assessment of the probability of the existence of a fact in issue"[13] (emphasis added). In *Smith*, the disputed evidence was a witness's assertion that the person standing trial was the man depicted in security photographs. The majority of this court held[14] that, because the witness's assertion of identity was no different from the material available to the jury from its own observation, the witness's assertion that he recognised the appellant was not relevant. The fact that someone else reached the conclusion provided no logical basis for affecting the jury's decision when the conclusion was based on material not different in any substantial way from what was available to the jury. Knowing that another person had drawn the connection neither assisted nor hindered the process of reasoning that had to be undertaken.

[24] Showing the jury what the appellant looked like when wearing the balaclava and overalls that were in evidence (with or without the addition of sunglasses that had not been received in evidence) could not "rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".[15] The central issue at the appellant's trial was whether he was the robber. There was no dispute that there had been a robbery. There was no dispute that the robber had been wearing a balaclava, overalls and sunglasses.

[25] No one asserted, however, that the person wearing the disguise of balaclava, overalls and sunglasses could be identified by looking at that person during the robbery or could be identified by looking at the security photographs. None of the witnesses, not even the witness who had seen the robber without the balaclava pulled down over his face, said that they could recognise the man who was thus attired. None of the witnesses, and neither trial counsel, asserted that the person depicted in the security photographs could be identified.

[26] Looking at the appellant wearing the balaclava and overalls (with or without sunglasses) enabled a comparison between no more than the items he put on and what was depicted in the security photographs. But that comparison could be drawn without the appellant being asked to put them on. Dressing the appellant in the items provided no information to the jury that could rationally affect, directly or indirectly, the determination of any fact in issue because it revealed nothing about the wearer and nothing about the appellant that was not already apparent to the jury observing him in the dock.

[27] Requiring the appellant to put on the balaclava, overalls and sunglasses may be contrasted with requiring him to walk in front of the jury and requiring him to speak certain words. Observing how the appellant walked and how he spoke certain words might bear upon the jury's decision whether he was the man the witnesses had described. The jury could observe for itself these matters concerning the appellant; the jury could compare its observations with what the

12. (2001) 206 CLR 650; 181 ALR 354; [2001] HCA 50 (*Smith*).
13. Section 55(1) of the Act.
14. *Smith* at CLR 655 [11]; ALR 357.
15. Section 55(1) of the Act.

witnesses had said about the robber. This stands in sharp contrast with the balaclava, overalls and sunglasses, where the focus necessarily fell only upon the disguise and said nothing about who had worn it. Deciding who had worn the disguise was not assisted by having the appellant put on the items he was asked to put on.

[28] It follows that dressing the appellant in the balaclava and overalls (and producing a pair of sunglasses for him to wear) proffered no relevant evidence for consideration of the jury. It should not have been done. It is, then, not necessary to consider how Pt 2.3 of the Act would apply to this use of these items.

[29] Not only was what was done not relevant, doing it cannot be assumed to have had no effect on the jury. Dressing the appellant like the robber may have depreciated his credibility as a witness.

[30] For the reasons given by Heydon J, neither the appellant being asked to walk in front of the jury nor his being asked to say certain words was a "demonstration, experiment or inspection" to which s 53 of the Act applied. As the reasons of Heydon J demonstrate, that section is engaged in respect of demonstrations, experiments or inspections which are conducted outside the courtroom and which are to constitute a part of the evidence adduced at trial. Again, as Heydon J demonstrates, such matters as experiments undertaken out of court by an expert witness for the purposes of forming an opinion which is proffered in evidence do not come within the section. (Experiments of that kind are not undertaken by order; they are undertaken to enable formation of an opinion which will be tendered in evidence.)

[31] Trial counsel for the appellant objected to the prosecution requiring the appellant to put on the balaclava and overalls and objected to the prosecution producing a pair of sunglasses for the appellant to wear. The trial judge overruled these objections. That was the wrong decision of a question of law.[16] The appellant's appeal against conviction was, then, to be allowed unless the Court of Criminal Appeal "considers that no substantial miscarriage of justice has actually occurred".[17]

[32] It follows that the Court of Criminal Appeal considered the application of the proviso on an incorrect footing. The appellant should not have been required to put on the balaclava, overalls or sunglasses. Moreover, the application of the proviso in this matter must be considered not only with regard to these errors, but also the further error identified by the Court of Criminal Appeal: the wrongful rejection of evidence intended to bolster the appellant's denial of his presence at the scene of the robbery. The appellant further submitted, however, that the proviso could not or should not be engaged because the trial departed from the fundamental assumptions underpinning a fair trial.

Some unsatisfactory features of the trial

[33] More than once during the trial the trial judge was required not only to decide disputed questions about the admissibility of evidence but also to rule upon applications that the jury be discharged without verdict. On some of these occasions the trial judge was asked to give reasons for decision, said that she

16. Section s 6(1) of the Criminal Appeal Act 1912 (NSW).
17. Section s 6(1) of the Criminal Appeal Act.

would do so later, but did not. The Court of Criminal Appeal concluded[18] that the trial judge "was remiss in not stating, even if quite succinctly, her reasons for a number of her rulings". But the court went on to conclude[19] that the failure did not amount "to such a fundamental procedural irregularity as to warrant setting aside the appellant's convictions". The court said:[20]

> [272] … All, or almost all, of the applications by counsel for the appellant at the trial were argued at considerable length. The competing submissions of the parties were stated and, indeed, often repeated a number of times. The views the trial judge was forming on each application were revealed by frequent remarks made by her in the course of the argument. … [I]n the present case it can be inferred from the transcript of the argument what were her Honour's reasons for making each of her rulings and it is possible for this Court to determine whether her Honour erred in making the rulings.

[34] Not every ruling given at trial must be accompanied by reasons. Many issues about the admissibility of evidence are best resolved by simply allowing or disallowing a question to which objection is taken. But there are some evidentiary issues that arise in a trial where it is desirable to give reasons. It is not possible to formulate a single criterion of universal application that distinguishes between issues whose resolution should be accompanied by a statement of reasons and those where reasons need not be given. It suffices to say that cases in which a discretion must be exercised or the resolution of the issue depends upon some intermediate conclusion of fact or law will more likely warrant the giving of reasons than will an issue about the relevance of a question or the form in which it is posed. But what is of particular importance in the present matter is that the trial judge considered that she should give reasons for particular evidentiary rulings but did not.

[35] Apart from evidentiary issues, there were two applications to discharge the jury without verdict which the trial judge refused, indicating, in respect of one of the applications, that she would give reasons later. It may be doubted that an application for discharge of the jury could properly be determined without the judge stating reasons for the decision either when announcing the decision or at some later time. The reasons need not, indeed usually will not, be long. But the circumstances in which it would not be necessary to give reasons for the decision are not readily identified. And the trial judge in this case did not consider that the applications by trial counsel for the appellant were of that kind. Yet the trial judge did not give reasons for rejecting the first application that was made.

[36] There is a further aspect of the conduct of the appellant's trial that must be noticed. In the course of the trial, the trial judge made a number of incorrect statements of what had happened in the course of evidence to or in the presence of the jury. The chief error made, in the course of the trial judge's charge to the jury, was to tell the jury that the appellant had "also called evidence, that is his father and his brother in support of his case, to the effect to support his denial of his being present and committing the offence which is alleged against him". The trial judge had ruled that neither the father nor the brother of the appellant could give evidence of the kind described. Her Honour had concluded (wrongly, as the Court of Criminal Appeal held) that the evidence was "not relevant to any issue

18. *Evans* at 522 [272].
19. *Evans* at 522 [272].
20. *Evans* at 522 [272].

before the court and before the jury, and secondly that if it was led it would be a breach of s 150 of the Criminal Procedure Act".

Applying the proviso

[37] The application of the proviso must then be considered in the light of several different aspects of the way in which the appellant's trial proceeded. First, there was the wrong decision of the question of law about the relevance of having the appellant put on the balaclava and overalls found at his house and the sunglasses produced by the prosecutor. Secondly, there was the wrong decision of the question of law or the miscarriage of justice (it matters not which) constituted by the refusal to permit the appellant's father and brother to give evidence about his practice of working on vehicles far away from the scene of the robbery at the time and on the day when the robbery occurred. Thirdly, there is the combination of the trial judge's failure to give reasons for rulings which she considered required reasons and the misstatement to the jury of the effect of what had happened at the trial which together may suggest that the trial judge did not have sufficient mastery of the conduct of the trial to ensure a fair trial and that there was, therefore, "on any other ground whatsoever … a miscarriage of justice".[21]

[38] The appellant submitted that the combination of errors made at trial was such a "serious breach of the presuppositions of the trial"[22] as to deny the application of the proviso.

[39] Since at least *Quartermaine v R*,[23] reference has been made in decisions of this court to the possibility that the proviso may not be engaged if a trial was so irregular that no proper trial had taken place. In *Wilde v R*,[24] three members of the court spoke of "a proceeding which is fundamentally flawed" and said that "[t]he proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings". Neither *Quartermaine* nor *Wilde* was identified as such a case and this court has not since authoritatively decided what kind of departures from essential requirements may be said to go to "the root of the proceedings". In *Weiss*,[25] it was not necessary to consider the question. In *Libke v R*,[26] those members of the court who decided that the conduct of the prosecutor at trial was such that an appellate court could not be satisfied that no substantial miscarriage of justice had actually occurred dissented from the court's orders.

[40] As the joint reasons in *Weiss* show,[27] the proviso did away with the old Exchequer rule by which there was a "miscarriage of justice" whenever there was *any* departure from trial according to law, regardless of the nature or importance of the departure. But it is necessary to recognise that the common form criminal appeal provision presents what, on its face, is a conundrum. The provision requires an appeal to be allowed if any of three kinds of error is shown (verdict against the evidence or weight of the evidence, wrong decision of any question of law, or "on any other ground whatsoever there was a miscarriage of justice"). Yet on the hypothesis that such an error has occurred (including that

21. Section s 6(1) of the Criminal Appeal Act.
22. *Weiss v R* (2005) 224 CLR 300 at 317 [46]; 223 ALR 662 at 675; [2005] HCA 81 (*Weiss*).
23. (1980) 143 CLR 595 at 600–1; 30 ALR 616 at 620 (*Quartermaine*) per Gibbs J.
24. (1988) 164 CLR 365 at 373; 76 ALR 570 at 575 (*Wilde*) per Brennan, Dawson and Toohey JJ.
25. *Weiss* at CLR 317 [46]; ALR 675.
26. (2007) 235 ALR 517; 81 ALJR 1309; [2007] HCA 30.
27. *Weiss* at CLR 308 [18]; ALR 667.

there has been on any other ground whatsoever a "miscarriage of justice") the appeal may be dismissed if the proviso is satisfied.

[41] *Weiss* directed[28] appellate courts to make an independent assessment of the evidence at trial and to "determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record,[29] the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty". And as was said in *Weiss*,[30] it is "neither right nor useful to attempt to lay down absolute rules or singular tests" that govern that task. But as was pointed out in *Weiss*:[31]

> [44] … [O]ne negative proposition may safely be offered. It *cannot* be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty. [Emphasis added.]

[42] Applying this negative proposition will very often resolve any question of applying the proviso where it is said that there has been a radical departure from the requirements of a fair trial. The graver the departure from the requirements of a fair trial, the harder it is for an appellate court to conclude that guilt is established beyond reasonable doubt. It is harder because the relevant premise for the debate about the proviso's application is that the processes designed to allow a fair assessment of the issues have not been followed at trial.

[43] The present case illustrates the point. Here the appellant was denied the opportunity to call alibi evidence. That denial might be characterised as refusing the appellant the opportunity to put his defence. So characterised, the refusal to admit the evidence could be described as a grave departure from the requirements of a fair trial. But applying that description to what happened may, in the end, serve only to distract attention from the closer analysis of the matter that the consideration and application of the proviso requires.

[44] On its face the DNA evidence appears overwhelming and the appellant's explanations for how a cap with his DNA came to be found at the scene of the robbery were thin. (He asserted that the robber must have planted the cap there and he offered some suggestions of who might have procured that.) But the apparent thinness of this explanation for the incriminating evidence of the cap may, we do not say must, have taken on a different appearance if his alibi witnesses had given evidence and were believed.

[45] It may readily be accepted that the evidence called at the appellant's trial demonstrated, beyond reasonable doubt, that the cap found at the robbery scene was his cap. But a further question had to be decided. Was it the *appellant* who had taken the cap to and dropped it at the robbery scene? No one said the robber had worn the cap. Had someone else taken the cap there, whether in the overalls the robber wore or the bag the robber carried, and dropped the cap? That was what the appellant sought to put in issue with the alibi evidence, not whether the

28. *Weiss* at CLR 316 [41]; ALR 673–4.
29. *Fox v Percy* (2003) 214 CLR 118 at 125–6 [23]; 197 ALR 201 at 207; 38 MVR 1 at 7; [2003] HCA 22 per Gleeson CJ, Gummow and Kirby JJ.
30. *Weiss* at CLR 316 [42]; ALR 674.
31. *Weiss* at CLR 317 [44]; ALR 674.

cap found was his. How should the Court of Criminal Appeal have approached that issue in deciding whether the proviso applied?

[46] First, the appellant's denial of committing the robbery may very well have been undermined by having him dress as the robber had dressed and show himself to the jury. It is not possible to say what effect this had on the jury's assessment of him as a witness. The verdicts returned by the jury at the appellant's trial thus provide little if any assistance in assessing the record of trial.[32] Secondly, in the Court of Criminal Appeal, the appellant relied on affidavits sworn by his brother and father deposing to the evidence that each would have given at trial. Those affidavits spoke of the appellant's practice rather than of any specific recollection about what happened on the day of the robbery. The brother swore that he did not recall the appellant "having any breaks from this job or ever not turning up for work"; the father swore that he could not recall the appellant ever missing a day of work.

[47] The evidence of both the brother and father invited challenge. Each deponent spoke only of what he could remember. How certain was that memory? May there not have been an occasion, now forgotten, when the practice was not followed? May not the memory be mistaken? But none of these challenges was made or answered at trial and the Court of Criminal Appeal could act only upon the basis that the deponents would have given evidence at trial in accordance with their affidavit and that that evidence could have been accepted by the jury. Did that evidence, taken at its highest, raise a reasonable doubt about who had taken the cap to the scene of the robbery and dropped it there?

[48] Because the alibi evidence was not called and was not tested at trial, the Court of Criminal Appeal could not decide from the record of the trial and the additional material received on the hearing of the appeal that the appellant was proved beyond reasonable doubt to be guilty of the offences on which the jury returned its verdicts of guilty. It could not do that because the material upon which it had to act was incomplete. An important element of the material had been excluded at trial and was necessarily presented to the Court of Criminal Appeal untested. Because it was untested the Court of Criminal Appeal could not say whether it could be taken at less than its face value. And at face value it left an issue about who took the cap to the scene and dropped it there not capable of resolution beyond reasonable doubt.

[49] The Court of Criminal Appeal could not determine beyond reasonable doubt that the appellant was the robber. The errors at trial both undermined his defence and in an important respect prevented him putting it fully. The sworn evidence the appellant had given may well have been undermined by having him dress as the robber. The alibi evidence it had to consider was necessarily incomplete.

[50] It is not then necessary to go on to decide what significance should be attached to the several features of the trial that suggest that the trial judge did not have sufficient mastery of the proceedings to ensure a fair trial. That is, it is not necessary to explore what kinds of failure in the trial process preclude the application of the proviso, beyond noting that in *Weiss* the court said[33] that "no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal,

32. *Weiss* at CLR 317 [43]; ALR 674.
33. *Weiss* at CLR 317 [45]; ALR 675.

even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt".

[51] These issues need not be resolved in this matter. They need not be resolved because the errors made at trial undermined the appellant's defence and prevented him putting it fully. The Court of Criminal Appeal ought not to have decided that the appellant had been proved beyond reasonable doubt guilty of the offences charged. The Court of Criminal Appeal ought not to have decided that there had been no substantial miscarriage of justice.

Orders

[52] The appeal should be allowed. The orders of the Court of Criminal Appeal should be set aside, and in their place there should be orders that:(a) the appeal to that court is allowed; (b) the appellant's convictions are set aside; and (c) a new trial be had.

[53] **Kirby J.** This appeal challenges orders made by the Court of Criminal Appeal of New South Wales.[34] By those orders, that court, while finding that error of law or a miscarriage of justice had been established by Mr Graham Evans (the appellant), dismissed his appeal. It did so by the application of the "proviso" to s 6(1) of the Criminal Appeal Act 1912 (NSW) (the Criminal Appeal Act). It follows that the court concluded that "notwithstanding … that the … points raised by the appeal might be decided in favour of the appellant … no substantial miscarriage of justice has actually occurred".

[54] I agree with the conclusion expressed by Gummow and Hayne JJ (the joint reasons) that the application of the "proviso" was erroneous.[35] The Court of Criminal Appeal ought to have ordered a retrial. That is the order that this court should now make.

[55] In most respects, I agree in the joint reasons. However, I disagree with the analysis in the joint reasons where they strike out, for the first time, upon a line of reasoning that was not previously argued or considered.[36] On this aspect of the case, I agree in what Heydon J has written in his reasons, although I differ from the ultimate conclusion reached by his Honour.[37] Save for this difference, which reflects an earlier divergence in this court on a like question[38] (and which, as there, does not ultimately produce a different outcome) my own analysis and conclusion result in my agreement in the orders proposed in the joint reasons. The appeal must be allowed.

The facts and legislation

[56] The facts relevant to the appeal are stated compendiously in other reasons.[39] It would be superfluous for me to restate them.

[57] Similarly, the other reasons explain comprehensively the course followed in the appellant's trial including in the questions addressed to witnesses about the appearance of the clothing (overalls and a balaclava) worn by the offender when

34. *Evans v R* (2006) 164 A Crim R 489; [2006] NSWCCA 277 (*Evans*).
35. Joint reasons at [45]–[51].
36. Namely, that the evidence proffered by having the appellant, at the prosecutor's request, wear a balaclava and overalls before the jury in court was not relevant to any issue in the appellant's trial. See joint reasons at [23]–[24].
37. Reasons of Heydon J at [262]–[264].
38. *Smith v R* (2001) 206 CLR 650 at 653–4 [6], 656 [12], 657–9 [20]–[23]; 181 ALR 354 at 355, 357, 359–60; [2001] HCA 50 (*Smith*).
39. Joint reasons at [11]–[14]; reasons of Heydon J at [129], [133]–[135], [137]–[150].

committing the offences and aspects of the trial judge's conduct of the proceedings about which complaint is made. I will repeat none of this material.

[58] The applicable provisions of the Criminal Appeal Act[40] and of the Evidence Act 1995 (NSW)[41] (the Evidence Act) are also stated elsewhere. I incorporate all of those provisions by reference. Adopting this course allows me to proceed directly to the points of agreement with, and difference from, the views expressed by my colleagues.

The issues

[59] The other reasons clarify the issues that now fall to be decided. Those issues are the ones expressed in the appellant's several grounds of appeal to this court, which are helpfully set out in the reasons of Heydon J.[42] So presented, the controversies that this court is asked to resolve may be summarised as follows:

(1) *The relevance of clothing issue*: Whether the Court of Criminal Appeal erred in failing to hold that the trial had miscarried as a result of the admission of the evidence of witnesses concerning items of clothing taken from the appellant's home some 22 months after the offences, suggested to be similar to clothing worn by the offender at the time of the offences and, on that ground, relevant to questions for decision by the jury.[43]

(2) *The demonstration issue*: Whether the Court of Criminal Appeal erred in concluding that s 53 of the Evidence Act did not apply to an in-court demonstration in which the prosecutor required the appellant to perform by dressing up in a balaclava and overalls, walking in front of the jury and saying words attributed to the offender by one witness[44] (the demonstration). If s 53 of that Act did not apply to the demonstration, did any residual rules of the common law apply to render such questioning and conduct impermissible? Whether, otherwise, such evidence was inadmissible as prejudicial and unfair, or as involving the splitting of the prosecution case, or as condoning improper conduct on the part of the prosecutor, in respect of which the Court of Criminal Appeal should have provided redress to the appellant.

(3) *The judicial warnings issue*: Whether the Court of Criminal Appeal ought to have held that a miscarriage of justice had occurred by reason of the failure of the trial judge to direct the jury concerning the specific dangers occasioned by the demonstration, questioning and procedures referred to in issues (1) and (2).[45] In particular, whether, in the circumstances, the attempted warning given by the trial judge to the jury about the dangers inherent in the use of in-court evidence for a suggested similarity between descriptions and appearances of items of clothing, the appearance of the accused when dressed up, walking and

40. See reasons of Heydon J at [130].
41. Reasons of Heydon J at [148]. See also at [186].
42. Reasons of Heydon J: ground 1 at [136], ground 2 at [168]; ground 3 at [228]; ground 4 at [237] and ground 5 at [249].
43. Cf reasons of Heydon J at [136].
44. Reasons of Heydon J at [168]. The prosecutor also invited the appellant to wear her own sunglasses, evidently to mimic still further the appearance of the offender. Those sunglasses were not in evidence. Their introduction into the case by counsel was rightly criticised by the Court of Criminal Appeal. That error compounded the errors and prejudice of the demonstration upon which the prosecutor had embarked.
45. Reasons of Heydon J at [228].

speaking,[46] and the imperfect evidence of surveillance videotapes, taken at the time of the offences, were defective for the lack of specific warnings to the jury about the dangers of convicting the appellant on the basis of any such perceived resemblance or similarities.

