IN THE SUPREME COURT OF NEW ZEALAND

SC 64/2010
[2011] NZSC 107

JUSTIN LEIGH HARNEY

v

POLICE

Hearing: 17 August 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: A J Bailey and K H Cook for Appellant
C L Mander and B J Fenton for Police

Judgment: 16 September 2011

JUDGMENT OF THE COURT

A The appeal is allowed and the convictions are set aside.

B No order is made for a re-trial.

REASONS

(Given by Blanchard J)

[1] This appeal is about the application of s 45 of the Evidence Act 2006 to identification evidence given by a police officer, who said that at the time of the incident giving rise to the charges he recognised the defendant, Mr Harney, from having had dealings with him on two occasions some years previously. No identification parade or other formal identification procedure had been carried out.

The issue is whether in the absence of such a procedure the evidence should have been admitted.

Facts

[2] The circumstances in which Constable Vallender came to give his identification evidence were these. On 3 May 2009 the constable was driving a police patrol car on State Highway 1 at Waimate. At about 4.04 pm he observed a motor vehicle with some distinctive features drive past him in the other direction. He said that the driver was a "thin faced white male aged about 35 to 40 years old". He did not claim to have recognised the driver at this point. Constable Vallender carried out a U-turn and activated the red and blue lights on his vehicle as a signal to the other vehicle to stop. Instead it accelerated away at high speed towards Glenavy with the constable's vehicle in pursuit. Because of the manner in which the pursued vehicle was being driven, Constable Vallender abandoned that pursuit.

[3] At about 4.24 pm the constable's vehicle was positioned beside an intersection in Glenavy. The constable saw the same distinctive vehicle approaching when it was some distance from the intersection. When it reached the intersection it made a turn in front of the constable (about 15 metres away from him) into a street on the other side of the intersection. He estimated its speed as it turned at "possibly 10–15 k's". He said he had an initially front-on view and then a side-on view of the driver "as he rolled around the corner in front of me". He said that he saw the driver clearly (just the top of his shoulders and head) and recognised him as Mr Harney. He had dealt with him on two occasions before:

> The first time was possibly seven years ago when there was an incident in Waimate. The second time was possibly I'm guessing a couple of years later, if not a year, two years later in a hotel.

The constable said Mr Harney had changed slightly in appearance in the intervening time but he was "very sure" that the defendant in Court was the driver at Glenavy.

[4] The constable gave chase again but once more abandoned a high-speed pursuit.

Section 45

[5] It is convenient at this stage to set out s 45 of the Evidence Act:

> **45 Admissibility of visual identification evidence**
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> (1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.
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> (2) If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.
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> (3) For the purposes of this section, a **formal procedure** is a procedure for obtaining visual identification evidence—
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> (a) that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency; and
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> (b) in which the person to be identified is compared to no fewer than 7 other persons who are similar in appearance to the person to be identified; and
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> (c) in which no indication is given to the person making the identification as to who among the persons in the procedure is the person to be identified; and
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> (d) in which the person making the identification is informed that the person to be identified may or may not be among the persons in the procedure; and
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> (e) that is the subject of a written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
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> (f) that is the subject of a pictorial record of what the witness looked at that is prepared and certified to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
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> (g) that complies with any further requirements provided for in regulations made under section 201.[1]

[1] No relevant regulations have been made under s 201.

(4) The circumstances referred to in the following paragraphs are **good reasons** for not following a formal procedure:

(a) a refusal of the person to be identified to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or a video record that shows a true likeness of that person):

(b) the singular appearance of the person to be identified (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared):

(c) a substantial change in the appearance of the person to be identified after the alleged offence occurred and before it was practical to hold a formal procedure:

(d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant:

(e) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence was reported and in the course of that officer's initial investigation:

(f) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a chance meeting between the person who made the identification and the person alleged to have committed the offence.

District Court

[6] In the District Court at Christchurch before Judge Erber, Mr Harney faced two charges of operating a motor vehicle recklessly (s 35(1)(a) of the Land Transport Act 1998) and two of failing to stop (s 114(2)).

[7] The prosecution proceeded on the basis that no formal procedure in terms of s 45(3) had been carried out. Constable Vallender was the only prosecution witness to the events at Waimate and Glenavy.