(4) *The sufficiency of reasons issue*: Whether the Court of Criminal Appeal erred in failing to uphold the appellant's complaints about the omission of the trial judge to give adequate reasons for critical rulings made in the course of the trial (including in respect of some issues for which reasons were reserved but never subsequently stated).[47]

(5) *The proviso issue*: Whether, in light of the resolution of the foregoing issues and the appellant's complaints of consequential or other errors of law and miscarriage of justice (including the wrongful exclusion of alibi evidence) or for reasons of a departure of the appellant's trial from the fundamental assumptions of a fair trial,[48] the Court of Criminal Appeal erred in dismissing the appeal on the basis of the "proviso" to s 6(1) of the Criminal Appeal Act.

Narrowing the issues

[60] *Reducing the differences*: In the approach that I take, by reference to the foregoing, it is possible to confine the issues that I must decide still further. I can do this either because I am in substantial agreement with what my colleagues have written on some of the issues or because a decision on some of the issues is ultimately superfluous to the disposition of this appeal.

[61] *The relevance of clothing questions*: Alike with Heydon J,[49] I would reject the appellant's argument that the prosecution's questions, addressed to the description of the balaclava and overalls (including by comparison with items of the same type found much later in the appellant's residence), were not relevant to the issues in the trial. I agree with Heydon J's reasons in this respect.

[62] I also agree with the conclusion stated in the joint reasons[50] that the procedures adopted, in showing the items recovered from the appellant's home to witnesses and asking for their comments, were not unfairly prejudicial to the appellant. They did not attract the application of s 137 of the Evidence Act so as to render the evidence inadmissible. Nor did they demonstrate that the trial judge had erred in declining to exercise her discretion under s 135 to exclude the evidence.[51] The first ground of appeal, and every element of the challenge on the first issue, therefore fails.

[63] *In-court demonstrations*: So far as the submissions on the second issue are concerned, it is convenient to isolate three subordinate submissions regarding which I do not demur from the conclusion reached in other reasons. Thus, alike with the joint reasons,[52] I accept the conclusion reached by Heydon J[53] that s 53 of the Evidence Act does not apply to an in-court "demonstration, experiment or inspection". The section is not therefore applicable to the demonstration

46. Reasons of Heydon J at [231]–[232].
47. Reasons of Heydon J at [237].
48. Cf *Weiss v R* (2005) 224 CLR 300 at 317–18 [46]; 223 ALR 662 at 675; [2005] HCA 81 (*Weiss*); cf joint reasons at [10].
49. Reasons of Heydon J at [154]–[161], [167].
50. Joint reasons at [16]. See also reasons of Heydon J at [165]–[166].
51. Reasons of Heydon J at [167].
52. Joint reasons at [30].
53. Reasons of Heydon J at [186]–[218].

conducted in court pursuant to the prosecutor's request that the appellant dress up in overalls and a balaclava, wear them while seated in the dock, walk in the courtroom in front of the jury and say words in their presence which had earlier been attributed to the offender.

[64] Although there are arguments both ways (and the resulting gap in the application of the Evidence Act in respect of *in-court* demonstrations is awkward and arguably unintended), the powerful examination by Heydon J[54] of the statutory text, the preceding common law and the reports of the Australian Law Reform Commission bring me with a certain reluctance to the same conclusion as his Honour has reached. This is that s 53 of the Evidence Act is confined to demonstrations *out of court*. The section did not apply to such activities undertaken in court, necessarily in the presence of the judge and jury.[55]

[65] If this outcome is not what was intended as the operation of the Uniform Evidence Acts, that needs to be addressed by the legislators. Any resulting problem cannot be solved judicially, by the application of the canons of statutory interpretation. A reluctance to conclude that such a lacuna exists in the Evidence Act is assuaged somewhat because, as Heydon J points out, the common law rules governing the conduct of such demonstrations remain applicable to the subject trial, save so far as the provisions of that Act otherwise provide expressly or by necessary intendment.[56] Certainly, at common law a demonstration required careful attention to conditions of "equivalence", "substantial similarity" or "faithful reproduction" of the evidence being demonstrated.[57]

[66] *No splitting of the prosecution case*: I place to one side for the moment the application of the common law rules. Two further subordinate submissions, arising under the second issue, can be rejected immediately. Thus, the appellant's specific argument that the prosecutor, by requesting the demonstration during the cross-examination of the appellant, split the prosecution case should be dismissed for the reasons given by Heydon J.[58] The objections at common law to the course adopted remain to be evaluated. However, the only point in the trial at which a prosecutor could have conducted any demonstration (assuming that to be legally permissible and otherwise proper) was during the cross-examination of the appellant, once he had elected to give evidence in his own case. Any suggestion that some other person of similar build, appearance or characteristics could have been used in a demonstration conducted during the prosecution's case is fanciful. There was no substance in this point.

[67] *No prosecutorial misconduct*: Nor, in this case, has the appellant made good his submission that, by her request to him to undertake the demonstration, the prosecutor misused her functions, requiring judicial correction.

54. Reasons of Heydon J at [216].
55. Thereby rendering the requirements of ss 53(2) and 53(3)(a) otiose or inappropriate.
56. Reasons of Heydon J at [224] setting out ss 9(1) and 11(1) of the Evidence Act. See, for example, *Van Vliet v Griffiths* (1978) 19 SASR 195 at 210.
57. *Scott v Numurkah Corp* (1954) 91 CLR 300 at 312, 316; [1954] ALR 373 at 379, 381–2; *R v Alexander* [1979] VR 615 at 622–3; *Grosser v South Australian Police* (1994) 63 SASR 243 at 248.
58. Reasons of Heydon J at [227]; cf *Shaw v R* (1952) 85 CLR 365 at 379–80; [1952] ALR 257 at 258–9.

[68] In a number of recent cases, this court,[59] the Court of Criminal Appeal itself,[60] as well as other courts of high authority[61] have found it necessary to remind prosecutors in criminal proceedings about the legal and professional rules governing their conduct in representing a special public litigant bearing, on behalf of the community, a "greater personal responsibility" to contribute to "the seriousness and the justness of judicial proceedings" of this kind.[62] Australian courts should not accept any decline in those standards. In proper cases, evidence of serious lapses in standards by prosecutors, if uncorrected at trial, should result in appellate orders requiring a new trial that will conform to the fundamental standards of fairness postulated for the administration of criminal justice in Australia.[63]

[69] This said, the conduct of the prosecutor on this occasion falls far short of the type of lapse that would invite such a sanction. What occurred involved (as I hold) an error of judgment on the part of the prosecutor. It may require correction because of the unfairness to the appellant occasioned in what then ensued. However, it was not misconduct on the part of the prosecutor as, for example, the introduction of insulting or demeaning comments and personal opinions can be.[64] The appellant is entitled to relief, as I shall show. But this is not a case where any relief should be given for prosecutorial misconduct. Where relief is sought on such a ground it should, in my opinion, be specifically pleaded as a ground of appeal. This was not done in the present appeal. Here the issue (such as it was) was only raised in the appellant's written submissions. The submission does not succeed.

[70] *Inadequate judicial warnings*: I can deal more peremptorily with the third and fourth issues.[65] So far as the third issue is concerned (the suggested omission of judicial warnings on the dangers of miscarriages of justice occasioned by identification or resemblance evidence), I respectfully differ from the conclusion of Heydon J that the inadequate (and in some respects inaccurate and confusing) directions given by the trial judge are to be discounted or passed by because of the failure of the appellant's trial counsel to seek further directions at the closing of the judge's summing up.[66]

[71] The concern evident in the statutes providing for appeals against conviction of criminal offences is fundamentally addressed to the *substance* of the outcome of such trials and whether they have miscarried for proved legal error or miscarriage of justice. It is not, at least solely, concerned with whether *technical* rules for making and recording objections at trial were observed by trial counsel.[67]

59. See *Stanoevski v R* (2001) 202 CLR 115 at 129 [54]; 177 ALR 285 at 296; [2001] HCA 4 (*Stanoevski*); *Subramaniam v R* (2004) 211 ALR 1 at 16 [52]–[54]; 79 ALJR 116 at 127–8; [2004] HCA 51; *Libke v R* (2007) 235 ALR 517 at 530–1 [41], 539–40 [83], 547–9 [121]–[126]; 81 ALJR 1309 at 1320, 1327, 1333–4; [2007] HCA 30. See also *Whitehorn v R* (1983) 152 CLR 657 at 663; 49 ALR 448 at 451.
60. *R v Kennedy* (2000) 118 A Crim R 34 at 41 [37]–[38]; [2000] NSWCCA 487; *R v Livermore* (2006) 67 NSWLR 659 at 667–9 [35]–[44]; [2006] NSWCCA 334 (*Livermore*).
61. See, for example, *Boucher v R* (1954) 110 CCC 263 (Supreme Court of Canada) (*Boucher*).
62. *Boucher* at 270 per Rand J.
63. *Weiss* at CLR 318 [47]; ALR 675; *Libke* at ALR 530 [38], 552 [133]; ALJR 1320, 1336.
64. Cf *Evans* at 522 [275].
65. See above these reasons at [59].
66. Reasons of Heydon J at [236].
67. *Gately v R* (2007) 241 ALR 1 at 15 [48]; [2007] HCA 55.

[72] In the present case, in the way the trial unfolded, defence counsel had many points to pursue. He appears to have fulfilled his duties with vigilance and diligence. On the other hand, as this court and other appellate courts have repeatedly pointed out,[68] the history of miscarriages of justice is littered with cases where serious wrongs have occurred on the basis of imperfect evidence of identification of the accused or imperfect evidence of resemblance. It is for that reason that courts in this country have insisted, even in cases where the prosecution case is otherwise strong, upon clear and detailed, accurate and properly cautionary instructions to the jury about the special dangers of convicting an accused person on the basis of identification or resemblance evidence. The need for warnings or cautions about the dangers of evidence of "resemblance" or "similarity" should not be diluted simply because they arise in new and different circumstances.

[73] Especially is this so because, as Heydon J has shown,[69] the prosecutor at the trial, very properly, discerned the imperfections of the trial judge's directions to the jury on this issue. The prosecutor sought to explain to the trial judge the need for more explicit warnings to the jury as to the special caution they should observe in drawing conclusions adverse to the appellant by reference, for example, to the evidence of witnesses concerning the apparent similarity of items of clothing found much later at the appellant's home and the overalls and balaclava worn by the offender, remembered from the time the crimes were committed.

[74] Despite the prudent interventions by the prosecutor in this respect, the trial judge did not subsequently provide the jury with supplementary directions of the kind the prosecutor correctly perceived to be necessary, so as to conform to the stringent standard stated in *Domican*[70] and other cases. Given that such a reminder had been given by the prosecutor, explicitly, it was unnecessary (or at least inessential) that the same point should also have been made by the appellant's trial counsel.

[75] I can put this issue aside because of the conclusion that I reach, on other grounds, that the appeal must be allowed. In any retrial of the appellant, it may be expected that, if like evidence of similarity between the items of clothing or personal appearance were adduced, the judge would give strong and clear warnings to the jury about the dangers inherent in the use of the identity and resemblance evidence.

[76] However, because of the view that I take about the demonstration that took place in the appellant's trial (and also the conclusion reached in the joint reasons on those issues), the need for a strong warning about the use of demonstrations is unlikely to arise in a second trial.

[77] *Inadequate interlocutory reasons*: Finally, I reach a similar conclusion in respect of the appellant's complaint concerning the suggested inadequacy of the trial judge's reasons for several of her rulings adverse to him.[71] On this issue,

68. *Alexander v R* (1981) 145 CLR 395 at 399; 34 ALR 289 at 291; *Domican v R* (1992) 173 CLR 555 at 561; 106 ALR 203 at 206; [1992] HCA 13 (*Domican*). See also *Domican (No 3)* (1990) 46 A Crim R 428 at 445; *R v Clout* (1995) 41 NSWLR 312 at 321; *R v Stewart* (2001) 52 NSWLR 301 at 333 [139]–[140]; [2001] NSWCCA 260.
69. Reasons of Heydon J at [234].
70. *Domican* at CLR 565–6; ALR 209–10.
71. Joint reasons at [33]–[36].

alike with the Court of Criminal Appeal[72] and with the joint reasons in this court,[73] I agree that the failure of the trial judge to give even brief and succinct rulings (if necessary later) on important questions, made during the hearing, amounted to "unsatisfactory features of the trial".[74]

[78] It is not necessary for me to elaborate these points. In the conclusion that I reach, there must be a retrial. In that retrial it can be expected that, if something more than the recorded exchanges between the judge and counsel is necessary and appropriate, the judicial obligation to give reasons for important rulings will be observed in the normal way.

[79] *The remaining issues*: The foregoing reasoning brings me to the two remaining issues that I need to address. The first is the application to the demonstration of the common law rules that remain applicable because s 53 of the Evidence Act does not govern this case. The second is the resulting application of the "proviso" in s 6(1) of the Criminal Appeal Act, including to the erroneous exclusion at trial of the alibi evidence, pursuant to s 150 of the Criminal Procedure Act 1986 (NSW). I turn to address these issues.

In-court demonstration: relevant but unfairly prejudicial

[80] *A new "relevance" issue*: I now arrive at the point where I depart from the joint reasons. Those reasons[75] conclude that no issue about the lawfulness of a "demonstration" arises (whether under the Evidence Act or the common law). For the joint reasons, an anterior legal question is presented. This is whether what was done at the prosecutor's request was "relevant". The joint reasons conclude that this is the "determinative" question. Those reasons answer the question adversely to the prosecution. That answer is fatal to the reception of such evidence. The evidence should not have been received not because it was unfairly prejudicial to the appellant but because it was legally irrelevant to the issues arising in the appellant's trial.

[81] I disagree with this analysis. Its only merit, as I see it, is that it obviates consideration of questions otherwise arising as to how Pt 2.3 of the Evidence Act (or the residual common law) would apply to the use of any "demonstration" actually carried out.[76]

[82] *Rejection of irrelevance*: There are several reasons why, in my view, this court should not adopt the analysis embraced in the joint reasons.

[83] First, it is not an argument that is raised in any of the appellant's grounds of appeal before this court. To the contrary, as the relevant ground (ground 2.2), set out in the reasons of Heydon J, demonstrates,[77] the appellant's objection to the demonstration before this court was not made on the footing that such conduct proffered no *relevant* evidence for the consideration of the jury. His ground of appeal impliedly accepts that what the appellant was asked to do could be judged by the jury to be relevant to the critical issue for decision,

72. *Evans* at 522 [272].
73. Joint reasons at [33]–[36].
74. Joint reasons at [33]; cf *Mraz v R* (1955) 93 CLR 493 at 514; [1955] ALR 929 at 940; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 666–7; 63 ALR 559 at 565–6; 9 ALN 85 (CN) at 88–9; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259–62; *Dinsdale v R* (2000) 202 CLR 321 at 329 [21]; 175 ALR 315 at 320–1; [2000] HCA 54.
75. Joint reasons at [18]–[19].
76. Joint reasons at [32].
77. Reasons of Heydon J at [168].

namely the identification of the appellant as the offender. Instead, the attack in this court, according to the applicable ground of appeal, was on the *permissibility* of the demonstration, measured on the footing that it was designed to elicit evidence that was relevant but unfairly prejudicial to the appellant.

[84] This court is a court of error. Under the Constitution, appeals to this court are limited to correcting errors of the courts below.[78] The purpose of a constitutional "appeal" is to quell a controversy between the parties, brought to this court for resolution.[79] Ultimately, unless an issue is raised on the record, as for example by a ground of appeal (or cross-appeal or notice of contention) or where the parties and the court agree to a relaxation of the rules so as to allow an issue to be raised more informally, there is no relevant controversy for the court to quell. This court does not enjoy a roving commission to create new grounds of appeal so that it might decide an appeal upon some basis about which no party is complaining.

[85] This approach of this court to its functions under the Constitution has been repeatedly stated by justices of the court, from early times to the present.[80] In effect, the judicial function that is enlivened in an appeal derives from the constitutional character of "matters" which can only be decided by federal courts. This does not prevent (although it may limit) judicial observations by way of obiter dicta on matters not strictly in issue but regarded as pertinent (and perhaps overlooked). It does not prevent this court from permitting a party to amend and enlarge the grounds that it wishes to advance, although doing so in criminal appeals has been said to be exceptional.[81] Where obedience to the Constitution, as the fundamental law, is raised, from which the justices derive their own authority, different questions may sometimes arise.[82]

[86] However, this is not a case where the question of the relevance of the demonstration evidence is considered in the joint reasons by way of obiter dicta. The appellant made no application to amend or enlarge his grounds of appeal to rely on what is now described as the "anterior question" of relevance. Nor are any constitutional questions presented that could possibly warrant treating the issue of relevance as one of fundamental obedience to law. Respectfully, therefore, I consider that the relevance argument does not fall to be decided. It is not a controversy before the court that we are asked to quell.

[87] Secondly, a question of procedural fairness is presented by the course taken in the joint reasons. Because the issue of relevance was not raised in the grounds of appeal, it was not addressed in the written submissions of the parties. In the respondent's submissions, the mention that is made of relevance is directed

78. *Mickelberg v R* (1989) 167 CLR 259 at 267; 86 ALR 321 at 325; *Eastman v R* (2000) 203 CLR 1 at 13 [18], 51 [158], 58 [178]; 172 ALR 39 at 43, 73–4, 79–80; [2000] HCA 29, cf at CLR 76 [232]; ALR 94 (*Eastman*).
79. *Singh v Commonwealth* (2004) 222 CLR 322 at 383 [152]; 209 ALR 355 at 401–2; 79 ALD 425 at 471–2; [2004] HCA 43 per Gummow, Hayne and Heydon JJ. See also *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 280 [63]; 227 ALR 425 at 441; 45 MVR 288 at 304; [2006] HCA 27 per Gleeson CJ, Gummow, Hayne and Crennan JJ.
80. Since at least *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265–6; 27 ALR 193 at 195.
81. *Gipp v R* (1998) 194 CLR 106 at 116 [24], 154–5 [136]–[138], 161 [164]; 155 ALR 15 at 22–3, 53–4, 58; [1998] HCA 21; cf CLR 125–6 [55]–[56]; ALR 30; *Crampton v R* (2000) 206 CLR 161 at 172 [14], 184 [51], 204–5 [116]–[117], 216–17 [156]; 176 ALR 369 at 372, 381–2, 398, 408; [2000] HCA 60 (*Crampton*).
82. *Roberts v Bass* (2002) 212 CLR 1 at 54 [143]; 194 ALR 161 at 199; [2002] HCA 57.

not to relevance, as such, but to whether the demonstration was identification evidence or not.[83] To the extent that it was mentioned at all in the appellant's oral submissions, this occurred but fleetingly and then in response to a question from the court.[84] No application was made after the question to expand the grounds of appeal. It was not mentioned in oral argument by the respondent. In reply, the appellant returned to his invocation of s 53.[85] He made no reference to s 55 of the Evidence Act.

[88] It follows that no extensive treatment of the argument of relevance was ever placed before this court. Nor do we have the considered opinion upon it of the Court of Criminal Appeal or of the trial judge, since it was not in issue, raised or argued there.

[89] If this appeal were to be decided on the "anterior question",[86] an issue would arise as to whether the grounds of appeal require amendment. That issue would, in turn, raise questions as to whether any such amendment should be allowed at such a late stage in this litigation.

[90] I do not say that an amendment would necessarily be denied. However, bringing the record into a correct relationship with an issue belatedly perceived to be determinative is an obligation, ultimately, of the court itself. Moreover, it is an obligation to be fulfilled with due respect to the requirements of procedural fairness to the opposing party which loses on a new point never earlier properly addressed. Leave to raise a new interpretation of the application of the Evidence Act might be granted, having regard to the broad view that this court has taken of its powers in that respect.[87] But the correct procedural steps would have to be taken, for otherwise there is no identified "controversy" that this court can justly "quell". There is also a real risk of procedural unfairness to the losing party.

[91] Thirdly, the fact that, despite the many experienced minds that have been brought to bear on the controversies of this case, no one previously has seen fit to raise an objection to the demonstration evidence on the grounds of relevance, is (or should be) reason enough for this court to pause before embracing such a new approach for itself.

[92] No one advanced such an argument at trial. It was not expressed in the grounds of appeal before the Court of Criminal Appeal. None of the judges of that court (all of whom had substantial trial experience) raised the issue. This was so, although other arguments over the relevance of the clothing evidence were certainly addressed, as the reasons of Heydon J in this court make plain.[88]

[93] Because there is no further appeal from the decision of this court in which a party disaffected may challenge novel legal or factual analysis, it is especially important to observe care and procedural niceties before embarking for the first time upon completely new analyses that may seem attractive.

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83. Cf joint reasons at [17].
84. [2007] HCATrans 368, pp 1485–510. See also p 1055.
85. See [2007] HCATrans 368, p 2528.
86. See the joint reasons at [19].
87. *Crampton* at CLR 172 [14], 184 [51], 204–5 [116]–[117]; ALR 372, 381–2, 398.
88. Reasons of Heydon J at [151]–[153]; cf *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300 at 303–4; 30 ALR 588 at 592–3; [1980] 3 All ER 257 (PC) at 260.

[94] Fourthly, the postulate of the "logically anterior question" embraced in the joint reasons[89] does not appear convincing when it is remembered that the test of "relevance", expressed in the Evidence Act, is an extremely broad one. Thus, s 56 of that Act states:

> 56 *Relevant evidence to be admissible*
>
> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> (2) Evidence that is not relevant in the proceeding is not admissible.

[95] The foregoing tests are stated in all their generality for application to millions of questions asked every year in the great variety of cases to which the Uniform Evidence Acts apply. According to s 55(1) of the Evidence Act, the test for relevance requires no more than that the evidence "if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding". That test must necessarily be given an extremely broad ambit.

[96] Other provisions of the Evidence Act reinforce the impression that the test of relevance is not a narrow or stringent one: see, for example, ss 57 and 58. A broad interpretation alone is the one compatible with the purpose of the Act, which is to aid the court process (effectively of quelling controversies brought to the court for that purpose, taking into account all evidence which has a bearing upon the questions in issue) rather than to delay or needlessly complicate the resolution of that process.[90]

[97] What is, or is not, relevant to an issue in proceedings is much more likely to be perceived by advocates and judges of trial than by an appellate court. Still more so than by the ultimate national appellate court, concluding for the first time for itself that an issue, which everyone else has considered to be relevant, is irrelevant.

[98] I cannot say that this course could not properly happen. Indeed, in the experience of this court it has already happened, at least once, in *Smith*.[91] I disagreed with the approach on that occasion.[92] In this appeal, I have considered whether the circumstances of the case are sufficiently analogous to require me to suppress my objection to the course favoured in the joint reasons and to conform to it. However, questions of relevance are always highly fact-specific. No general rule could be laid down that was not anchored in the proof of the facts in issue in the particular proceeding.

[99] Many of the reservations that I expressed in *Smith* can therefore be repeated in this appeal:[93]

> [23] … [There are] reasons for caution in permitting a case to take on a completely new complexion, especially where the new point concerns the relevance of evidence. Questions of relevance raise the logical connection between proof of a propounded fact and a conclusion about a matter having persuasive significance for an issue for trial. Notions about the relevance of particular facts to ultimate conclusions in a trial can vary

89. Joint reasons at [19].
90. See, for example, *R v Clark* (2001) 123 A Crim R 506 at 566–7 [111]–[112]; [2001] NSWCCA 494 per Heydon JA.
91. (2001) 206 CLR 650; 181 ALR 354; [2001] HCA 50. The approach in *Smith* "to read down the concept of relevance contained in s 55" has been criticised: A Ligertwood, *Australian Evidence*, 4th ed, LexisNexis, Sydney, 2004, pp 56–7 [2.22]–[2.23].
92. *Smith* at CLR 658–9 [21]–[24]; ALR 359–60.
93. *Smith* at CLR 658–9 [23]; ALR 359–60.

> as between the parties, who may see the issues differently. Perspectives of relevance may also develop during the course of a trial as the issues become clearer, as immaterial issues fall away and as understandings of the applicable law become more certain. This is why appellate courts ordinarily defer to the rulings of trial judges about the issue of relevance. Such deference also rests upon a recognition of the fact that practical considerations usually require such rulings to be made on the run … Rulings as to relevance therefore depend substantially upon judicial impression. In the face of the fact that relevance is, in part at least, determined by impression, it is significant that neither the trial judge, nor the appellate judges nor counsel earlier perceived the evidence in question to be irrelevant. In now expressing an opinion about relevance, this Court has neither the advantages of an express ruling on the point by the trial judge nor analysis and opinion of the Court of Criminal Appeal.

[100] Every word in this extract applies to this appeal. Even more so because here the question of relevance did not arise (as in *Smith*) in a preliminary ruling, made before the trial evidence was adduced. Here, the question fell to be decided at an advanced stage in the conduct of the trial when the prosecution case had closed, when the appellant had given his evidence-in-chief and when the issues for the jury's verdict had been sharpened and clarified. It would be a bold decision for this court to come to its own conclusion that the evidence proffered by the prosecution in the contested demonstration was irrelevant to the proof of a fact in issue (as distinct from unfairly prejudicial to the appellant or inadmissible on some other ground).

[101] Fifthly, when one reflects on whether the evidence that the prosecutor was seeking to adduce could "rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding", one such fact was clearly whether the appellant was the offender who had committed the crimes alleged. Relevant to that question was (to put it broadly) whether, when dressed in overalls and a balaclava; when walking in front of the jury; and when saying words ascribed to the offender at the scene, there were apparent similarities, in the jury's view, between the appearance and conduct of the appellant and the earlier evidence and descriptions given (or viewed on videotape) concerning the offender.

[102] Of course, there were differences. Thus, there was no relevant sound of the offender on the videotape; the words he was asked to utter were not exactly those said by the witness, Mrs Gleeson, to have been misstated by the offender. The video and photographic stills lacked sharpness and clarity. The circumstances of the appellant sitting (on one estimate) for 10 minutes in the witness box were seriously unfair. But depending on what evidence the jury accepted, it cannot be said that the evidence was irrelevant to the obvious purposes for which it was proffered by the prosecutor. It was open to the jury to consider that all or some of the evidence was relevant to their decision. Dangerous, unfair, humiliating and prejudicial, yes. But irrelevant, no. Some of the most prejudicial evidence in a trial is that which is potentially most relevant in the opinion of lay jurors.

[103] As in *Smith*, it is, in my view, a mistake to attempt to get the relevance test to do the work of excluding evidence such as that of the demonstration that took place in the appellant's trial. Such an approach would shift the debate of exclusion to unduly subtle preliminary argument. It would divert the decision-maker's mind from the real grounds provided by the law for exclusion of evidence which, although relevant, is unfairly prejudicial and to be excluded on that ground.

[104] *Addressing unfair prejudice*: The foregoing are the reasons why I am unable to avoid the balancing test of probative value and prejudice presented by the demonstration. Attractive as such avoidance might seem, it is neither presented by the grounds of appeal as framed nor sound in principle or in law.

[105] When I address the issues presented in the way that I regard to be correct (and as they were addressed below, and in the parties' real arguments before this court) I none the less reach the same conclusion as that stated in the joint reasons. The Evidence Act did not apply to govern the demonstration. Instead, the common law principles applied. The conduct of demonstrations in court before a jury is subject to rules protecting the accused from unfair prejudice or from being engaged in conduct that is misleading, confusing, demeaning, prejudicial or unjust. In the context of a jury trial, such rules must be upheld by the trial judge.

[106] It can be expected that, in Australia, in the future, the common law rules in this respect will develop in ways generally harmonious with the provisions of the Uniform Evidence Acts.[94] Those provisions acknowledge the broad powers enjoyed by trial judges to ensure the fairness, applicability and utility of demonstrations.[95] They direct attention to whether the demonstration will "assist the court in resolving issues of fact or understanding the evidence". They demand vigilance against "the danger that the demonstration … might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time" and the need to "properly reproduce the conduct or event to be demonstrated".[96] All of these are considerations that are reflected in the common law principles that fall to be applied in this case.

[107] With due respect to Heydon J, who has reached the opposite conclusion,[97] it is my opinion that what the prosecutor required the appellant to do was a "demonstration" so far as the common law rules applying to in-court demonstrations are concerned. The prosecutor obliged him to dress up, to walk before the jury and to say particular words. She did so for the manifest purpose of allowing the jury to draw their own comparisons between what they saw and heard for themselves and other available evidence relevant to the identity of the offender.

[108] It is not correct to dismiss the prejudice to the appellant as insubstantial because of the fact that he was obliged to sit in the witness box for a relatively short time, measured against the duration of the entire trial, during part of which the jury's attention would have been distracted and focused on the objections being voiced by the appellant's trial counsel.[98] Counsel protested that what was happening was "totally improper" and "patently unfair". The duration of the demonstration is not the essence of the appellant's complaint. The complaint is that the prosecutor's questions made him sit, in the jury's presence, in a garb often associated with armed robberies, inescapably similar to the appearance of the offender shown on the video film and photographic stills and necessarily looking sinister and criminal-like. Even if glanced at for a moment, such an

94. *R v Swaffield* (1998) 192 CLR 159 at 208 [121]; 151 ALR 98 at 132; [1998] HCA 1; cf at CLR 193–4 [67]–[68]; ALR 121
95. See, for example, s 53(3) of the Evidence Act: "Without limiting the matters that the judge may take into account in deciding whether to make an order".
96. Section 53(3)(b),(c) and (d) of the Evidence Act.
97. Reasons of Heydon J at [223].
98. Reasons of Heydon J at [185].

image (like images of hijackers, terrorists and murderers in well-remembered films, documentaries and news broadcasts) would etch an eidetic imprint on the jury's collective mind. It is an image unfairly prejudicial to the appellant.

[109] There have been cases where witnesses have been requested to engage in in-court demonstrations by revealing a particular part of the body otherwise clothed,[99] providing a sample of handwriting or wearing a hat,[100] or where they have otherwise been tested on some idiosyncratic spoken or written reproduction of particular words.[101] However, never in my experience has conduct in which the accused person has been asked to engage come close to the serious prejudice to which the appellant was subjected by the questioning by the prosecutor and the demonstration that she led him to perform in his trial.

[110] When cases come before this court, we must look beyond the instant case. We must examine what has happened recently against the standard of what will occur if, condoned, it becomes a general rule. In *Livermore*,[102] the Court of Criminal Appeal in New South Wales addressed what it saw as repeated instances of Crown Prosecutors making extravagant and improper submissions in closing which, the court said, caused it to "[think] that [its] repeated condemnation … appears to have fallen on deaf ears". In *Livermore*, the conduct of concern was the content of the prosecutor's closing address to the jury. Here, there is no complaint of such a kind. Indeed (as I have shown) the prosecutor in her closing observations attempted to assist the trial judge to provide directions to the jury on identification and resemblance evidence that were legally accurate and protective of the appellant.

[111] None the less, where, as here, such a prejudicial course of demonstration and questioning has been allowed at trial and excused by the Court of Criminal Appeal, it falls to this court to insist on a return to basic standards of fairness in prosecution practice and in the conduct of such trials. That means ensuring that serious potential prejudice to an accused person, by obliging him to dress in court in the presence of the jury as a villain, should not be allowed. It should be disallowed in the clearest of terms. We should not avoid such condemnation by taking a pathway around it, deploying reasoning never previously hinted at.

[112] If in trials of persons for armed robbery (now commonly captured by surveillance cameras on film and in still photographs) the accused could be required by prosecuting counsel to dress up like the offender and to present before the jury in the varying garments of criminal disguises, the trial of the accused would be gravely compromised. When the issue comes to this court we should tackle it directly and say so clearly.

[113] No one suggested that the generality of the exclusionary language of ss 135 and 137 of the Evidence Act did not apply where the source of the governing rule lay in the common law rather than the Evidence Act itself. It follows that the Court of Criminal Appeal erred in failing to hold that any probative value of the evidence which the prosecutor sought to adduce by way of the demonstration was outweighed by the danger that the evidence might be unfairly prejudicial to the accused. On this ground, the trial judge should have

99. Cf *Sorby v Commonwealth* (1983) 152 CLR 281 at 292; 46 ALR 237 at 244; *Bulejcik v R* (1996) 185 CLR 375 at 380–1; 135 ALR 517 at 519–20; [1995] HCA 54 (*Bulejcik*).
100. *R v Kirby* [2000] NSWCCA 330.
101. *R v Voisin* [1918] 1 KB 531; *Bulejcik* at CLR 381; ALR 520.
102. *Livermore* at 669 [44].

declined to admit the evidence adduced by the prosecutor. She should have excluded that evidence and stopped the demonstration.

[114] Where the evidence was adduced, the trial judge was clearly required to give clear and firm directions to the jury in an attempt (if that were possible) to cure the prejudice to the accused that had been occasioned by the demonstration. As this was neither the approach taken at trial nor demanded by the Court of Criminal Appeal, the proceedings below miscarried. A serious injustice was done to the appellant. This requires reconsideration of the remaining issue presented by the prosecution's invocation of the "proviso".

The proviso was not applicable to this appeal

[115] At the invitation of this court, the parties provided supplementary written submissions addressed to the proper approach to the application of the "proviso" in the common form in which criminal appeal legislation is expressed in Australia.[103] Some concern and uncertainty appears to have arisen in intermediate courts[104] over the reconciliation of earlier authority of this court on the "proviso"[105] and what was more recently said in the joint reasons in *Weiss*.[106] There was some consideration of this question in *Libke*.[107]

[116] The central holding in *Weiss*, which followed suggestions to similar effect in relation to the role of appellate courts both in criminal[108] and civil[109] appeals, was that the appellate function must, in every case, be discharged by the intermediate court for itself. It must be done by reference to principles derived from the statutory language. It is not to be discharged by incantations involving speculation concerning what the jury or judge at trial (or a future jury or judge) would, or might, or should have done if this or that had happened or not happened. About this much, there is, I believe, unanimity in this court. It has emphasised the very substantial role and duty of appellate courts to review the evidence and to reach conclusions *for themselves* by the application of the statutory tests.

[117] There is also unanimity (for the possibility is expressly reserved in *Weiss*)[110] that there may be cases where "errors or miscarriages of justice occurring in the course of a criminal trial may amount to such a serious breach

103. Section s 6(1) of the Criminal Appeal Act 1912 (NSW); s 568(1) of the Crimes Act 1958 (Vic); s 353(1) of the Criminal Law Consolidation Act 1935 (SA); s 668E(1) of the Criminal Code 1899 (Qld); s 30(3) of the Criminal Appeals Act 2004 (WA); s 402(1) of the Criminal Code Act 1924 (Tas); and s 411(1) of the Criminal Code (NT).
104. Cf, for example, *R v Tofilau (No 2)* (2006) 13 VR 28 at 35–6 [15]; [2006] VSCA 40.
105. Especially *Maric v R* (1978) 20 ALR 513 at 521; 52 ALJR 631 at 635; *Wilde v R* (1988) 164 CLR 365 at 371–2; 76 ALR 570 at 574–5 (*Wilde*); *Domican* at CLR 566; ALR 210; *Graham v R* (1998) 195 CLR 606 at 610 [10]; 157 ALR 404 at 406; [1998] HCA 61; *R v Lee* (1998) 195 CLR 594 at 605 [44]; 157 ALR 394 at 403; [1998] HCA 60; *Stanoevski* at CLR 128 [50]; ALR 296; *Festa v R* (2001) 208 CLR 593 at 631–2 [121]; 185 ALR 394 at 423–4; [2001] HCA 72 (*Festa*).
106. *Weiss* at CLR 314 [35]; ALR 672.
107. *Libke* at ALR 531–3 [42]–[53]; ALJR 1321–2.
108. See, for example, *Festa* at CLR 631–2 [121]; ALR 423–4. See also *Eastman* at CLR 105 [315]; ALR 117.
109. *Fox v Percy* (2003) 214 CLR 118 at 126–7 [25]; 197 ALR 201 at 208; 38 MVR 1 at 7– 8; [2003] HCA 22.
110. *Weiss* at CLR 317 [46]; ALR 675, citing *Wilde* at CLR 373; ALR 575; *Conway v R* (2002) 209 CLR 203 at 241 [103]; 186 ALR 328 at 357; [2002] HCA 2; *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 148 per Herron CJ; *R v Henderson* [1966] VR 41 at 43 per Winneke CJ; *R v Couper* (1985) 18 A Crim R 1 at 7–8 per Street CJ.

of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso".

[118] Beyond these points, there remain questions that I regard as still alive for final resolution if tendered to this court in a suitable case. In a sense, those questions may be a product of the "conundrum" which the joint reasons in this appeal recognise as appearing on the face of the common form legislation in which criminal appeal jurisdiction is expressed throughout this country.[111] Elsewhere and earlier, the "conundrum" was described as "a riddle of the kind which Plutarch records caused Homer to die of chagrin".[112]

[119] However that may be, it is unnecessary to wrestle with such large questions in this appeal. The questions at issue here arise, ultimately, because of the very high value accorded by our law to the fair trial of a person accused of a criminal offence[113] and the normal assumption that every person facing such an accusation will have a legally accurate and fair trial before being convicted and suffering punishment. Such expectations about criminal trials are even greater where the crime charged is serious, as it normally is in Australia when tried before a jury. Separate and constitutional questions may arise in the trial on indictment of federal crimes. Those questions, also reserved in *Weiss*,[114] are not material here.

[120] The parties' submissions on *Weiss*, *Libke* and past authority can be safely put aside to be reconsidered, perhaps, if a suitable case for addressing the "conundrum" or "riddle" presents in the future. Meantime, the resolution of the appellant's case, under the "proviso", can be reached without the necessity of anything more than the application of the language of the Criminal Appeal Act.

[121] Approaching the final issue in this way, alike with the joint reasons, I would conclude that the exercise by the Court of Criminal Appeal of the powers reposed in it by the Criminal Appeal Act, and specifically the "proviso", miscarried. That court erred in failing to uphold the appellant's submission that the trial judge had erred in law in admitting evidence of the demonstration. That error being established, either this court must, for its own part, re-exercise the powers reposed in the Court of Criminal Appeal, or it must remit that exercise to be performed by that court correctly and in accordance with law. No party argued for remitter. There is no reason why this court should not reach, and give effect to, its own view in disposing of this appeal.

[122] As in the joint reasons,[115] I do not find it essential to decide whether there was such a departure from the fundamental assumptions of a fair trial in the appellant's case that the "proviso" could not, or should not, be engaged. In view of what I have said about the gravely prejudicial and unfair effect of the demonstration, I am sympathetic to that analysis. However, it is not essential for me to approach the arguments about the "proviso" in that way. So I refrain from doing so. One day, it may be necessary for this court to address the requirements of that approach.[116] It is not essential in this appeal.

111. Joint reasons at [40].
112. *R v Gallagher* [1998] 2 VR 671 at 672 per Brooking JA, noted in *Eastman* at CLR 105 [315]; ALR 117 per Hayne J.
113. *Dietrich v R* (1992) 177 CLR 292 at 298, 326–7; 109 ALR 385 at 386, 408–9.
114. *Weiss* at CLR 317–18 [46]; ALR 675.
115. Joint reasons at [10].
116. Cf *Weiss* at CLR 317–18 [46]; ALR 675; *Nudd v R* (2006) 225 ALR 161 at 185 [90], 189 [108]–[109], 200–1 [162]; 80 ALJR 614 at 634, 636–7, 645; [2006] HCA 9.

[123] As Heydon J has forcefully demonstrated, by reference in particular to the DNA evidence consistent only with a source derived from the appellant,[117] the prosecution case against the appellant at trial was, objectively, extremely powerful. To reconcile the DNA evidence on the cap, found at the crime scene, with the appellant's asserted absence from that scene, it was necessary, in effect, to postulate that the cap was deliberately planted there by someone maliciously seeking to inculpate the appellant in a serious criminal offence or, alternatively, secured through later transference of the appellant's DNA to the cap, either accidentally or deliberately.

[124] As against this extremely damaging evidence, the appellant, as the joint reasons point out,[118] was denied the opportunity to call the alibi evidence of his father and brother concerning their recollections as to his presence in a workshop in Campbelltown, far from the crime scene or, more accurately, their lack of recollection of his absenting himself from that place at the relevant time, when he would be expected to be working there.

[125] The exclusion of the alibi evidence (which the Court of Criminal Appeal accepted was erroneous)[119] constituted, in the circumstances, a radical departure from the requirements of a fair trial.[120] Those requirements are the postulate upon which the "proviso" operates. Because the alibi evidence was not called and tested at the time, but should have been, it is not available to this court to be weighed in the balance in deciding whether no actual miscarriage of justice has occurred.

[126] I respect and understand the contrary conclusion of Heydon J. However, I prefer the decision reached in the joint reasons. I do so because I agree with those reasons that "[t]he graver the departure from the requirements of a fair trial, the harder it is for an appellate court to conclude that guilt is established beyond reasonable doubt".[121]

[127] Ultimately, there were two grave departures from the requirements of a fair trial in the appellant's case. First, the appellant was erroneously denied the chance to call evidence which would tend to exculpate him. And secondly, in being subjected to a demonstration in court, in the presence of his jury, the appellant was cast in a sinister light in a way that was seriously prejudicial to him. That error was never repaired, or attempted to be repaired, by accurate, corrective instructions from the trial judge. These were grave departures from the requirements of a fair trial. Taken together, such considerations make the case unsuitable for the application of the "proviso". Accordingly, a retrial must be had.

117. Reasons of Heydon J at [257]–[258].
118. Joint reasons at [43]–[44].
119. *Evans* at 519 [242], 524 [290]–[291], 524 [292]. Wrongly the trial judge appears to have considered that, without consent, leave to adduce evidence of the alibi could not be granted retrospectively.
120. Joint reasons at [43].
121. Joint reasons at [42]. It is worth noting that in its General Comment No 32 on Art 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee of the United Nations treated such issues as important. It said at para [30]: "Defendants should normally not be … kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals". By analogy, they should not be presented looking like criminal offenders.

Orders

[128] It follows that I agree in the orders proposed in the joint reasons.[122]

[129] **Heydon J.** Graham John Evans (the accused), after a jury trial in the District Court of New South Wales before Backhouse ADCJ, was convicted on two charges of armed robbery and one charge of assault with intent to rob. The events leading to these convictions took place on Thursday 28 February 2002 in the chambers of Strathfield Municipal Council. At about 4.10 pm a man entered the chambers. He was wearing dark blue overalls. His head was covered by a red balaclava. He was wearing sunglasses. He was carrying a sawn-off rifle. He took cash belonging to the council from Laura Gleeson, a council employee. He then menaced a member of the public, Zbigniew Marszalek, with the rifle and robbed him of some of his cash. Finally, he menaced another member of the public, Bo Qin Huang, with the rifle and forced him to place some of his cash on a counter, though he did not in fact take this cash away.