[8] The District Court Judge recorded in his oral judgment[2] that at the conclusion of the prosecution case defence counsel, Mr Bailey, had submitted that the evidence of identification did not come within the "good reasons" under s 45(4). The Judge

[2] *Police v Harney* DC Christchurch CRI-2009-009-8289, 31 August 2009.

did not accept that submission. The defence had then elected not to call evidence. In his judgment Judge Erber explained:[3]

> [8] A formal procedure under that subsection does not have to be followed if there was a good reason for not following a formal procedure and the prosecution say there was a good reason. That was there was no point in a formal procedure in relation to the second occasion [at Glenavy] because Mr Harney was known to Constable Vallender. As to that identification I note that the identification was based on contact between the two persons at the earliest five years before and at the latest seven years before the events. I have to bear that in mind. I also have to bear in mind the stricture of [sic] relating to identification evidence in the Summary Proceedings Act. But I have no doubt whatever that Constable Vallender properly identified Mr Harney on the second occasion. Consequently the prosecution has proved beyond reasonable doubt that the circumstances in which the identification [was] made has produced a reliable identification.

[9] The Judge found the charges relating to the second occasion proved beyond reasonable doubt and convicted Mr Harney on one count of driving recklessly and one count of failing to stop. The charges relating to the earlier pursuit were dismissed because the constable had not been able to say that Mr Harney was the driver at the earlier time. The Judge sentenced Mr Harney to a term of imprisonment of one month, cumulative upon a sentence he was already serving for other offending. The sentence has been served.

High Court

[10] Mr Harney's appeal against conviction was dismissed by the High Court.[4] The High Court Judge took the view that s 45(2) did not apply because Constable Vallender had recognised Mr Harney from his previous dealings. While the contact went back some years, the Judge was satisfied that there would have been "little if any point" in a formal procedure as the result "would likely have been a foregone conclusion".[5] The list of factors in subs (3) was not exhaustive. In this case the degree of association was not within the "slight category such as might still require an identification parade".[6] The Judge inferred from Judge Erber's decision that he had placed particular weight on his assessment of the constable's viva voce evidence

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3 At [8].
4 *Harney v Police* HC Christchurch CRI-2009-409-141, 13 October 2009 per Harrison J.
5 At [15].
6 At [16].

and his confirmation of his evidence-in-chief (a written brief) of clearly recognising Mr Harney. The High Court Judge was satisfied that Judge Erber had a sufficient evidential basis for concluding beyond reasonable doubt that Mr Harney was driving the vehicle.

Court of Appeal

[11] The Court of Appeal granted special leave but dismissed the appeal.[7] In a joint judgment, Chisholm and Keane JJ first addressed whether there had been a good reason for not following a formal procedure. They did not accept an argument for the appellant that a high degree of familiarity should be required before an enforcement agency can be excused from carrying out a formal procedure. They said that there would be "good reason" not to conduct a formal identification procedure where the witness recognises an accused, except where such procedure would serve a useful purpose, such as would be likely the case where there is a slight acquaintance only.[8] It had therefore been open to Harrison J in the High Court to conclude that it was unlikely that a formal procedure would have served a useful purpose in this case. The identification was being made by a police officer who was "very sure" of his identification; although the previous contact had been some years previously, there had been contact on two occasions; and the circumstances surrounding the identification at the intersection were "reasonably conducive to an accurate identification".[9]

[12] The joint judgment then considered the position if s 45(2) had applied, that is, whether the circumstances in which the identification was made produced a reliable identification beyond reasonable doubt. They said that essentially the issue in the case was whether a Judge's impression of, or confidence in, the identification witness could be taken into account as part of the s 45(2) inquiry.[10] They concluded that a Judge was entitled to take it into account in making an assessment of the identification witness. Again they were not persuaded that there had been an error below.

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7 *Harney v R* [2010] NZCA 264 per William Young P, Chisholm and Keane JJ.
8 At [27].
9 At [28].
10 At [30].