The appeals

[130] The accused appealed against his convictions to the Court of Criminal Appeal of New South Wales (James, Hidden and Hoeben JJ) under s 5(1) of the Criminal Appeal Act 1912 (NSW) (the Criminal Appeal Act). Section 6(1) of that Act provides:

> 6 *Determination of appeals in ordinary cases*
>
> (1) The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion … that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

The accused's arguments that there had been an error of law or a miscarriage of justice succeeded in two respects. However, the Court of Criminal Appeal applied the proviso to s 6(1) in favour of the prosecution because it considered that no substantial miscarriage of justice had actually occurred. It therefore dismissed the appeal.[123]

[131] The accused appeals to this court against that order. He seeks in lieu of it an order that his conviction be quashed and that either a verdict of acquittal be entered or a new trial be ordered. The appeal should be dismissed. Before turning to the grounds of appeal, and the reasons why the particular arguments advanced on behalf of the accused are to be rejected, it is desirable to explain the evidentiary background.

The evidentiary background

[132] At the trial there was no dispute that the crimes alleged had occurred. The key issue was whether the accused had committed them.

[133] *The prosecution case*: The prosecution case rested principally on the following evidence. A cap had been dropped by the offender at the scene of the crime. The DNA profile of material lifted from that cap matched the DNA profile of a buccal swab which had been taken from the accused with his consent.

122. Joint reasons at [52].
123. *Evans v R* (2006) 164 A Crim R 489; [2006] NSWCCA 277 (*Evans*).

That DNA profile would be expected to occur in fewer than one in 10 billion people. On 30 December 2003 police officers searched a house owned by the accused's father in which the accused resided: they found a red balaclava in his bedroom and a pair of blue overalls in the laundry. The accused said he owned the balaclava and that it had been there for 2 years. The balaclava was similar to a large number of red balaclavas found in a box in the basement. These balaclavas had been obtained by the accused in 2000. The accused had discolouration and scarring on his arms, giving him, if he were the offender, a reason for wearing the overalls — to cover up a possible means of identification. The prosecution contended that the balaclava and the overalls were at least similar to those worn by the offender. While under cross-examination, the accused was asked by prosecuting counsel to put on the balaclava and overalls. The jury were asked to compare the appearance and other traits of the accused at the trial in the balaclava and overalls with the appearance of the offender in film of the crimes taken on surveillance cameras, and in still photographs derived from that film, and with descriptions by seven eyewitnesses of the offender's gender, voice, height, age, build, skin complexion, hair and manner of walking. Two witnesses said the offender had an Australian accent. It was said that he spoke in a slow purposeful way and with a "very slow", "very dull" voice. One witness said the offender asked for the "serious cash" and three said he asked for "serious money" or otherwise used the word "serious". One witness said that when he said "'[T]his is serious', it almost came over as, 'sherious', or something like that". There was evidence from five witnesses that the offender was 5 ft 6 in–5 ft 8 in tall; on the other hand, one said he was 5 ft 2 in tall and another 180 cm tall (that is, nearly 5 ft 11 in). There was evidence from two witnesses that the offender was aged 30–45. Six witnesses said that the offender was of slight or thin or slim or skinny or very slender build. Three said he had fair to medium or fair or pale or white skin. One said he had dark, almost black hair. His mode of walking was said by Mrs Gleeson to be "a real relaxed walk; it was not a run. It was just bouncing, walking out". She also agreed that it was "a swagger style of slow walk". Four witnesses said the overalls the offender was wearing appeared too large on him and one said the balaclava he was wearing was too big for his head.

[134] *The defence position*: The accused gave evidence. He advanced an alibi defence in the sense that he denied being at the Strathfield Council chambers on 28 February 2002 and he denied committing the offences, but he said he could not be sure where he was. He said his ordinary practice on Thursday afternoons was to work at his brother's business at Campbelltown, which is about 43 km from Strathfield. Evidence from his father and brother of that practice was rejected because notice of intention to rely on the alibi defence had not been given.[124]

[135] An expert for the defence was called and said that while it was probable that the source of the DNA material found on the cap was that of the accused, it could have got there by some means other than the accused wearing it: it could have been transferred, probably in the form of saliva, from some other item which came into contact with the cap. The expert also said that the accused could be excluded as a contributor to the DNA on a tissue left behind at the scene of the crime; in this respect he disagreed with the prosecution expert, who said that

124. See s 150 of the Criminal Procedure Act 1986 (NSW).

the accused could not be excluded as a possible contributor. In his closing address to the jury defence counsel submitted that the offender had deliberately left a cap which was not his with the accused's DNA on it so as falsely to implicate the accused.

Ground 2.1: showing the balaclava and overalls to witnesses

[136] The first ground of appeal was:

> The Court of Criminal Appeal should have held that the trial miscarried as a result of the admission of evidence of eyewitnesses concerning items of clothing that had been randomly seized from the [accused's] home 22 months after the offence.

[137] *Pre-trial events*: Defence counsel made a pre-trial application to exclude from evidence excerpts from a film of the police search of the accused's residence which resulted in the balaclava and overalls being removed. In the course of that application, however, he made it plain that he did not object to evidence that the police had located the balaclava and the overalls there, or evidence of what the accused said about that. It was implicit in this stance that he did not see the balaclava and overalls as inadmissible, for if he had, evidence of their finding would also be inadmissible.

[138] *Prosecution's opening address*: Prosecution counsel said in her opening address to the jury that the offender's overalls were blue and he was wearing a red balaclava. Then she said:

> On Tuesday 30 December 2003 the police attended the accused's home at Campbelltown and they found a red balaclava with eye and mouth holes cut in it in a bedroom, and the accused then directed them to a box of similar red balaclavas which were in a storage area under the house. The police also found a pair of blue King Gee overalls in the laundry, and the accused told the police that they belonged to him.

Defence counsel did not object to these statements.

[139] *The eyewitness evidence*: The balaclava and the overalls were marked for identification as MFI1 and MFI2 respectively during the examination-in-chief of the first prosecution witness, Helen Connell. She was an employee of the council. She said the balaclava was similar in colour to the offender's headgear. She said it could be the same as the headgear worn by the offender because it was too big for him. It appeared to be of the same thickness. She said the overalls were of a similar style to those worn by the offender, although they were a lot dirtier and a little faded. Defence counsel did not object to the items being shown to the witness or to the questions about them. Indeed he asked questions of his own about them highlighting the evidence-in-chief so far as it pointed to differences between MFI2 and the overalls worn by the offender.

[140] The second prosecution witness, Patricia Smith, a council employee, described the offender as wearing heavy duty dark coloured overalls that appeared to be too large for him. She described the balaclava as bright coloured and made of thick fabric. A little later she was shown both MFI1 and MFI2. She said that the knit of the fabric in the balaclava was similar to the fabric of the offender's balaclava. She said that the studs, pockets and collar of the overalls were similar in style to his overalls, although the colour of the offender's overalls was perhaps darker. Again there was no defence objection to this procedure. Defence counsel drew the witness's attention to a prior statement of hers in which she had said the overalls were red and clean. Eventually the witness said the

balaclava was "red or a bright colour orange" and appeared to suggest that in her prior statement she was not intending to convey anything about the colour of the overalls.

[141] The third witness was Lesley Thompson, an employee of the council. She said the offender wore a worn red balaclava and fairly old King Gee overalls which were a blue colour lighter than navy blue. She said the balaclava had white stitching around the opening of the eyes, nose and mouth. Prosecuting counsel then asked the witness to look at MFI1, the balaclava. Defence counsel objected on the ground that its appearance was inconsistent with the description which the witness had given of the offender's balaclava. The defence objection was overruled. The witness said that MFI1 was "very similar" to the offender's balaclava in that it was of exactly the same style, though she remembered white stitching. Defence counsel then contended that the condition of MFI2 was different from the condition of the overalls the witness said she observed on the offender. Hence he objected to questions about MFI2 as irrelevant, and also unfair, in view of the risk of what he called a "displacement effect" — the risk that showing an object to a witness would influence the witness towards an unreliable identification of it. This objection too was overruled. He continued to accept that evidence of the finding of MFI2 by the police at the accused's residence was admissible. Mrs Thompson said MFI2 looked like the offender's overalls, being of the "same style", but she remembered the offender's overalls to be a "bit paler". Defence counsel, in his cross-examination, highlighted the fact, in contrast to Mrs Thompson's recollection of what the offender was wearing, that MFI1 did not have white stitching and MFI2 was paler.

[142] The fourth witness was Mr Marszalek. He described the offender's balaclava as red, woollen, covering the whole face and thick. He described the overalls as "bluey grey", with the colour having gone out of them. MFI1 and MFI2 were shown to Mr Marszalek, but defence counsel neither objected nor asked the trial judge whether his position was protected without objection by reference to the ruling given on questions about MFI1 and MFI2 in relation to the third witness. Mr Marszalek said he thought MFI1 was the balaclava the offender was wearing, based on the colour and the texture of the wool. He said MFI2 corresponded with the type of overalls worn by the offender in style and colour. In cross-examination he accepted that, contrary to his initial observation, MFI1 was inside out, and that he did not recall the offender's balaclava as having white stitching. He accepted that the overalls which were MFI2 were stained with paint and oil or grease, but maintained they were "bluey grey".

[143] The fifth witness was Nasim Ibn Samad, an employee of the council. He could not remember the colour of the balaclava, and said the overalls were deep blue. He was shown MFI1 and MFI2, again without objection or request for protection. He said MFI1 was similar to the offender's balaclava, and referred to the presence of two eyeholes and a nose hole. He said MFI2 was more or less similar to what he saw, but was more faded in colour. In cross-examination he said the offender's overalls were light blue, and the balaclava was red with some white.

[144] The sixth witness was Mrs Gleeson. She said the offender's balaclava was red. She said his overalls were fairly new blue King Gee overalls — "a darker blue, not a pale blue". MFI1 and MFI2 were shown to the witness, again without objection or request for protection. She said MFI1 had the same sort of knit as the offender's balaclava, and MFI2 was less clean and more faded

than the offender's overalls. In cross-examination she said the offender's overalls were dark blue and clean, and the MFI2 overalls were nothing like the offender's overalls. In cross-examination she also said the only features which MFI1 and the offender's balaclava had in common were that they were red and of a similar knit.

[145] The seventh witness was Bo Qin Huang. He said his recollection of the balaclava was not as strong as his overall recollection, but that it was blue, that the overalls were dark blue, and that they were newer and brighter than MFI2. MFI2 was shown to the witness without objection or request for protection. In cross-examination the witness said that MFI2 was the same in style as the overalls worn by the offender.

[146] The position by that stage was that in opening prosecution counsel had referred to the balaclava and the overalls which became MFI1 and MFI2, and the circumstances of their finding, without objection. In the course of the pre-trial application, defence counsel had implied three times that he did not object to their admissibility. MFI1 had been shown to seven witnesses and MFI2 to six of those witnesses. Defence counsel had not objected to this procedure in relation to the first two witnesses, and had cross-examined the first witness by reference to MFI2. Counsel did object to this procedure in relation to the third witness, but, after the objection was overruled, he cross-examined the witness by reference to MFI1. Counsel did not object to or seek protection in relation to the procedure for the next four witnesses. The fourth, fifth and seventh witnesses were all cross-examined by specific reference to MFI2, and the sixth witness was cross-examined by specific reference to both MFI1 and MFI2.

[147] *The defence objection*: Despite this state of affairs, at the start of the following day defence counsel made an application which extended over that day and into part of the next day. Defence counsel began by saying that he wished to "renew the application that I made as a pretrial application" — that is, the application to exclude the videotape of the police search of the accused's residence which led to the discovery of MFI1 and MFI2. He said that since all the eyewitnesses had now given evidence, it was clear that MFI1 and MFI2 were not the balaclava and overalls worn by the offender in view of the dissimilarities revealed. It followed that the fact that they had been found at the accused's residence was so lacking in probative value as to merit its exclusion from evidence. Later this application revealed itself as or changed into an application that MFI1 and MFI2 should not be admitted into evidence (which appeared to involve a reversal of what was implied in counsel's stance on the pre-trial application), and then into an additional application that all of the evidence about MFI1 and MFI2 should be ruled inadmissible (even though in relation to six of the seven witnesses it had not been objected to).

[148] Prosecution counsel accepted that while none of the witnesses positively asserted that MFI1 was the offender's balaclava, the evidence showed they resembled each other. It was relevant within the meaning of "relevant" in the Evidence Act 1995 (NSW) (the Act).[125] It was circumstantial evidence which the

125. Section 55(1) of the Act provides:

> 55 *Relevant evidence*
>
> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

Section 56 provides:

jury were entitled to take into account together with all the other evidence. Counsel contended that the evidence ought not to be excluded under s 135 or s 137 of the Act.[126] She also submitted that the application should have been made earlier, since defence counsel had in his possession before the start of the trial witness statements substantially conforming to the evidence of each witness about the offender's balaclava. In view of the stage the trial had reached, the evidence could not be excluded, and the only remedy would be to discharge the jury. This aspect of the submission was one with which both the trial judge and defence counsel agreed.

[149] The parties made similar submissions in relation to MFI2 and the questions about it.

[150] The trial judge overruled the objections. MFI1 became Ex M and MFI2 became Ex O.

[151] *Submissions by counsel for the accused in this court*: In this court counsel for the accused noted that the balaclava and overalls were shown to the witnesses 2 years and 7 months after the offence; that the balaclava was inside out, and had black markings on it; that they were mass-produced items found in premises where there were hundreds of balaclavas and half a dozen overalls; and that the trial judge, who had given no formal reasons for her ruling, had failed to assess the probative value of the evidence and whether that was outweighed by the danger of unfair prejudice. Counsel therefore submitted that the evidence was irrelevant and, in the alternative, that it was unfairly prejudicial.

[152] These submissions criticised the trial judge for failing to understand the nature of the defence application at the trial. It is true that at times she did misunderstand the state of argument. At one point she assumed that MFI1 and MFI2 had been tendered without objection, although they had not yet been tendered. She also wrongly said that they would never be tendered. She wrongly said there was no objection to any of the eyewitness evidence: there had been to that of the third witness. She also wrongly thought that the defence objected to all of the evidence relating to what the witnesses said about the balaclava and the overalls, as distinct merely from questions directed to MFI1 and MFI2.

[153] The terms of this criticism unfortunately make it necessary to say, as prosecution counsel in this court correctly submitted, that the errors into which the trial judge fell in understanding the arguments were excusable, because the

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56 *Relevant evidence to be admissible*

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

126. Section 135 provides:

135 *General discretion to exclude evidence*

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party, or

(b) be misleading or confusing, or

(c) cause or result in undue waste of time.

Section 137 provides:

137 *Exclusion of prejudicial evidence in criminal proceedings*

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

defence position was constantly fluctuating and obscure. An essential function of advocacy in adversarial trials, and of the extended debates about admissibility in which both counsel and the judge participated in this trial, is to thrash out and refine points of controversy. By the end of the argument just summarised this process had succeeded in clearing up all misunderstandings.

[154] *Relevance of balaclava*: The questions about MFI1 were relevant on three bases. First, they were relevant because they were capable of eliciting evidence that MFI1 was identical with the offender's balaclava. Secondly, they were relevant because they were capable of eliciting evidence that MFI1 resembled the offender's balaclava. Thirdly, the employment of MFI1 in questioning the witnesses assisted them to explain to the jury the colour, fabric and other features of the balaclava they observed on the offender by reference to the features of MFI1. These three bases may be explained as follows.

[155] *Relevance — identity*: The arguments advanced on this issue by the defence, both at trial and in this court, concentrated on the supposedly unsatisfactory answers of the witnesses. That approach is fallacious in principle, but even on its own terms it fails. It is true that none of the witnesses said in terms that MFI1 was identical with the offender's balaclava. It is also true that some pointed to differences which the jury might think significant. But even if none of the witnesses unequivocally said there was identity, it does not follow that their evidence was not relevant. It is not the case that a body of evidence received in answer to relevant questions must be rejected merely because that evidence does not achieve the highest goals the tendering party may have had. The weight of that body of evidence, taken with the evidence as a whole, may have been slight or it may have had some circumstantial value in supporting a conclusion of identity. That was a question for the jury to resolve at the end of the trial, not for the judge to resolve halfway through it.

[156] In any event the approach advocated on behalf of the accused is wrong in principle. It concentrates on the answers given, not the questions asked. Criminal trials in Australia are largely oral, and a primary mode of tendering evidence is by addressing questions to witnesses. What controls the reception of oral evidence is a process of objection to the question, not the answer. That process directs attention to the way in which questions are formulated, and tends to compel precision. Once a question not objected to has been answered responsively, it is normally too late to object to either the question or the answer.

[157] The relevance of a question depends on whether one among a range of possible answers "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding". It is not the case that a question is irrelevant because one possible answer is not relevant. If a witness answers a question "I did not see", that may not "rationally affect … the assessment of the probability of the existence of a fact in issue", but the question remains relevant so long as one possible answer satisfies the quoted words. Thus a question to which one possible answer was "MFI1 is identical to the offender's balaclava" would have been a relevant question. Indeed the question would remain relevant if it could have been answered "I deny that MFI1 is the offender's balaclava". That is, a question asked by the prosecution can be a permissible question even if the answer does not favour the prosecution. And a question which is relevant does not lose its relevance if the witness says "I cannot remember". The relevance of a question is to be judged in its own terms by reference to the possible answers it might receive, not the answer actually given.

[158] Hence, although the prosecution did not put its arguments to the trial judge in this way, the questions were permissible — they were relevant questions — as going to the issue of identity. It follows that MFI1 itself was relevant, together with the circumstances of its being found in the accused's bedroom, since these circumstances established a link with the accused.

[159] *Relevance — resemblance*: The second basis on which the questions about MFI1 were relevant was that they were capable of eliciting evidence that MFI1 resembled the offender's balaclava. Even if the jury thought the eyewitness evidence about the balaclava was by itself weak if tendered to prove identity, it was open to them to conclude that MFI1 was the offender's balaclava in view of resemblances between them, and that the accused was the offender, after taking into account other evidence in the case. If the questions about MFI1 were relevant, so was MFI1 itself, and so were the circumstances in which it was found.

[160] *Relevance — aid to witnesses*: The third basis on which the questioning about MFI1 was relevant was that it assisted the witnesses to explain to the jury the particular features of the offender's balaclava which they remembered noting. A witness may be asked for a recollection of the distance between two things or people, and may be asked to express it by reference to the length of an object in the courtroom, such as a chattel which is an exhibit. A witness may be asked to express a shade of a colour observed in the past by reference to the colour of a carpet or a curtain or an item of clothing worn by someone in court. By parity of reasoning, it is not irrelevant to show a witness an object and ask that witness to explain the detail of the testimony being given by reference to the characteristics of that object.

[161] If this third basis were the only basis of relevance, while it would make the questioning about MFI1 relevant, and would make MFI1 itself relevant, it would not make the fact that MFI1 was discovered in the accused's bedroom relevant. In this the third basis differs from the first two. But the grounds of appeal do not complain about reception of the fact of discovery in the accused's bedroom as an independent matter. In any event, the first two bases support the reception of that fact.

[162] *Section 137*: Could the questions about MFI1, MFI1 itself, and the fact that it was discovered in the accused's bedroom be excluded under s 137?[127] Defence counsel at the trial argued that to show MFI1 to the witnesses was unfairly prejudicial. An argument of this kind is capable of having force, but the force would vary depending on how the witnesses were questioned. The more the questions were leading, the greater the chance that an analogy with the dangers arising in the identification of accused persons existed. Defence counsel at the trial called it a "displacement effect". That is inapposite. Stephen J's dissenting judgment in *Alexander v R* described the "displacement effect" thus:[128]

> Having been shown a photograph, the memory of it may be more clearly retained than the memory of the original sighting of the offender and may, accordingly, displace that original memory. Any subsequent face-to-face identification, in court or in an identification parade, may, on the identifying witness's part, in truth involve a matching of the man so identified with the remembered photograph, which has displaced in his memory his recollection of the original sighting.

127. For the terms of the section see above [126].
128. (1981) 145 CLR 395 at 409; 34 ALR 289 at 299 (*Alexander*).

Had the witnesses been shown MFI1 before the trial, it might have been arguable that the memory of MFI1 might have been more clearly retained than the memory of the original sighting of the offender's balaclava, and might have displaced that original memory, so that the in-court comparison of MFI1 with the memory of the offender's balaclava might be tainted by a displacement in the witness's mind of the memory of the original perception of the offender's balaclava by the memory of MFI1. Prosecution counsel said that none of the eyewitnesses had been shown MFI1 or MFI2 before entering the box. Several witnesses confirmed this. Defence counsel never cross-examined to the contrary, never complained of any failure by the prosecution to call evidence of that kind in relation to the other witnesses, and never denied prosecution counsel's assertion. Hence no displacement effect could have operated.

[163] A closer analogy is with dock identification. That analogy was relied on by counsel for the accused in this court.[129] The danger was described thus by Mason J in *Alexander*:[130]

> Traditionally it has been accepted that a witness identifies the accused at the trial as the person whom he observed at the scene of, or in connection with, the crime. This "in court" identification, sometimes described as primary evidence, is of little probative value when made by a witness who has no prior knowledge of the accused, because at the trial circumstances conspire to compel the witness to identify the accused in the dock.

In relying on that analogy, counsel for the accused in this court drew attention to the dangers associated with the supposed identification of mass-produced objects.[131] So, it might be said, a witness might reason that prosecution counsel would not be showing MFI1 to a witness unless the police thought the accused was connected with MFI1; hence the witness might feel pressure to exaggerate similarities between the two balaclavas, or to identify them as being the same.

[164] This analogy is not sound. A witness who is invited to identify the offender is under considerable pressure not to select anyone but the person sitting in the dock: to do otherwise is to risk looking foolish. The witnesses in the trial of the accused were not under pressure to say anything about MFI1. The questions of prosecution counsel lacked any leading character. Taken as a whole, the seven eyewitnesses revealed a variety of recollected perceptions and a variety of capacities for testimonial expression, strongly suggestive of bona fide attempts to say what they could recollect about a frightening series of events which took place unexpectedly over a very short time more than 2 years earlier. The lack of uniformity in their evidence about MFI1 is a sign that they felt no pressure to give one particular set of answers. There might have been pressure of that kind if

129. Counsel for the accused at trial did not appear in the Court of Criminal Appeal or this court; senior counsel for the accused in this court did not appear in either court below; junior counsel for the accused in this court did not appear at the trial, but did appear alone in the Court of Criminal Appeal. Prosecution counsel at the trial did not appear in the Court of Criminal Appeal or in this court. Senior counsel for the prosecution in this court appeared in the Court of Criminal Appeal, but junior counsel for the prosecution in this court did not appear in either court below.

130. *Alexander* at CLR 426–7; ALR 313. See also Gibbs CJ at CLR 399; ALR 291 and *Davies and Cody v R* (1937) 57 CLR 170 at 181–3; [1937] ALR 321 at 331–2 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ.

131. He referred to *R v Clout* (1995) 41 NSWLR 312 at 321 (*Clout*) per Kirby ACJ. As the Court of Criminal Appeal pointed out (*Evans* at 506 [142]), the passage referred to dealt with the appropriate jury warning, and therefore assumed the admissibility of the evidence.

prosecution counsel had employed leading questions in relation to MFI1 — an error into which it is easy to fall when witnesses are questioned about chattels present in court. But counsel avoided that trap. The Court of Criminal Appeal correctly concluded that the eyewitnesses were not led into giving evidence which did not reflect their recollections.[132]

[165] Once these considerations are put aside, there is no unfair prejudice. The more the evidence of the eyewitnesses convincingly revealed similarities between what they described in MFI1, the more that evidence "prejudiced" the accused. The less it revealed similarities, the less it "prejudiced" the accused — indeed it benefited him. But this "prejudice" was not distinguishable from the probative value of the evidence; it is not prejudice as that term is used in s 137, and is certainly not unfair prejudice. "Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted".[133] Since the witnesses had provided descriptions of the offender very soon after the crimes, and these were available to defence counsel, it was possible for him to cross-examine them effectively on any departures from these statements, as he did. While the defence tactics were not to object to the questioning of the first two witnesses, but to object to the questioning of the third, whose evidence was more favourable to the accused, the prosecution tactics of showing the third witness MFI1 were objectively fair in their tendency to elicit evidence favourable to the accused.

[166] For the same reason neither MFI1 nor the questions about it were "unfairly prejudicial" within the meaning of s 135. Nor were they "misleading or confusing". Nor did they "cause or result in undue waste of time": they comprised a small fraction of the evidence as a whole. Hence the trial judge's failure to exercise her discretion under s 135 to exclude the evidence has not been shown to be wrong.

[167] *Admissibility of evidence about the overalls*: For the same reasons as those given in relation to the balaclava, the questioning about MFI2 was relevant, as was MFI2 itself and the evidence about where it was found; s 137 did not apply to make the evidence inadmissible; and no error has been shown in the failure of the trial judge to exercise her discretion under s 135 to exclude the evidence.

Ground 2.2: accused wearing balaclava, walking before the jury wearing overalls, and saying "serious"

[168] The second ground of appeal was:

> The Court of Criminal Appeal should have held that:
> (a) section 53 [of the Act] applies to "in court" demonstrations; and/or
> (b) the prosecutor should not have been permitted to require the applicant to put on a balaclava and overalls, walk up and down in front of the jury and say words which were attributed to the robber by one eyewitness.

[169] The events complained of came to pass in the following way.

[170] *The physical features of the accused*: Early in the cross-examination of the accused, he gave evidence that at the time of the crime he was 47, he was 5 ft 8 in tall, his hair was dark, his skin complexion was very fair and he weighed

132. Evans at 505 [136] per James J (Hidden and Hoeben JJ concurring).
133. *Papakosmas v R* (1999) 196 CLR 297 at 325 [91]; 164 ALR 548 at 569; [1999] HCA 37 per McHugh J.

73 kg. Without objection, he was asked to take his jacket off, roll up his sleeves and show the jury the insides of his arms. He said areas of pigmentation or discolouration were caused by industrial solvents and areas of scarring were caused by industrial accidents.

[171] *The balaclava and the sunglasses*: The first event complained of related to Ex M (the balaclava) and some sunglasses. First, the accused was asked to place the balaclava over his face. After a defence objection was overruled, the accused complied. Prosecution counsel then began to make a statement about what those in the courtroom could see, to which defence counsel objected. In the presence of the jury, debate about that objection proceeded over more than two pages (which in this court counsel for the accused contended took 10 minutes and which certainly took some minutes). The debate concluded with prosecution counsel withdrawing her question and the trial judge saying she would not interfere. At that point prosecution counsel asked the accused to remove the balaclava. She then asked him to take a pair of sunglasses. Defence counsel objected, and prosecution counsel made it plain that she wanted the jury to compare the appearance of the accused wearing the sunglasses and the balaclava with what they saw on the video and the photographs taken during the crime. After a debate about admissibility in the absence of the jury, the trial judge permitted the course proposed by prosecution counsel to take place. The essence of counsel's objection was that it was "blatant unfairness" to dress the accused up so as to make him look like a robber. After putting on the sunglasses and the balaclava, the accused complied with requests to face the jury and turn side-on to the jury.

[172] The Court of Criminal Appeal held that the trial judge erred in asking the accused "to put on sunglasses which had not been admitted into evidence, which had not been shown to any witness and which were produced for the first time when the prosecutor asked the [accused] to put them on".[134] That conclusion was not challenged by the prosecution on this appeal.

[173] *"Give me the serious cash"*: The second event complained of followed soon after the accused had removed the sunglasses and the balaclava. Prosecution counsel asked the accused to say: "Give me the serious cash". A strongly put defence objection was rejected. The accused then said, at the request of prosecution counsel, "Give me the serious cash" and "I want the serious cash". It will be remembered that Mrs Gleeson had suggested that the offender may have pronounced "serious" as "sherious".[135]

[174] *Walking in overalls before the jury*: The third event took place when prosecution counsel asked the accused to put on the overalls (Ex O). Defence counsel objected unsuccessfully. The court adjourned so that the accused could remove his outer clothing and put on the overalls. When the court resumed, prosecution counsel asked him to walk in front of the jury.

[175] *The accused's arguments in this court*: The objections made by counsel for the accused in this court were that the three events just described were irrelevant, should have been excluded under s 137, contravened s 53 of the Act (which was not mentioned at trial), or, if s 53 did not apply, contravened similar

134. *Evans* at 512 [193].
135. See above at [133].

common law requirements. It is convenient to examine the admissibility of the three events (apart from the use of the sunglasses) under those four heads in that order.

[176] *The relevance of wearing the balaclava*: In her final address, prosecution counsel submitted that there were several items of circumstantial evidence suggesting that the accused was the offender. She referred to them both being male, to their shared height, to their similar age, to their walk, to their build, to the bagginess of the overalls on them, to their hair colour, to their skin complexion, to the resemblances between the features of the balaclava and overalls noticed by the witnesses and the features of Ex M and Ex O, and to the similarity between the offender's way of walking as described by Mrs Gleeson and the way the accused walked in front of the jury and between the witness box and the dock. Counsel analysed the evidence on all these matters quite closely in her final address. It is against that background that the relevance of the three items of evidence must be considered.

[177] Counsel for the accused in this court submitted that the appearance of the accused in a balaclava which was not asserted to be the balaclava worn by the offender was irrelevant on the ground that it could not "rationally affect … the assessment of the probability of the existence of a fact in issue", namely the identity of the offender. That is incorrect. If, attired in the balaclava, the accused had looked very different from the descriptions given by the eyewitnesses, that would have been material capable of raising a reasonable doubt. If, so attired, he had looked similar to the descriptions, it would, taken with other evidence, have been material capable of supporting a conclusion of identity. The relevance of evidence does not depend on its capacity by itself to prove the prosecution case on a particular issue, or to raise a reasonable doubt in favour of the defence on that issue. The effect on assessing probability which is to be looked for is the effect of the contested evidence taken with other evidence either admitted by the time the controversial evidence is tendered, or to be called.

[178] *The relevance of saying "serious"*: The accused's objection to the relevance of the sentences he was asked to repeat centred on the contention that the eyewitnesses gave different accounts of what was said, and the accent, tone and volume with which it was said; only four of the seven eyewitnesses said that the offender used the word "serious"; only Mrs Gleeson referred to the peculiar pronunciation; and she merely said that when the offender said: "'This is serious', it almost came over as, 'sherious', or something like that". It was submitted that this did not amount to a demonstration of a speech idiosyncrasy by the offender; that the words which counsel asked the accused to say were not those recalled by Mrs Gleeson ("This is serious, give me the money"); and that the accused was not asked to repeat the words attributed to the offender by other witnesses, but only something similar to what they said. Counsel also noted that the jury asked to hear a tape of the accused's evidence, noted that they asked for the written transcript of the accused saying, "Give me your serious cash", and noted that there was no voice recording of the offender's voice with which the jury could compare the accused's voice.

[179] In her final address to the jury prosecution counsel apparently conceded that before the jury the accused had not mispronounced the word "serious", and said "it is possible that word was just slurred at that time". Prosecution counsel drew attention to Mrs Gleeson's description of the offender's voice as "very dull" and of other witnesses' descriptions of it as having an Australian accent.

[180] The relevance of what happened is not diminished by the differences — which, incidentally, the submission advanced for the accused exaggerates — in the accounts given by the eyewitnesses of what the offender said and how he said it. Prosecution counsel was entitled to invite the jury to accept Mrs Gleeson on the question of how the offender pronounced "serious" and on the dullness of the offender's voice, and the jury were entitled to accept those invitations. If so, the offender could be said to have one or two speech idiosyncrasies, though it or they might well be shared by other people. The jury were entitled to conclude that the offender said something along the lines of what the prosecution counsel asked the accused to say, even though the precise phrases recalled by each of the four witnesses were not put one after the other: in the circumstances precise accuracy of observation, and of recollection after more than 2 years, could not be expected.

[181] The accused's submissions concede that if the offender did have a speech idiosyncrasy it would be relevant that the accused shared it. An unusual pronunciation can be as much a circumstance which, taken with other circumstances, can point to identity as an unusual mode of spelling particular words,[136] or a marked accent or a speech impediment. But the fact that the accused apparently did not share the idiosyncrasy of pronunciation — for there was no suggestion by the prosecutor in final address that he did — favoured the accused. The questions thus were capable of eliciting, and apparently elicited, evidence that could have rationally affected "the assessment of the probability of the existence of a fact in issue", namely that the accused lacked a trait which the offender was said to possess. Prosecution counsel's requests were also relevant in being capable of eliciting answers favourable to the prosecution.

[182] The accused submitted, apparently relying on *Bulejcik v R*,[137] that evidence of the speech idiosyncrasy shared by the accused and the offender was irrelevant unless the jury could compare the accused's voice in court with an out-of-court recording. That case affords no warrant for the submission, which is contrary to principle.

[183] *The relevance of walking in overalls*: Counsel for the accused submitted that a "demonstration" of what the accused looked like in overalls not asserted to have been worn by the offender was not relevant. That submission must be rejected. There was evidence of similarity as well as dissimilarity between what the offender wore and Ex O. There was evidence of many physical similarities between the offender and the accused. According to prosecution counsel's submission to the jury, there was a similarity between the way the accused walked in the overalls before the jury (and indeed in the way he walked between the dock and the witness box) and the gait which Mrs Gleeson observed. The evidence was that the offender was wearing a shirt or t-shirt under the overalls, and that the overalls looked baggy. According to prosecution counsel's final address, so did the overalls worn by the accused. And defence counsel said that the accused looked like "a Michelin man" in them. Prosecution counsel was careful to ensure, after the accused had expressed willingness to put the overalls on over what he was already wearing, that the accused remove his outer garments first. She was thus attempting to bring the conditions before the jury as close to the conditions described by the witnesses as possible.

136. See *R v Voisin* [1918] 1 KB 531.
137. (1996) 185 CLR 375; 135 ALR 517; [1995] HCA 54 (*Bulejcik*).

[184] The appearance of the accused walking in overalls in front of the jury was capable of making an impression on the jury which was favourable to the accused (as his counsel submitted in final address) as much as it was capable of causing an impression adverse to him (as prosecution counsel submitted). Either way the evidence was relevant.

[185] *Exclusion under s 137*: Should the three events have been excluded under s 137? Save in one way, there was no respect in which those events created any danger of "unfair prejudice to the accused" — that is, prejudice over and above the damage to his position caused by the probative value of the evidence. The exception was the period during which the accused sat wearing the balaclava in the presence of the jury, until prosecution counsel told him to remove it, while debate took place about whether it was legitimate for prosecution counsel to describe what the accused looked like. If prosecution counsel was entitled to ask him to wear the balaclava, it was only necessary that he do it for a brief period, while the jury observed the accused. For the accused to sit with the balaclava on for some minutes during the debate should not have happened and was irregular. If this irregularity constituted a miscarriage of justice, it was not a serious one, for the following reasons. Defence counsel, who had objected to the balaclava being donned, failed to apply for it to be removed, his concentration being apparently absorbed by a fiery debate about the correctness of prosecution counsel's course. The vigorous character of that debate may have riveted the attention of the jurors on the exchanges between counsel and judge, and thus distracted them from gazing at the accused. The debate did not last long. Viewed in the context of the case as a whole, which lasted 10 days, the incident was brief and insignificant. It will, however, be returned to in relation to the application of the proviso.[138]

[186] *Application of s 53*: Did s 53 of the Act apply? It is desirable to set out the whole of Pt 2.3, in which it appears:

> 52 *Adducing of other evidence not affected*
>
> This Act (other than this Part) does not affect the operation of any Australian law or rule of practice so far as it permits evidence to be adduced in a way other than by witnesses giving evidence or documents being tendered in evidence.
>
> 53 *Views*
>
> (1) A judge may, on application, order that a demonstration, experiment or inspection be held.
>
> (2) A judge is not to make an order unless he or she is satisfied that:
>
> (a) the parties will be given a reasonable opportunity to be present; and
>
> (b) the judge and, if there is a jury, the jury will be present.
>
> (3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following:
>
> (a) whether the parties will be present;
>
> (b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence;
>
> (c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time;
>
> (d) in the case of a demonstration — the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated;

138. See below at [249]–[264].

(e) in the case of an inspection — the extent to which the place or thing to be inspected has materially altered.

(4) The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.

(5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

54 *Views to be evidence*

The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

[187] For the accused it was submitted in the Court of Criminal Appeal and this court, though not at trial, that s 53 applied, and that it had not been complied with in that the trial judge did not follow the process mandated by s 53. In this court it was also submitted for the first time that no consideration of s 192 had been undertaken.[139] Counsel submitted that "demonstration" evidence was a substantial limb of the prosecution case: this may be an exaggeration, for it took only a very short time, but it was referred to in prosecution counsel's final address.

[188] Section 34(1) of the Interpretation Act 1987 (NSW) (the Interpretation Act) provides:

34 *Use of extrinsic material in the interpretation of Acts and statutory rules*

(1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or

(b) to determine the meaning of the provision:

(i) if the provision is ambiguous or obscure, or

(ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.

139. Section 192 provides:

192 *Leave, permission or direction may be given on terms*

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and

(b) the extent to which to do so would be unfair to a party or to a witness; and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought; and

(d) the nature of the proceeding; and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

Section 34(2)(a) provides:

> (2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act, or a statutory rule made under the Act, includes:
>
> (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer …

Section 35(2)(c) provides that marginal notes shall be taken not to be part of the Act. Hence among the material not forming part of the Act is the marginal note to s 53 ("Views") and the marginal note to s 54 ("Views to be evidence"). Further, s 3(3) of the Act provides:

> (3) Without limiting the effect of, and subject to, section 34 of the Interpretation Act 1987, material that may be used in the interpretation of a provision of this Act includes any relevant report of a Law Reform Commission laid before either House of the Parliament of the Commonwealth before the provision was enacted.

The Australian Law Reform Commission published two reports on evidence — an interim report (ALRC 26) and a final report (ALRC 38). The former was tabled in the Parliament of the Commonwealth on 21 August 1985 and the latter was tabled there on 5 June 1987. Hence, like the marginal notes, they may be used for the purposes stated in s 34(1).

[189] *The law which pre-existed s 53*: The starting point in construing s 53 must be the common law.

[190] At common law a "view" was an out-of-court examination of land, or of chattels too large to be taken into court and tendered as exhibits. The purpose of a view was to assist the trier of fact, by enabling an examination of the dimensions, appearance and relative positions of the features of the things viewed, "to understand and weigh the oral evidence".[140] A "view" was distinguished from an out-of-court demonstration or reproduction of a past event which had been described by witnesses in court. According to Fullagar J, the court could not treat a demonstration or reproduction as in truth a demonstration or reproduction of what witnesses had described unless one of two conditions was satisfied. The first was that the parties specifically admit that "the demonstration was, or [agree] that it should be treated as, a reproduction of what the witnesses had attempted to describe". The second was that it be "proved by evidence … that the demonstration really did reproduce what the witnesses had attempted to describe".[141] On the other hand, Dixon CJ, Webb, Kitto and Taylor JJ favoured a stricter test: apart from power under rules of court, they said experiments or demonstrations (as distinct from views) could not be taken into account unless they took place "at the request of or with the complete concurrence" of all parties.[142]

[191] A demonstration was described thus by Lord Denning (delivering the judgment of the Privy Council) in *Tameshwar v R*:[143]

> It is very different when a witness demonstrates to the jury at the scene of a crime. By giving a demonstration he gives evidence just as much as when in the witness-box he describes the place in words or refers to it on a plan. Such a demonstration on the

140. *Scott v Numurkah Corp* (1954) 91 CLR 300 at 315; [1954] ALR 373 at 381 (*Scott*) per Fullagar J.
141. *Scott* at CLR 316; ALR 381–2.
142. *Scott* at CLR 312; ALR 379.
143. [1957] AC 476 at 484; [1957] 2 All ER 683 at 686.

> spot is more effective than words can ever be, because it is more readily understood. It is more vivid as the witness points to the very place where he stood. It is more dramatic as he re-enacts the scene. He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible he will say at least "I stood here" or "I did this", and, unless held in check, he will start to give his evidence all over again as he remembers with advantages what things he did that day. But however much or however little the witness repeats his evidence or improves upon it, the fact remains that every demonstration by a witness is itself evidence in the case. A simple pointing out of a spot is a demonstration and part of the evidence.

In *Karamat v R*, Lord Goddard (delivering the judgment of the Privy Council) gave the following example of a demonstration:[144]

> … the evidence of a police constable or other witness who might testify that he was keeping watch on a certain place and saw an incident might be challenged on the ground that, from the place where he was concealed, he could not possibly have seen what he said he had. It might be of the utmost value then to let the jury see the place with the witness in the position to which he had spoken; he might well be able to demonstrate that, while a shorter man would not have been able to see the incident or a taller man might have been exposed to view, he could, though concealed, have seen what he said he did.

Hence the expression "demonstration" includes the operating of a machine said to have caused an injury.[145]

[192] A reproduction or reconstruction goes further. Examples include the repetition of a pantomime[146] and the screening of a film simultaneously with a performance by a band.[147]

[193] The common law, then, draws a distinction between views, demonstrations and reconstructions:[148]

> It seems to be generally accepted that a view is an inspection of a scene or object without seeing it in operation or witnesses providing further explanation of the events. A demonstration is a view incorporating an explanation by a witness of the incident in question or a demonstration of the machine or other object in operation. A reconstruction goes further still and is an attempt to recreate the incident (whether in full or part) with witnesses and testimony.

[194] *The subject-matter of s 53*: Section 53 uses the expressions "inspection", "demonstration" and "experiment", but none of these expressions is defined in the Act. Section 53 deals with views in the common law sense, although it calls them inspections: whether "inspection" in s 53 extends more widely, to any examination of an exhibit by a witness in court, is considered below.[149] Section 53 also deals with demonstrations. It does not deal with reconstructions under that name, and the word "experiment" is not apt to cover an attempt to recreate an incident, since it would seem that "experiment" in s 53 means a test

144. [1956] AC 256 at 263; [1956] 1 All ER 415 at 417.
145. *Goold v Evans & Co* [1951] 2 TLR 1189; *Buckingham v Daily News Ltd* [1956] 2 QB 534; [1956] 2 All ER 904.
146. *Menzies-Stuart v Macleod* (1901) 18 WN (NSW) 82.
147. *Scott* (the majority, Dixon CJ, Webb, Kitto and Taylor JJ, however, referred to the event as "a demonstration" (at CLR 307–10, 312, 314; ALR 375–8, 379, 380–1) and also as an "experiment or … demonstration" (at CLR 310, 314; ALR 377, 380–1); Fullagar J called the event "a demonstration or reproduction of what the witnesses had described … in court" (at CLR 316; ALR 381–2)).
148. D Ormerod, "A Prejudicial View?" [2000] *Crim LR* 452, p 453.
149. See below at [195]–[218].

or trial or tentative procedure or other operation for the purpose of discovering something or testing a principle or hypothesis.[150] But s 53(3)(d) suggests that reconstructions fall within the expression "demonstrations", since that paragraph assumes that the goal of a demonstration is to reproduce a particular piece of conduct or event.

[195] *The true construction of s 53*: Section 53 does not apply to what happens in the courtroom at the trial, for the following reasons.

[196] First, if the word "inspection" in s 53 has the same meaning as "view" at common law — and it is hard to see how it can have any wider meaning — in that application s 53 is limited to visits outside the courtroom to inspect some place or some thing which cannot conveniently be brought to court. This suggests that s 53 does not apply to what happens in the courtroom in any of its applications.

[197] Secondly, if s 53 did apply to conduct in the courtroom, s 53(2) would be otiose in that application of s 53. That is because in all litigation (except ex parte applications) the parties have a reasonable opportunity to be present in court, and the judge and, if there is a jury, the jury will be present. The absurdity of imposing as a precondition to an order under s 53 a state of affairs which inevitably exists points against a construction of s 53 which would extend to courtroom conduct.

[198] Thirdly, if s 53 did apply to conduct in the courtroom, s 53(3)(a) would almost always be otiose in that application of s 53. That is because in most litigation (leaving aside special cases like those involving accused persons who have absconded, and leaving aside cases where defendants in civil cases have failed to attend the trial, or where an ex parte application is made) the parties will be present. There is serious implausibility in a construction of s 53 which would require the court to take account of a factor which almost always will exist.

[199] Fourthly, s 53(3)(e), so far as it concerns "places" to be inspected, points against the application of s 53 to conduct in the courtroom. The requirement that the judge take into account the extent to which a place to be inspected has materially altered is wholly inapplicable to conduct in the courtroom, for trials about the condition of a courtroom are rare, and are unlikely to take place in that courtroom.

[200] Fifthly, at common law the trier of fact could draw any reasonable inference from all evidentiary material in court. There was a restrictive common law rule adopted in some but not other English cases, and in this court,[151]

150. Does s 53 operate harmoniously with the practice in relation to experiments in patent cases? It is common for rules of court to provide for the judge to regulate the conduct of experiments on which a party proposes to rely. Thus, under O 58 r 31(1) of the Federal Court Rules, a party proposing to tender as evidence experimental proof of a fact must apply for directions about, inter alia, service of particulars of the experiment, persons who may attend it, its time and place, and the recording of its conduct and results. See also, for example, r 48.16 of the Uniform Civil Procedure Rules 2005 (NSW) and s 10.04 of the Supreme Court (Intellectual Property) Rules (Vic) 2006; T A Blanco White, *Patents for Inventions and the Protection of Industrial Designs*, 4th ed, Stevens, London, 1974, pp 420–1, para 12-118; and S Thorley, R Miller, G Burkill, C Birss and D Campbell (eds), *Terrell on the Law of Patents*, 16th ed, Sweet & Maxwell, London, 2006, p 546, para 12-181. If s 53 applied to experiments of this type it would not be possible for them to be conducted without an order from the judge, a condition of which, under s 53(2)(b), would be that the judge be present. Probably s 53 does not apply: the "experiments" referred to in s 53 are limited to those conducted as part of the trial in front of the trier of fact, and do not include those conducted before the trial and described by witnesses at the trial.

151. For example, *Scott*.

preventing an out-of-court view being used as evidence in its own right, as distinct from being an aid to understanding evidence given in court. That rule is abolished by s 54, but it was a rule which applied only to out-of-court activities. The enactment of s 54 thus points to the conclusion that s 53 only applies to out-of-court activities: the rule enacted by s 54 already existed for in-court activities.

[201] Sixthly, all but the simplest "experiments" are impossible to perform in court. If they are to be performed at all, they have to be performed outside the courtroom. That suggests that no part of s 53 applies to in-court activities.

[202] Seventhly, where s 53 applies, counsel for the accused submitted that it would be necessary for the court to comply with s 192. This submission would rest on the view that the "application" for an "order" under s 53(1) is an application for "leave" or "permission" or "direction" within the meaning of s 192(1). If sound, this would mean that the court must take into account the matters described in s 192(2). This submission does appear to be sound. Bearing in mind the need to construe s 53 in its context in the Act, it is desirable to examine what consequences the need to comply with s 192 would have.

[203] It was part of the argument advanced by counsel for the accused in this court that when the accused was asked to say sentences containing the word "serious", s 53, and hence s 192, applied. Yet at common law a witness could be required "to speak … so that the jury or another witness may hear his voice".[152] There was no common law equivalent to the s 53/s 192 procedure, and the question arises whether a construction of s 53 which leads to the delays and inconveniences attendant upon the need to comply with that procedure is reasonable. Similarly, at common law a witness may be required "to write so that the jury or another witness may … compare his handwriting".[153] It has been held permissible, at least with the witness's consent, for a witness to demonstrate that he could type a record of interview in less than 36 minutes.[154] It has been held permissible for a witness, who claimed in the past to have signed his signature upside down and in reverse, to demonstrate this before the jury after also signing his ordinary signature.[155] Where an offender is said to have walked with a limp, it is permissible to ask the accused to walk a short distance in front of the jury.[156] Subject to questions of exclusion on grounds of prejudice, it is permissible for injured persons to be invited to show the extent of their injuries[157] or for experts to explain them[158] or for the evidence of paralysis or numbness to be revealed by inserting pins into injured plaintiffs[159] and for injured persons to indicate what

152. *Sorby v Commonwealth* (1983) 152 CLR 281 at 292; 46 ALR 237 at 244 (*Sorby*) per Gibbs CJ.
153. *Sorby* at CLR 292; ALR 244 per Gibbs CJ. See also *Osborne v Hosier* (1705) Holt 194; 90 ER 1006; *Doe d Devine v Wilson* (1855) 10 Moo PC 502 at 530; 14 ER 581 at 592; *Cobbett v Kilminster* (1865) 4 F & F 490; 176 ER 659; *R v Whittaker* [1924] 3 DLR 63 (*Whittaker*).
154. *R v Burles* [1964] Tas SR 256 at 257 (*Burles*).
155. *R v Fernandes* (1996) 133 FLR 477 at 482–4.
156. *People v Hayes* 818 NE 2d 916 (Ill, 2004).
157. For example, *Mizner v Lohr* 238 NW 584 (Iowa, 1931); *Olson v Tyner* 257 NW 538 (Iowa, 1934); *Patterson v State* 39 So 2d 709 (Ala App, 1949); *Spaak v Chicago and North Western Railway Co* 231 F 2d 279 (7th Circ, 1956); *Johnson v Clement F Sculley Construction Co* 95 NW 2d 409 (Minn, 1959).
158. For example, *Citizens' St R Co of Indianapolis v Willoeby* 33 NE 627 (Ind, 1893); *Sornberger v Canadian Pacific Ry* (1897) 24 Ont App 263.
159. *Osborne v City of Detroit* 32 F 36 (CC Mich, 1886); *Stephens v Elliott* 92 P 45 (Mont, 1907); *Wilson & Co Inc v Campbell* 157 P 2d 465 (Okl, 1945).

their capacity to perform bodily movements was before the injury and after it.[160] A jury has been invited to feel a plaintiff's skull to assess whether a hole caused by trepanning was filled by bone or a softer tissue.[161] At common law a witness may be required "to show his face or some other part of his body so that he may be identified".[162] At common law a witness can be compelled "to submit his foot for comparison with a foot print",[163] or to demonstrate its formation.[164] It is permissible at common law for a tailor claiming payment for making a suit for a customer who resists the claim on the ground that the suit did not fit to ask the customer, while testifying, to try it on in the presence of the jury.[165] It is also permissible for an accused to demonstrate his inability to pull neither of two balaclavas left at the scene of a crime over his head.[166] Where the defence called evidence that clothing left at the scene of a crime did not fit the accused, it was permissible to require the accused to wear the clothing in order to see whether it fitted him.[167] The "wearing of a piece of clothing connected with a crime to see if it fits" is "commonplace" and "entirely unexceptional".[168] It has been held permissible for a witness to leave the witness box in order to demonstrate how the accused committed an act of indecency on him[169] or to demonstrate the position in which a murdered person was found.[170] A witness who gave evidence about the effect of burning the horsehair stuffing of a chair was permitted to demonstrate that effect by setting on fire a handful of horsehair from the chair.[171] During the present trial, without objection, the accused was asked to take off his jacket, revealing his stomach, as part of a cross-examination directed to showing that he was fair-skinned, and was also asked to show the jury his discoloured and scarred arms; yet in this court it was said that the jury's "inspection of the stomach" was something which "perhaps" fell within s 53. Counsel for the accused submitted that while he could see no unfairness in an accused person being asked to roll up a sleeve to see whether there was a distinctive tattoo there, s 53 would apply (and therefore s 192).

[204] In short, "[d]emonstrations are frequently given in the witness box … both by ordinary witnesses and by professional witnesses such as medical or pathological experts. It is common for an ordinary witness by physical actions … to support oral evidence of an observed action".[172] On the accused's argument,

160. *Adams v City of Thief River Falls* 86 NW 767 (Minn, 1901); *Burles* at 257 (bending a knee).
161. *McAndrews v Leonard* 134 A 710 (Vt, 1926).
162. *Sorby* at CLR 292; ALR 244 per Gibbs CJ.
163. *Whittaker* at 68 per Walsh J.
164. *Daniel v Guy* 23 Ark 50 (1861) (relevant to prove race in a suit for freedom).
165. *Brown v Foster* (1873) 113 Mass 136 at 137; approved by J B Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Little, Brown & Co, Boston, 1898, p 263, n 1.
166. *R v Hartwick* (VSCA, Crockett, Ashley and Mandie JJ, No 154/1994, 5 June 1995, unreported, BC9503322).
167. *People v Warmack* 413 NE 2d 1254 (Ill, 1980).
168. *R v Kirby* [2000] NSWCCA 330 at [47] (*Kirby*) per Wood CJ at CL (Beazley JA and O'Keefe J concurring): in that case the court assumed that s 53 did not apply where an accused person was asked to put on a hat.
169. *R v Brett* (QCA, Thomas, Ambrose and Lee JJ, No 353/1990, 19 April 1991, unreported, BC9102525) (*Brett*) (preferable that witness consent).
170. *State v Richardson* 84 P 2d 699 (Wash, 1938).
171. F Tennyson Jesse (ed), *Trial of Sidney Harry Fox* (1930) in the Notable British Trials series, Edinborough, Hodge, 1934, pp 147–8.
172. *R v Baker* [1989] 3 NZLR 635 at 638.

"demonstrating" how a car accident occurred by the use of models,[173] "demonstrating" distances by the use of the hands, or "demonstrating" distances by the making of comparisons of the distances between features of the courtroom, "demonstrating" with an arm how high something was, or "demonstrating" what the posture of a person was, or how a knife or a gun was held, or how a blow was struck, or where an organ in the body is, or what kind of blow may have caused a particular kind of injury[174] — all these common forensic events, which are illustrations of witnesses communicating more clearly by actions than they can in words, would call for a s 53/s 192 inquiry. It would be extraordinarily cumbersome if s 192 had to be complied with in relation to the very common and speedy methods of eliciting evidence just set out. That points against the application of s 53 to courtroom conduct.

[205] It is now necessary to deal with submissions advanced for the accused which relied on s 53(4) and (5). Counsel for the accused submitted: "The potential for the application of s 53 to in-court demonstrations is also clear from the words in subsec (5) which allows the jury (or court) to inspect exhibits without an order from the court. This must apply to an inspection occurring in the courtroom, as well as in the jury room". He also submitted that s 53(4) "denotes a specific limit as to what it is permissible for a jury to do with an exhibit without an order from the court". Hence he said that both subsections "contemplate that an experiment, demonstration or inspection may be conducted in court". The argument is not clear, but it appears to have two elements. One is that the enactment of s 53(4) assumes that if it had not been enacted s 53 would have applied to the conduct of experiments whether in the jury room or in court; s 53(4) forbids experiments in the jury room, but leaves open their possible carrying out in court, to be regulated by s 53. The second element is that the enactment of s 53(5) assumes that if it had not been enacted s 53 would have applied to the inspection of exhibits by judge or by jury, whether that inspection took place in court, in the judge's chambers, or in the jury room; and s 53(5) prevents s 53(1)–(3) from applying in the latter two places, but not to inspection of exhibits in court. The better view is that s 53(4) was inserted to deal with one specific problem which is distinct from those dealt with in s 53(1)–(3), and casts no light on the construction of those subsections. And s 53(5) is consistent with the proposition that s 53 applies only to events outside the courtroom: it was inserted to prevent the section applying to those events outside the courtroom which take place in the judge's chambers or the jury room, and assumes nothing about those events which take place inside the courtroom when the judge or jury examines an exhibit. Section 53(5) merely preserves the status quo in relation to inspections by judge and jury out of court. The argument advanced by counsel for the accused on the basis of s 53(5) goes too far: if it were sound, it would follow that the section applied to the "inspection" of an exhibit by a witness, so that every time a witness was asked to look at a documentary exhibit or a chattel which had been marked as an exhibit in order to answer some question about it, the s 53/s 192 procedure would have to be complied with. This cannot be correct.

173. *Burles* at 257.

174. *Whittaker* at 66 per Walsh J. The last examples were given by the Court of Criminal Appeal: *Evans* at 510 [184] per James J (Hidden and Hoeben JJ concurring). See also *R v Quinn* [1962] 2 QB 245 at 257; [1961] 3 All ER 88 at 93; *Brett* at 4 per Ambrose J.

Whether or not s 53(5) was unnecessary, it does not follow from its existence that inspections of exhibits in court by witnesses are governed by s 53, or that any conduct in court is governed by it.

[206] Hence the ordinary meaning of the text of s 53, taking into account its context in the Act and the purpose or object underlying the Act, which includes the expeditious conduct of trials, is that s 53(1)–(3) does not apply to conduct inside the courtroom.

[207] *The construction of s 53 in the light of extrinsic materials.* But it was argued for the accused that that meaning is manifestly unreasonable, and that s 53 has a contrary meaning. For that reason, s 34(1)(b)(ii) of the Interpretation Act, as well as s 34(1)(a), permit recourse to the marginal notes to ss 53 and 54 and what the Australian Law Reform Commission wrote about the problem of "views".

[208] Do the marginal notes to s 53, "Views", and to s 54, "Views to be evidence", assist? Since the common law meaning of a "view" was an out-of-court inspection of a place or thing, while the marginal notes may not be decisive guides to meaning, so far as they go, they tend to support the construction of s 53 as not applying to in-court conduct.

[209] More clear assistance comes from the relevant Australian Law Reform Commission Reports. ALRC 26, in App C, entitled "Differences and Uncertainties in the Laws of Evidence", under the heading "Inspection Out of court", discussed, as that heading would suggest, various activities outside the courtroom. It discussed "inspections" of "property (including land)" and "the carrying out of 'experiments' on such property".[175] Clearly these expressions are limited to property outside the courtroom. They therefore cover the ensuing subjects of discussion — "a 'view' where the fact finder uses his power of observation (and other senses) to help to understand and assess the value of evidence adduced in court", and "a 'demonstration' which involves actually taking additional evidence, whether by experience [scil: 'experiments'], demonstration or reconstruction".[176] That the commission was only discussing out-of-court visits is supported by the fact that the authorities it cited for the proposition that the court had an inherent power to order "an inspection" concerned out-of-court visits.[177] That is, the commission treated "views" as out-of-court inspections not involving experiments, demonstrations or reconstructions, and it saw experiments, demonstrations or reconstructions as also taking place out of court. It then summarised[178] what the majority said in *Scott*[179] and other cases relating to out-of-court visits,[180] or to jury room experiments.[181] Under the subheading "Demonstration (at the Scene)", the

175. Australian Law Reform Commission, "Evidence", Interim Report No 26, 1985, vol 2, App C, p 335, para 310 (ALRC 26).
176. ALRC 26, vol 2, App C, p 335, para 310.
177. *R v Sullivan* (1869) 8 SCR (NSW) 131 at 136–7; *R v Martin* (1872) LR 1 CCR 378 at 380–1 (*Martin*).
178. ALRC 26, vol 2, App C at 335, para 311.
179. (1954) 91 CLR 300; [1954] ALR 373.
180. *Commissioner for Railways v Murphy* [1967] ALR 706 at 707; (1967) 41 ALJR 77 at 78; *Kristeff v R* [1969] ALR 53; (1968) 42 ALJR 233; *Denver v Cosgrove* (1972) 3 SASR 130 at 133; *Pope v Ewendt* (1977) 17 SASR 45 at 49; *R v Alexander* [1979] VR 615.
181. *Kozul v R* (1981) 147 CLR 221; 34 ALR 429 (*Kozul*).

commission turned to the principles stated in Australian cases[182] about experiments, demonstrations and reconstructions outside the court or in the jury room.[183] The commission proceeded to analyse various English and Privy Council cases: some stated principles consistent with those stated in Australia and some did not, but all of them involved events outside the courtroom,[184] and in all of them the principal cases discussed involved events outside the courtroom.[185]

[210] When the commission turned to make recommendations with a view to remedying the "Differences and Uncertainties" discussed in the passages just described, it did so in a section entitled "Views, Demonstrations and Experiments" containing five paragraphs. The discussion in the first paragraph commenced as follows:[186]

> 1027. *The Law and its Rationale*. The judge or jury *may leave the court to observe places or objects that cannot be brought to or reproduced successfully in the court*. Such an *excursion* is a view. At the scene of the view, evidence may be led in the form of a demonstration or an experiment. Although there is some uncertainty as to the existing law, particularly in England, a distinction is drawn between a view and a demonstration — only the latter is classified as evidence. The former is material assisting the tribunal of fact in understanding evidence adduced *in the court*. [Emphasis added.]

The opening and closing words make it plain that the types of conduct which are made the subject of these distinctions are all conduct out of court. The balance of the paragraph developed arguments to the effect that it is wrong in principle that a view — an "excursion" beyond the courtroom — is not "classified as evidence". The second paragraph, on the strength of those arguments, proposed that "a view be treated as evidence",[187] a recommendation now reflected in s 54 of the Act. Plainly the second paragraph, like the first, was concerned with out-of-court visits. That conclusion is supported by the opening words of the third paragraph: "But the use of *out of court* inspection must be subject to limitations".[188] The limitations recommended correspond with those appearing in s 53(3)(b)–(e) of the Act. The fourth paragraph recommended, in relation to

182. *Scott* at CLR 310, 316; ALR 377–8, 381–2; *R v Ireland (No 1)* [1970] SASR 416 at 426; *R v Alexander* at 632; *Kozul*.
183. ALRC 26, vol 2, App C, pp 335–6, para 312.
184. ALRC 26, vol 2, App C, p 336, para 313: *Goold v Evans & Co* [1951] 2 TLR 1189 (judge sees operation purportedly similar to that which the plaintiff worker was engaged in at the time of the injury sued on); *Buckingham v Daily News Ltd* [1956] 2 QB 534; [1956] 2 All ER 904 (judge inspects machine in defendant's printing house and observes a demonstration by plaintiff of the manner in which he was cleaning its blades when he was injured); *Karamat v R* [1956] AC 256; [1956] 1 All ER 415 (visit to murder scene); *Tameshwar v R* [1957] AC 476; [1957] 2 All ER 683 (visit to scene of robbery); *Salsbury v Woodland* [1970] 1 QB 324; [1969] 3 All ER 863 (*Salsbury*) (visit by judge to scene of highway accident); *Tito v Waddell* [1975] 1 WLR 1303; [1975] 3 All ER 997 (visit to Ocean Island to examine physical conditions).
185. *R v Whalley* (1847) 2 Car & K 376; 175 ER 155 (visit to scene of alleged rape); *Martin*; *London General Omnibus Co Ltd v Lavell* [1901] 1 Ch 135 (inspection by judge hearing passing off cases of two omnibuses in the courtyard of the Royal Courts of Justice); *Kessowji Issar v Great Indian Peninsula Railway Co* (1907) 23 TLR 530 (visit by appellate judges to scene of railway accident); *Hare v British Transport Commission* [1956] 1 WLR 250 at 253; [1956] 1 All ER 578 at 580 (visit by judge to station).
186. ALRC 26, vol 1, p 565, para 1027.
187. ALRC 26, vol 1, p 567, para 1028.
188. ALRC 26, vol 1, p 567, para 1029 (emphasis added).

"an inspection *out of court*", what is now s 53(2)[189] and the fifth paragraph[190] dealt with what it called an "analogous area to out of court inspection", namely "inspection by a jury in the jury-room, considered by the High Court in [*Kozul*]".[191] The commission said:[192]

> 1031. … While, under the proposal, such inspection by a jury would be considered part of the evidence in the proceeding, it would be impractical to require the presence of the trial judge, or to provide the parties or their counsel with an opportunity to be present. There is always a risk, however, that the jury will not just inspect the relevant object but also experiment with it.

[211] The commission dealt with the impracticality referred to in the first sentence just quoted by inserting in each of its draft Bills a clause which now corresponds with s 53(5). Of that clause as appearing in the draft Bill in its final report the commission said that it "makes it clear that the existing practice of the jury or the court inspecting exhibits may continue".[193] Hence s 53(5) cannot be read as suggesting that s 53(1)–(3) applies to in-court conduct.

[212] The commission dealt with the risk of jury experiments by recommending that the jury be directed not to carry out experiments with exhibits; this is consistent with s 53(4) of the Act.

[213] Two further points may be noted. The first is that to speak of the inspection of exhibits in the jury room as being part of the evidence in the proceeding is to reveal a misunderstanding of the problem: a jury which looks at the exhibits three times is not receiving three times as much evidence as if it looked at them once.[194] The point of the recommendation, adopted in s 54 of the Act, that the jury can draw inferences from what it sees, hears or otherwise notices during a demonstration, experiment or inspection, was to bring the common law rule for out-of-court views into line with the common law rule for out-of-court demonstrations and reconstructions. That recommendation could have no impact on what happened inside the courtroom, because there has never been any doubt that what happens inside the courtroom is more than an aid to understanding the evidence. And it cannot have sensible operation on what happens inside the jury room. That is because what the commission calls "inspection by a jury in the jury-room" of a document or chattel which has become an exhibit is a totally different process from the out-of-court examination of premises or chattels which the common law calls a view and s 53 calls an inspection.

[214] The second point is that the issue of whether experiments conducted by the jury in the jury room should be allowed is an issue which is entirely distinct from the issue of whether the s 53 conditions apply in relation to events in court. The solution propounded by the commission in relation to the former issue says nothing about the latter. To seek to draw stray implications from passing remarks

189. ALRC 26, vol 1, p 567, para 1030 (emphasis added).
190. ALRC 26, vol 1, p 567, para 1031.
191. (1981) 147 CLR 221; 34 ALR 429.
192. ALRC 26, vol 1, pp 567–8, para 1031.
193. Australian Law Reform Commission, "Evidence", Report No 38, 1987, App A, p 249, para 392 (ALRC 38).
194. "It is the thing produced … and not its inspection by the court, or the inference derived from its inspection, which constitutes real evidence": S L Phipson, "'Real' Evidence", App A to S L Phipson (ed), *Best's Principles of the Law of Evidence*, 12th ed, Sweet & Maxwell, London, 1922, p 603.

by the commission ignores the fact that the overwhelming body of the discussion in ALRC 26 is directed, and directed only, to conduct outside the courtroom. If ALRC 26 is a permissible aid to the construction of s 53, it completely contradicts the construction of s 53 advanced on behalf of the accused.

[215] The Bill recommended by ALRC 26 contained two clauses (cll 138 and 139) which are substantially to the same effect as ss 53 and 54 of the Act, save that there was no reference to the judge's order being made on application.[195] The Bill recommended by ALRC 38 was the same[196] save for an amendment to make it plain that the judge's power to order the holding of a demonstration, experiment or inspection was to be exercised on application.[197] Neither ALRC 38 itself[198] nor the commentary on the clauses throws any light on the present issue, namely whether s 53 applies to in-court demonstrations, experiments or inspections.[199]

[216] In summary, then, the commission was seeking to overcome five problems in the common law. One problem related to the propriety of judges visiting scenes relevant to the litigation without notice to the parties:[200] that is met by s 53(1) and (2) (which derive partly from ALRC 26[201] and partly from ALRC 38).[202] A second problem was whether an out-of-court view could be ordered without the consent of the parties:[203] this too was met by s 53(1) and (2). A third problem was thought to be that guidance was needed on the factors relevant to making an order for "out of court … inspections, including appropriate experiments and demonstrations":[204] this was met by s 53(3). A fourth problem was considered to be that what was seen on sites outside the courtroom could only be used to understand the evidence given in court, not as evidence in its own right:[205] that was met by s 54. A fifth problem was described as arising in an "analogous area to out of court inspection", namely the conduct of the jury in the jury room. The commission thought that "it would be impractical to require the presence of the trial judge, or to provide the parties or their counsel with an opportunity to be present", but it also thought that jury experiments with exhibits should be prohibited.[206] The ban on experiments was achieved by s 53(4). The common law capacity of the jury (and the judge) to examine exhibits was preserved by s 53(5).[207]

[217] The first four of these problems relate, and relate only, to out-of-court activities of a particular kind. The fifth of these problems relates to out-of-court activities of a different kind. None of the problems relate to conduct in the courtroom. Indeed no problems have arisen in relation to conduct in the

195. ALRC 26, vol 2, p 66.
196. ALRC 38, App A, cll 144 and 145, p 200.
197. ALRC 38, p 134, para 244.
198. ALRC 38, p 134, paras 243–4.
199. ALRC 38, App A, p 249, paras 393–4.
200. *Salsbury* at QB 343–4; All ER 873–4.
201. ALRC 26, vol 1, p 567, paras 1029–30.
202. ALRC 38, p 134, para 244.
203. ALRC 26, vol 2, App C, p 335, para 311: the relevant recommendation is in vol 1, p 567, para 1030.
204. ALRC 26, vol 1, p 567, para 1029.
205. *Scott*, discussed in ALRC 26, vol 2, App C, p 335, para 311, and the subject of a recommendation in vol 1, p 567, para 1028.
206. ALRC 26, vol 1, pp 567–8, para 1031.
207. See [205] above.

courtroom comparable with the above problems, and the commission was not directing itself to conduct in the courtroom.

[218] Against this background it is clear that the recommendations in ALRC 26 apply only to out-of-court conduct, that the same is true of ALRC 38, that the language employed by the commission in its draft Bills bears that meaning, and hence that s 53, which is not materially different, does as well. The commission discussions also reveal that s 53(4) and (5) require no different view to be arrived at.

[219] *The interrelation of s 26(b) and s 53*: Apart from taking issue with the contention that s 53 applied in court, prosecution counsel advanced two other arguments for its non-application in this case.

[220] The first of these two prosecution arguments was that the three things which the accused was required to do fell outside s 53 but within s 26(b); and that they were simply an aspect of "the production and use of documents and things in connection with the questioning of witnesses" within the meaning of s 26(b) of the Act.[208] Even if that were so, there was still a failure by both counsel and the judge explicitly to advert to s 192. The requests to put on the balaclava and overalls did not, however, mean that they were used in connection with the questioning of the accused. They occurred during that questioning, but although the requests to put the items on and move in various ways were in the form of questions, no questions were asked about the balaclava itself while the accused was wearing it or about the overalls themselves while the accused was wearing them. Even if, which is far from certain, the fact that a forensic event can be analysed as falling within s 26 makes it impossible for it to fall within s 53, the requests to put the balaclava and overalls on do not plainly fall within s 26(b). And the requests in the form of questions to say "Give me the serious cash" and "I want the serious cash" also fall outside the language of s 26(b), since no document or thing was produced or used in connection with those requests.

[221] *Section 53 did not apply in its terms*: The second of the two arguments advanced by the prosecution was that the three events complained of were not demonstrations, experiments or inspections. The argument is sound in relation to inspections, for that refers to the inspection of land or chattels. The argument is also sound so far as experiments are concerned, for what happened could not be described as an experiment. But is the argument sound in relation to demonstrations? Prosecution counsel in this court argued:

> [A demonstration] involves an attempt to reproduce the conditions or features of the thing demonstrated to provide information about that thing, usually because the thing itself is not available or directly observable. The information provided by the demonstration allows the jury, or the fact finder, to draw some inference about the actual condition or features of the thing the demonstration was designed to recreate. However, that is different to the situation where the thing is directly observable and there is no need to provide information or evidence about it.

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208. It provides:

> 26 *Court's control over questioning of witnesses*
> The court may make such orders as it considers just in relation to:
> …
> (b) the production and use of documents and things in connection with the questioning of witnesses …

The submission continued:

> … [T]he appearance of the items as worn by the [accused] was not a demonstration of some thing, it was not designed to provide information about a thing not directly discernible. His appearance in the items was the thing itself and the jury could observe it for themselves. They were not being asked to infer from the appearance of the [accused] wearing the items something about the condition or appearance of something else, the presentation was not evidence about something not available to them. It was the very thing the jury were to observe so that they could have a direct perception of that appearance.

[222] Prosecution counsel said that the jury were being invited to compare what they could gather about the offender's appearance and voice from the evidence of the witnesses, the security video and the still photographs with what they could see of the accused. The accused agreed that there were similarities between his physical characteristics at the trial and those he had on 28 February 2002. When he was asked to don the balaclava and sunglasses to face the jury and turn side on to the jury, to don the overalls, to walk in the overalls, and to say "serious", an appeal was being made to the jury's direct observation of the accused so that the jury could weigh that direct observation against the evidence about the offender. The accused was not asked to point out any particular features of a place or an object. He was not asked to describe by reference to a place or object what happened at that place or to that object. Nor was he asked to recreate or repeat some event which had happened in the past. All that happened was that an attempt was made to highlight some features of the accused so that the jurors could judge for themselves whether they were features which the other evidence revealed the offender to have. The process is what Wigmore characteristically called "autoptic proference".[209]

[223] This argument of prosecution counsel is correct. The evidence of the eyewitnesses about what they saw and heard, and the video film and photographs, were admitted without objection. In evaluating it (and counsel for the accused was correct to submit that the video film and photographs were of very poor quality), the jury were entitled to look at the accused in the dock — noting his age, the colour of his hair and skin, his build. When he walked from the dock to the witness box they could take note of his style of walking. The evidence elicited by prosecution counsel about his age, hair colour, skin colour and build was admissible and not objected to. As he answered questions the jury could compare his voice with the descriptions given by eyewitnesses of the offender's voice. All these matters could be taken into account because the "events that occur in the presence of a jury in the regular course of a trial are material which the jury can — as it no doubt does — take into account in the finding of contested facts".[210] The three events to which exception is taken were nothing more than techniques for highlighting particular features of resemblance which the accused may or may not have had with the offender. They did not involve him demonstrating anything about what happened; they simply involved him revealing particular features of his appearance, gait and pronunciation, as revealed in sentences similar to those the offender was said to have uttered. Even if s 53 applies to in-court conduct, they were not "demonstrations" designed, in the language of s 53(3)(d), to "reproduce the conduct or event to be demonstrated".

209. J H Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev), Little, Brown & Co, Boston, 1972, vol 4, p 322, § 1150.
210. *Bulejcik* at CLR 380; ALR 519 per Brennan CJ.

[224] *Were common law rules as to the three events complied with?* Counsel for the accused submitted that if s 53 did not apply, there were common law rules which did. That is correct. Section 9(1) of the Act provides:

> 9 *Application of common law and equity*
>
> (1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

Section 11(1) of the Act provides:

> 11 *General powers of a court*
>
> (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

Nothing in Pt 2.3 provides that any common law rules which apply to in-court conduct of the type challenged in this appeal are abolished, and that is so even if, contrary to the conclusion just stated,[211] that conduct is characterised as being a demonstration, experiment or inspection.

[225] Counsel for the accused then submitted that the impugned events were demonstrations, and the common law rules which applied were similar to those stated in s 53(3). That is true to the extent that even if the evidence were tendered under a common law rule, s 135 would have to be complied with, and its meaning in substance is the same as s 53(3)(c); and it is also true to the extent that the factors listed in the other paragraphs of s 53(3) are material at common law, for they go to relevance. However, contrary to a submission by the accused, if the evidence were tendered under a common law rule, it would not be necessary to comply with s 192.

[226] One difficulty with the submission that common law rules similar to s 53 apply is that for reasons given above[212] the three events were not "demonstrations" or, more correctly, "reconstructions". It is true that if the attire the accused was asked to wear, the actions he was asked to perform and the things he was asked to say were significantly different from what the eyewitnesses had said the offender had worn, done and said, the requests that the events in court take place should have been refused — but on grounds of relevance, not any special rule about "demonstrations" or "reconstructions". However, there was evidence that the offender had worn a balaclava and overalls similar to those which the accused was asked to wear. There was evidence of how he walked and how he pronounced "serious". The jurors were entitled to make findings — by assembling a mosaic from small pieces of evidence given by different witnesses if they saw fit — about what the offender was wearing, how he walked and how he pronounced "serious". If what the accused looked like, walked like and spoke like corresponded with that mosaic, it would assist the prosecution case. If it did not, it would assist the accused. The evidence was sufficiently relevant. No specific "reconstruction" rule requiring equivalence to, substantial similarity with or a faithful reproduction of some earlier condition or event applied. The evidence was therefore admissible unless s 135 or s 137 applied. Putting aside the unduly long time during which the accused wore the balaclava, there was no unfair prejudice: the three impugned events took place very briefly; it was reasonably necessary for the case which the prosecution wished to advance for them to take place, and the conduct of prosecution counsel did not exceed those

211. Above at [195]–[218].
212. Above at [221]–[223].

legitimate necessities; the events appeared to have generated evidence favourable to the accused in one respect, and defence counsel contended to the jury that they did so in more than one respect; and so far as they were prejudicial, the prejudice lay in their probative value. It is true that, as was submitted for the accused, the trial judge did not refer to s 137 (or, if it was relied on, s 135); nor perhaps did the trial judge analyse the issues coherently. But her decisions to allow the impugned events to take place were correct.

[227] *Case-splitting*: Finally, one distinct submission of the accused must be rejected. It was submitted that the three events complained of contravened the principle that the prosecution must present its case in full before the defence case opens.[213] It would have been impossible for the prosecution to ask the questions now complained of, however, until the defence had been opened and the accused had entered the witness box. In answer to that point counsel for the accused made the following submission:

> … [I]f things are to occur such as how he looks in a balaclava … one could easily … get another person of his height and shape and put a balaclava on their head. One could actually lead evidence in the Crown case of some of these things, but the fact that it occurs in the defence case … only makes the situation worse, not better.

Whatever difficulties there were in the course adopted by prosecution counsel, they would have been accentuated if the person asked to wear the balaclava had been not the accused, but someone said to share his height and shape.

Ground 2.3: jury warnings

[228] This ground is:

> The Court of Criminal Appeal should have held that there was a miscarriage of justice occasioned by failure to direct the jury on the dangers of the procedure outlined in ground 2.1 and/or 2.2 (above).

[229] The first complaint, then, is that the trial judge failed to warn the jury about the dangers in the evidence of the eyewitnesses about the balaclava and the overalls. The second complaint is that there was a failure to warn the jury about the dangers of the accused wearing a balaclava, wearing overalls and walking in front of the jury, and saying two sentences containing the word "serious".

[230] These are narrow complaints. The first complaint is an afterthought. It is not a complaint made in the grounds of appeal in the Court of Criminal Appeal and the terms of the Court of Criminal Appeal's judgment suggest that it is not a complaint which that court was conscious of having been made in argument to it.

[231] After counsel had addressed the jury and before the summing up, they made submissions about the directions which the trial judge should give on various points. Defence counsel did not at any stage request either of the directions which, it was said in this court, should have been given. What he did say was that the case was a circumstantial case, there being "no direct evidence" that the accused was the offender. The trial judge then said that although all the circumstantial evidence was tendered to show that the accused was the offender, she did not see how "the usual direction given by judges in respect of identification" could be given. That view was correct. It may be accepted that an

213. *Shaw v R* (1952) 85 CLR 365 at 379–80; [1952] ALR 257 at 258–9 per Dixon, McTiernan, Webb and Kitto JJ.

example of "identification evidence" arises where the identifying witness relies on the clothing worn by the person identified.[214] But no witness suggested that the accused was or resembled the offender; hence the definition of "identification evidence" in Pt 1 of the Dictionary to the Act was not satisfied, there was no need to give the warning that there is "a special need for caution before accepting identification evidence" mandated by s 116(1), the evidence did not fall within the words "identification evidence" in s 165(1)(b) of the Act, and thus no s 165(2) warning was required on that account.[215]

[232] At one point the trial judge and defence counsel agreed that there was a need to warn the jury to "[e]xercise caution", but whether it was caution about what the witnesses saw of the offender's balaclava and overalls or caution about something else is not clear. Later, prosecution counsel instigated a brief discussion of s 165. Defence counsel submitted in relation to s 165 that "while it's not intended to be exclusive, there is an indication of the types of evidence by the inclusions". The trial judge then said: "It's if they have given different evidence on another occasion, something like that. I don't think it is appropriate here. But is it substantially a circumstantial case?" Defence counsel said: "It is absolutely a circumstantial case in my submission". Defence counsel did not say anything more on the point. Hence, contrary to the submissions of counsel for the accused in this court, there was no statutory requirement to give a s 165 direction because it cannot be said that his predecessor made a "request" for a s 165 warning within the meaning of s 165(2). The conditions necessary to satisfy the word "requests" in s 165(2) in relation to a warning about "evidence of a kind that may be unreliable" would involve counsel making the request identifying what the "kind" of evidence was, why it was unreliable, and what the terms of the warning requested were. None of these points were identified. Defence counsel certainly did not specifically ask for warnings on the subjects set out in ground 2.3, let alone formulate in terms what the content of those warnings might have been. Prosecution counsel did suggest, however, that the trial judge should "modify the identification evidence directions but refer to it as resemblance evidence, not identification evidence".

[233] In her summing up the trial judge said there was no positive evidence of visual identification. She then said:

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214. *R v Lowe* (1997) 98 A Crim R 300 at 317 (*Lowe*).
215. Section 165(1) provides:

> 165 *Unreliable evidence*
>
> (1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:
>
> …
>
> (b) identification evidence …

Section 165(2) provides:

> (2) If there is a jury and a party so requests, the judge is to:
>
> (a) warn the jury that the evidence may be unreliable, and
>
> (b) inform the jury of matters that may cause it to be unreliable, and
>
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

Section 165(5) provides:

> (5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

> Nevertheless you do have evidence from a number of witnesses describing the appearance of the person who came into the council demanding money on 28 February '04 [sic] and you do have witnesses who describe the wearing apparel and you have also got the security video and the stills, the still photographs. And when the accused gave evidence he was asked to do certain things in relation to exhibits M and O, that was to put on the red balaclava and the pair of overalls so a comparison could be made between the person described as the robber by the various witnesses and the accused.

Later she said:

> … [A]lthough I have said to you there is no visual identification in the ordinary sense of the word … I am still bound to give you a direction which in effect is a special caution about identification evidence.
>
> I say to you at the outset that in the case of identification evidence the warning of a need for special caution before accepting of [sic] identification is one which is given in every case in which such evidence is disputed by the accused. It is not given because of any particular view which I may have formed concerning the reliability of — when I say that I am not really giving you this direction at the moment. I am telling you this is the sort of direction that is given in every case and the principal reason for it being given is because of the nature of this type of evidence and I will direct you now specifically that the type of evidence that you have heard in this case here which goes to the identification in the Crown case which is led for the purpose of or the foundation of its submission in the evidence is of such a type that you could safely act on it providing you are satisfied yourselves about the evidence and you accept the evidence.
>
> What I am endeavouring to say to you is that for this type of evidence that you have had before you it also calls for a special caution and as I say that is not because I formed any view concerning the reliability of the evidence in this case. In other words it is given universally in relation to any identification. There is universally given a special caution. Now what I am going to say to you is this, the weight to be given to that evidence is a matter for your decision, not mine, and I have nothing to do with that decision which you have to make.
>
> You should not interpret these directions as indicating any particular view which I may have formed one way or another. As I said you must approach this evidence with special caution. There are however a number of matters in this case which I propose to draw to your attention which are relevant to the reliability of the evidence that has been given and my direction is that you are bound to consider those matters in determining whether you will accept that evidence as reliable.

She then referred to the limited time which the eyewitnesses had to make observations and the particular circumstances they were in.

[234] These directions were correctly criticised by the Court of Criminal Appeal on grounds which it is unnecessary to repeat.[216] The criticisms were not criticisms made by defence counsel when the judge was hearing submissions about further directions after the close of the summing up. In this court counsel for the accused made a broad-ranging attack on these directions. The first criticism was that the trial judge's statement that she was giving the directions because she was required to and not because of any view of the facts she had formed weakened her directions.[217] The second was that the conventional identification warning had not been given. Neither of these are points of criticism identified by ground 2.3. A third criticism was that strong warnings are needed where claims of similarity are made in relation to voices,[218] clothing[219] or

216. *Evans* at 515 [211], 516 [218], [220] per James J (Hidden and Hoeben JJ concurring).
217. Citing *R v Stewart* (2001) 52 NSWLR 301 at 333 [139]–[140]; [2001] NSWCCA 260.
218. Citing *Bulejcik*.
219. Citing *Lowe* at 317; *Kirby* at [52]–[69].

objects.[220] None of these three criticisms grounded any request by defence counsel for a further direction at the close of the summing up; indeed he made no request for a further direction of any kind. Prosecution counsel, however, did draw attention to the trial judge's failure to give a "resemblance warning" about what the eyewitnesses said about the balaclava and the overalls — the matter she had suggested as desirable in the debate before the summing up. The transcript records the following after the jury were asked to retire:

> CROWN PROSECUTOR: One further direction.
> HER HONOUR: About the editing, that one?
> CROWN PROSECUTOR: No, about the resemblance evidence of the civilian witnesses concerning Exhibits M and O, your Honour hasn't given the direction concerning special caution in respect of that evidence.

The jury then left the court, and the debate continued thus:

> CROWN PROSECUTOR: Your Honour has referred to it generally in terms of the witnesses' descriptions of what the offender was wearing and carrying, in context of the special caution direction, but your Honour did not specifically include a reference to their evidence about Exhibits M and O. When they were shown them.
> HER HONOUR: You mean the sort of — where I think Mr Marszalek — are you thinking of his sort of answer?
> CROWN PROSECUTOR: All of their answers in —
> HER HONOUR: All of the evidence in relation to?
> CROWN PROSECUTOR: They all generally said, if I can use the expression, resembled.
> HER HONOUR: It resembled.
> CROWN PROSECUTOR: With what the offender was wearing. They each said varying things about the items, and we agreed that was to be referred to as resemblance evidence, and my suggestion is that your Honour needs to say that that special caution that you have given applies to that evidence as well.
> HER HONOUR: Applies especially to the evidence that each of them gave about — Did you want to say something?
> [DEFENCE COUNSEL]: My understanding of the caution your Honour did give was applied to the descriptions of the person, and apparel, that is as I heard the caution your Honour gave, it was applicable to both the description of the person and the apparel.
> HER HONOUR: Even if I didn't specify, I certainly had in mind. Well I think I would have had in mind both. Put it that way.
> [DEFENCE COUNSEL]: Your Honour did say apparel.
> HER HONOUR: You don't have any difficulty, do you, if I have them back in and I will just tell them that the — particularly the caution that related to the balaclava and the overalls.

In fact there is nothing to suggest that the trial judge did thereafter give any "caution that related to the balaclava and the overalls".

[235] Contrary to a submission made by counsel for the accused in this court, the Court of Criminal Appeal was correct to say that in that passage counsel for the accused "did not support and actually opposed" prosecution counsel's submission.[221]

[236] The relevant course of events before the summing up, then, was that prosecution counsel suggested a "resemblance warning" akin to an "identification warning", and raised the question of a s 165 warning; defence counsel asked for "the usual warnings" without saying what they were, and did

220. Citing *Clout* at 320–2; *R v Whalen* (2003) 56 NSWLR 454 at 467–8 [46]–[51]; [2003] NSWCCA 59.
221. *Evans* at 514 [207] per James J (Hidden and Hoeben JJ concurring).

not make any request for a s 165 warning. After the summing up, prosecution counsel reminded the trial judge of the need for a "resemblance warning" about what the eyewitnesses said about Exs M and O, but defence counsel twice indicated it was not necessary. Even though the trial judge said she would give it and did not, the failure of defence counsel to press for it after prosecution counsel raised the point, and thereafter to remind the trial judge of her failure to fulfil her promise that she would comply with prosecution counsel's request, disables counsel for the accused now from saying that the failure to give the two warnings which it is now said should have been given amounted to a miscarriage of justice. To examine witnesses by reference to the balaclava and overalls in the manner employed in this case, though permissible, is not a particularly common event. To ask the accused to don the items, walk before the jury and speak as requested is less common. On the other hand, the difficulties of drawing inferences from mass-produced items are fairly obvious, and were stressed by counsel for the accused in address. The jury must have appreciated the diverse reactions of the eyewitnesses to the offender's clothing. Further, the events to which the two warnings which it is said should have been given related took up very small amounts of time — a miniscule fraction of the whole trial. Rather than asking for unspecified "usual warnings", it was incumbent on the defence, if it was thought the unusual nature of the events called for specific directions, to formulate the precise words of any direction sought and either read them to the judge at dictation speed or hand up a document containing them. What McHugh JA said of civil jury trial is true for criminal cases as well:[222]

> If a party is to rely as a ground of appeal on a misdirection in a summing-up, his counsel must specify at the trial that portion of the summing-up which he requires to be withdrawn. If any further direction is needed, counsel must specify with precision what direction the trial judge should give.

The conduct of defence counsel, who at all times showed a vigilant determination to protect his client's interests as energetically as possible, suggests that he did not see his client's position as being damaged by the summing up, that he considered that the prosecution counsel's request might not advance it, and that he did not think his client's position would be improved by the very subtle and detailed warnings which it was submitted to this court should have been given.

Ground 2.4: failure to give reasons

[237] This ground was:

> The Court of Criminal Appeal erred in:
>
> (a) Inferring reasons for judgments of the trial judge in circumstances where on applications of substance, there were no such reasons given;
>
> (b) Failing (as a matter of procedural fairness) to uphold the appeal in circumstances where on applications of substance there were no reasons given by the trial judge;
>
> (c) Holding that there was no error in the reasons of the trial judge where no reasons were ever given by the trial judge and those reasons were rather, the reasons that the Court of Criminal Appeal had itself inferred.

[238] Counsel for the accused submitted that the trial judge failed to give reasons or gave only incomplete reasons for:

(a) overruling the defence objection to the questioning of Mrs Thompson about the balaclava and the overalls;

222. *Singleton v Ffrench* (1986) 5 NSWLR 425 at 440.

(b) deciding not to rule inadmissible all the evidence given about the balaclava and the overalls, the items themselves, and their finding at the accused's residence;
(c) deciding to grant leave to the prosecution to amend the indictment;
(d) deciding to refuse to waive the notice requirements relating to alibi evidence and to refuse to allow evidence of alibi;
(e) deciding to overrule objections to the accused being made to wear the balaclava, the sunglasses and the overalls, to walk up and down and to say "serious";
(f) refusing to give an identification direction either under s 116 of the Act or s 165; and
(g) refusing an application to discharge the jury.

[239] Counsel for the accused submitted of these failures: "The rulings … were central to the trial and the failure to give reasons, despite repeated request[s], pervaded the entire trial". In assessing the meaning and validity of this submission, the following matters are relevant.

[240] First, counsel for the accused does not now complain, and did not complain in the Court of Criminal Appeal, about the grant of leave to amend and the refusal to discharge the jury. The failure to give any reasons for the grant of leave or to give full reasons about the discharge application may thus be left out of consideration.

[241] Secondly, the Court of Criminal Appeal found that the trial judge had erred in relation to the alibi question and the sunglasses. The failure to give reasons for these rulings could scarcely improve the accused's position on these issues in this court.

[242] Thirdly, of the remaining rulings, reasons were not sought by defence counsel in relation to the ruling about Mrs Thompson, the rulings about the accused wearing, doing and saying various things, or the identification directions. The only remaining ruling for which reasons were sought and promised was the decision not to hold inadmissible all the evidence given by eyewitnesses about Exs M and O, the exhibits themselves, and the circumstances of their finding.

[243] Fourthly, it is very unusual for trial judges to give reasons, beyond what they say in dealing with argument, about why they propose to give some directions to the jury but not others. It is not generally desirable to require them to go further.

[244] There are innumerable rulings given in trials in response to objections for which reasons should normally neither be requested nor given — those relating to the form of questions, those relating to their capacity to elicit inadmissible evidence, those relating to their tendency to infringe privilege. Sometimes reasons for rulings on relevance and privilege should be given, because they offer a guide to counsel in their future conduct, and the time lost in giving the ruling is outweighed by the time saved in ensuring future compliance with it. But if reasons were to be given for every ruling, trials would become interminable. Although no trial is perfect, if the present trial had any significant fault, it was the lengthy periods which the trial judge permitted counsel to take up in debating questions of admissibility.

[245] The Court of Criminal Appeal criticised the failure of the trial judge to give reasons for some of her rulings. That criticism was correct, at least in cases where defence counsel requested reasons and they were promised. However, the

Court of Criminal Appeal held that the failure to give reasons was not "such a fundamental procedural irregularity as to warrant setting aside the [accused's] convictions".[223] This was because, as the Court of Criminal Appeal correctly said, the relevant applications were usually argued at length, so that the evolving views of the trial judge were apparent from what she said in argument.[224]

[246] In criticising this reasoning, counsel for the accused cited several authorities. But, leaving aside cases concerning trials by judge alone, where statute may compel the giving of reasons,[225] the cases cited all turn on the need for reasons in relation to final orders, like a sentence,[226] an increased sentence,[227] an order denying an entitlement to workers' compensation[228] and an order awarding damages.[229] It is in that type of case where the primary purposes for giving reasons have operation — to enable the parties to see whether their arguments have been understood and what the decision is based on, to further judicial accountability, and to ascertain how cases will be decided in future.[230] Counsel for the accused did cite cases indicating that reasons must be given where "that is necessary to enable the matter to be properly considered on appeal".[231] Although many rulings on evidence or other interlocutory rulings in criminal jury trials are unlikely to form the basis of an even faintly arguable appeal, in relation to significant rulings, where a request for reasons is made, at least brief reasons should be given. But where the purpose of the reasons is to enable appellate courts to consider the appeal properly, if that purpose can be achieved in other ways, as where the course of argument makes the reasons plain, the failure to give reasons, though erroneous, will not constitute a miscarriage of justice. That was the case here. It cannot be said that the objections or applications made by defence counsel were peremptorily dismissed without being admitted to her Honour's mind. She gave full opportunity for the arguments to be developed.

[247] It was contended for the accused that the Court of Criminal Appeal erred in failing to uphold the appeal on grounds of procedural fairness and erred in inferring the reasons for the rulings from what was said in argument. One thing that matters is whether the rulings were correct: they were. Another thing that matters is that miscarriages of justice be avoided, as distinct from procedural errors which are regrettable but do not cause any miscarriage of justice. The failure to give reasons can be procedurally unfair, but procedural unfairness is not

223. *Evans* at 522 [272] per James J (Hidden and Hoeben JJ concurring).
224. *Evans* at 522 [272] per James J (Hidden and Hoeben JJ concurring).
225. *Fleming v R* (1998) 197 CLR 250; 158 ALR 379; [1998] HCA 68; *R v Murphy* [2000] NSWCCA 297.
226. *R v Thomson* (2000) 49 NSWLR 383 at 394 [42]; [2000] NSWCCA 309 per Spigelman CJ (Wood CJ at CL, Foster AJA, Grove and James JJ concurring); *Harris v R* (2005) 158 A Crim R 454 at 459 [22] per Studdert J (Grove and Whealy JJ concurring).
227. *Dinsdale v R* (2000) 202 CLR 321 at 329 [21]; 175 ALR 315 at 320–1; [2000] HCA 54 per Gaudron and Gummow JJ.
228. *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280 (*Soulemezis*) per McHugh JA.
229. *Carlson v King* (1947) 64 WN (NSW) 65 at 66 (*Carlson*) per Jordan CJ, Davidson and Street JJ (failure to comply with counsel's request to note points of law); *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430; 25 MVR 373.
230. *Soulemezis* at 279 per McHugh JA.
231. *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 666; 63 ALR 559 at 565–6; 9 ALN 85 (CN) at 88–9 per Gibbs CJ (Wilson, Brennan and Dawson JJ concurring); see also *Carlson* at 66 per Jordan CJ, Davidson and Street JJ; *Pettitt v Dunkley* [1971] 1 NSWLR 376.

to be looked for in the air: counsel for the accused in this court failed to demonstrate how either his predecessor or their client was in any way worse off because of the failure to give reasons in this case.

[248] Counsel for the accused submitted:

> The approach adopted of "inferring reasons" puts intolerable burdens on courts of appeal and leaves litigants unable to properly present their cases on appeal. The procedure adopted at trial and on appeal denied procedural fairness to the [accused]. A miscarriage of justice was thereby occasioned.

The first sentence is correct in some circumstances, but was not shown to be correct in the circumstances of this trial. For that reason the conclusions in the second and third sentences do not follow.

Ground 2.5: the proviso

[249] This ground was:

> The Court of Criminal Appeal erred in applying the proviso notwithstanding that it upheld the [accused's] complaint in relation to:
>
> (a) The prosecutor requiring the [accused] to put on the prosecutor's "old skiing glasses" which had not been admitted into evidence, had not been shown to any witness and which were produced for the first time when the prosecutor asked the [accused] to put them on …
>
> (b) The error identified … in refusing to waive the notice requirements relating to alibi evidence and the refusal to allow alibi evidence in the trial.

[250] The arguments of the accused in this court concentrated on the alibi evidence,[232] and practically nothing was said about the sunglasses. It is necessary to approach the question of the proviso to s 6(1) of the Criminal Appeal Act on a slightly wider basis than the Court of Criminal Appeal did because it was concluded above that, apart from the two respects in which the Court of Criminal Appeal favoured the accused, an irregularity possibly amounting to a miscarriage of justice took place when the accused responded to prosecution counsel's request to put on the balaclava and sat with it on for some minutes in the presence of the jury while an objection was being debated.[233]

[251] *The accused's alibi evidence*: The accused said during examination-in-chief that he could not remember where he was on the afternoon of 28 February 2002, save that he was not at Strathfield. He said it was his practice on Thursdays to prepare limousines for display from 5 pm in his brother's car hire business at Campbelltown. This took him from 2 or 3 pm to 5 pm. After an adjournment, prosecution counsel submitted that the accused's alibi evidence had been given without complying with s 150 of the Criminal Procedure Act 1986 (NSW), which requires the leave of the court where notice has not been given. Counsel said she would cross-examine him about the evidence he had given, but would object to alibi evidence from other witnesses. The cross-examination in question was not directed to establishing that the practice about which the accused had testified did not exist. Instead it was directed, successfully, to establishing that there were no records to confirm that the accused had worked in accordance with his practice on that particular afternoon, and no evidence available from anyone working in nearby businesses to that effect.

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232. For the Court of Criminal Appeal's reasoning, see *Evans* at 516–19 [222]–[242], 523–4 [284]–[288] per James J (Hidden and Hoeben JJ concurring).
233. See above at [185].

[252] *The alibi ruling*: The trial judge refused to grant leave "retrospectively" to rely on alibi evidence, and refused leave to call evidence about alibi from the accused's father and brother. But she did not strike out the accused's evidence. Contrary to a submission advanced on behalf of the accused the Court of Criminal Appeal was right to say that the evidence which the accused gave in support of the alibi "was not withdrawn from the jury".[234] Indeed, although neither counsel addressed the jury about the accused's evidence of practice, both referred to his evidence that he was not at Strathfield.

[253] *The evidence of the accused's brother and father*: The accused's brother gave evidence on various topics. But, conformably with the trial judge's refusal of leave to call alibi evidence, defence counsel elicited none. The same approach was taken with the father.

[254] *The summing up*: In her summing up the trial judge said:

> The accused … has given evidence himself and he's also called evidence, that is his father and his brother in support of his case, to the effect to support his denial of his being present and committing the offence …

It was not correct to say that the father and brother had given evidence to support the accused's denial of being present. They had testified, but the trial judge had ruled that they could not give evidence on that particular point.

[255] *The uncalled evidence of the father and the brother*: In an affidavit read to the Court of Criminal Appeal, the father said that the accused had the task of preparing five cars for display outside the brother's shop on Thursdays, usually starting just after lunch and finishing between 4 and 5 pm. He did not recall the accused ever missing a day's work. An affidavit by the brother was to similar effect, save that he said the work took the accused 5 hours, and that he did not recall the accused having any breaks or not turning up for work.

[256] *The accused's submission*: Counsel for the accused submitted that the "defence case" was that the accused's practice on Thursdays was to work in his brother's business at Campbelltown at times inconsistent with being at Strathfield at 4.10 pm. While the accused gave evidence supporting that case, he was prevented from putting it fully because he could not call his father and brother to support that practice. For that reason, it was submitted, the appeal fell within the following words in *Weiss v R*:[235]

> [45] … [T]here may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind.

It was also submitted that the errors amounted to "such a serious breach of the presuppositions of the trial as to deny the application" of the proviso.[236] Thus, it was submitted, it did not matter how strong the other evidence against the accused was: the proviso could not be applied. If that argument were to fail, the question would be whether the evidence which the trial judge did not permit the accused to call could have raised a reasonable doubt about the prosecution case.

234. *Evans* at 523 [287] per James J (Hidden and Hoeben JJ concurring).
235. (2005) 224 CLR 300 at 317 [45]; 223 ALR 662 at 675; [2005] HCA 81 (*Weiss*) per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.
236. *Weiss* at CLR 317 [46]; ALR 675 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

[257] *Conclusion*: There was extremely strong evidence against the accused, even assuming that no connection between the offender's balaclava and overalls and the accused was proved. The evidence was that before the robberies the floor of the chambers was clean. The surveillance video, and the sequence of photographs derived from it, showed that there were no items on the floor in front of the counter as the offender was standing there at 16.09:35, and that by 16.09:45 two items appeared in that area. One is clearly a tissue. Although there plainly is a second item, it is more difficult to discern. The inescapable inference is that the items were dropped by the offender. The area was cordoned off so that the items were not disturbed. They were photographed in situ and those photographs, taken close up and in colour, clearly depict a green baseball cap. In his final address to the jury, counsel for the accused said that the photographs appeared to show two items on the floor, and said: "One is probably the tissue and the other is probably the cap". In addition, after the robberies, three witnesses saw a green baseball cap on the floor. That cap — the cap photographed in the cordoned-off area — had the accused's DNA on it. Finally, when the cap was shown to the accused in the witness box, he said it was "vaguely familiar" and that his father may have had a hat like that. His father said that he had won similar caps, he had left them in the garage of the house where the accused resided, and that anyone could wear them.

[258] In this court it was submitted for the accused that "there was no evidence at the trial that the robber dropped more than one item or specifically a cap". That submission is true if it means that there was no direct testimonial evidence to that effect. In every other sense it is untrue, because the video, the photographs, and the testimonial evidence established beyond doubt that the offender left the cap behind him.

[259] In those circumstances, what explanation for the presence of the cap with its incriminating DNA could be offered to suggest a reasonable doubt about the accused's guilt? In his final address to the jury counsel for the accused submitted that the cap was deliberately placed on the floor by the offender with DNA other than his own on it — that is, that false evidence was planted. This implies that the offender deliberately obtained a cap with the accused's DNA on it. If the evidence had not been planted, the only explanation capable of raising a reasonable doubt is that the cap left by the offender had, by accident, the accused's DNA on it. There is no evidentiary basis for treating either of these suggestions as possibilities, let alone reasonable possibilities. They are utterly implausible. The theory that the accused's DNA found on the cap could have been deposited there by transference of blood, semen or saliva, rather than from contact with the accused's skin, faces the difficulties that there was no evidence of staining on the cap, that the DNA was found on the inside brim area, where one would expect to find it if it were worn facing forward, and that, in the words of the relevant defence expert, there "was a bucket of DNA present".

[260] In short, the defence's "explanation" for the presence of the accused's DNA on the cap has no evidentiary support. It goes no distance towards raising a reasonable doubt.

[261] The parties advanced, in written submissions filed by leave after the oral hearing, complex and detailed analyses of the law relating to the proviso. In the circumstances it is not necessary to set out and evaluate these submissions.

[262] The "procedural fairness" which counsel for the accused contends he was denied was an opportunity to call vague evidence of practice in relation to a specific day more than 2 years before the trial, by way of confirmation of his own evidence to that effect. His own evidence to that effect had not been challenged in cross-examination: all that the cross-examiner did was establish a lack of business records and a lack of useful information from inquiries. Not only was the alibi defence, as put both by the accused in his evidence and by his father and brother in their affidavits, vague: it was also weak — going only to practice more than 2 years earlier, not to a specific recollection of being present at a place other than Strathfield. The trial judge's failure to permit a full deployment of the defence is not the "significant" procedural unfairness spoken of in *Weiss*. Nor is it "a serious breach of the presuppositions of the trial".[237]

[263] As for the sunglasses, the trial judge's error was trivial, since the jury knew they were prosecution counsel's old ski glasses and had nothing to do with the accused.

[264] The Court of Criminal Appeal was right to apply the proviso in relation to the two respects in which it accepted defence arguments. The conclusion that there was one further irregularity does not alter the correctness of that conclusion in view of the fact that that irregularity was not serious.[238] Indeed, whether it is to be characterised as a miscarriage of justice within the meaning of the main part of s 6(1) of the Criminal Appeal Act at all need not be considered; for even if it were, it was certainly not "substantial", and the proviso applies.

Order

[265] The appeal should be dismissed.

[266] **Crennan J.** I agree with Heydon J that the appeal should be dismissed and I agree with his Honour's reasons.

[267] The evidence of the accused referred to as evidence of an alibi was not evidence of an actual recollection of being elsewhere than at Strathfield on the afternoon of 28 February 2002. Rather, it was evidence of a practice of the accused to attend his brother's business at Campbelltown on a Thursday for a period of time inconsistent with being at Strathfield at 4.10 pm. The evidence of the accused's father and brother which was not called supported the accused's evidence of the practice. The accused was not challenged in cross-examination about the practice. Neither prosecution counsel nor defence counsel addressed the jury about the accused's evidence of his practice which went to the jury.

[268] When those matters are considered together with other evidence described by Heydon J as "extremely strong evidence against the accused",[239] the errors complained of did not amount to "such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso".[240]

237. Compare the passages quoted above at [256] from *Weiss* at CLR 317 [45]–[46]; ALR 675.
238. See above at [185].
239. See above at [257].
240. *Weiss v R* (2005) 224 CLR 300 at 317 [46]; 223 ALR 662 at 675; [2005] HCA 81 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ (footnote omitted).

Orders

(1) Appeal allowed.

(2) Set aside the orders of the Court of Criminal Appeal made on 7 September 2006, and in their place order that:

(a) the appeal to that court be allowed;

(b) the appellant's convictions be set aside; and

(c) there be a new trial.

SOPHIE CALLAN
BARRISTER