[13] In a concurring judgment, William Young P expressed concern about the practice of deferring the challenge to admissibility where that has not earlier been fairly signalled. He pointed out that the nature and context of the previous dealings between Constable Vallender and the appellant could have been relevant to the decision of the police to dispense with a formal procedure. As well, if there were operational reasons why the constable (and other police officers) could be expected to keep an eye out for Mr Harney, that too could be relevant, the President said, noting Mr Harney's "most impressive list of previous convictions", much of it associated with motor cars.[11] If counsel for Mr Harney had clearly signalled a challenge to the admissibility of the identification it was likely that Constable Vallender would have been able to give "chapter and verse" as to why a formal identification procedure would have been pointless.[12] But in doing so he would have referred to previous offending by Mr Harney which was probably inadmissible in relation to the substantive determination of the charges. In the absence of a signalled challenge, the police sergeant who was prosecuting in the District Court could not fairly have been expected to lead detailed evidence about Mr Harney's past interactions with the constable. There had been something of an ambush. But it would have been open to the Judge to have re-opened the case for the purpose of conducting a voir dire. The President would have favoured directing a rehearing in the District Court if the admissibility of the identification evidence had not been established.[13]

[14] The President agreed, however, that there was good reason for dispensing with a formal procedure and, on the second issue, said that he was satisfied that the constable's confidence was relevant to the reliability of the identification. He accepted that the confidence level of the identification witness could not, in itself, satisfy the s 45(2) reliability test but this consideration could not sensibly be left out of a reliability assessment: "[i]f the identification witness is unsure of the identification, such unsureness plainly could not be ignored".[14] At least in a negative sense, confidence was relevant. More importantly, the expression of confidence rested on two premises: familiarity with Mr Harney and the circumstances in which

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11 At [45].
12 At [46].
13 At [48].
14 At [52].

the constable saw Mr Harney in Glenavy being conducive to making an accurate identification. Both premises were comprehended by the expression "circumstances in which the identification was made":[15]

> Although the expression of confidence was conclusory, it was in substance, and particularly in the context of his evidence as a whole, an assertion that he knew what the appellant looked like and that the circumstances in which he saw him in Glenavy enabled him to make an accurate identification.

Admissibility under s 45

[15] Opinion evidence is generally admissible under s 24 of the Evidence Act:

> ... if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

Identification evidence is a species of opinion evidence. The witness is offering an opinion that the alleged offender was the person the witness saw in circumstances related to the offending. Such evidence has, however, inherent and well-known dangers which the requirements of s 45 are designed to mitigate so far as possible.[16] As defence counsel often say to juries, there have been famous miscarriages of justice arising from mis-identification by an honest, and therefore apparently believable, eyewitness.[17] Judges should therefore be astute to ensure that what s 45 requires is strictly followed and that identification evidence is not admitted except in accordance with the section.[18]

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15 Ibid.

16 Material from the Law Commission and other sources on the dangers of identification evidence is referred to in *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [33]–[36].

17 Section 126 of the Evidence Act requires a judge trying a case with a jury to warn it of the special need for caution before finding the defendant guilty in reliance on the correctness of a visual or voice identification, and in particular that a mistaken identification can result in a serious miscarriage of justice. The judge must also alert the jury to the possibility that a mistaken witness may be convincing and that where there is more than one identification witness, it is possible all of them may be mistaken.

18 In some circumstances there may appear to be a conflict between s 45 and s 35 (the previous consistent statements rule) but identification evidence which is admissible under the specific regime in s 45 should not be excluded under s 35. The specific section is plainly intended to override that more general provision.

[16] Section 45 is concerned with "visual identification evidence" as defined in s 4:

> **visual identification evidence** means evidence that is—
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> (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
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> (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a)

This definition includes the type of identification evidence known as recognition evidence, where the witness purports to identify the offender as someone with whose appearance the witness is already acquainted.

[17] When the witness knows the offender, the witness is likely to be able to offer a more reliable opinion as to identity. The carrying out of a formal identification procedure may then be of no practical utility, and even create a false impression of the reliability of the identification, when in reality the witness has simply pointed to a person previously known to the witness. In delivering the advice of the Privy Council in *Goldson*[19] Lord Hoffmann recorded, with approval, counsel for the appellants' acceptance that if the accused is accepted to be a person well-known to the identifying witness, no identification parade need be held:

> ... The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. In fact, the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, whereas all that it would confirm was the undisputed fact that the witness knew the accused. It would not in any way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime.

[18] Bearing these matters in mind, we turn to s 45. Subsection (1) applies to visual identification evidence in two situations:

(a) where a formal procedure complying with subs (3) has been followed; or

(b) where there was a "good reason" for not following a formal procedure.

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[19] *Goldson v R* [2000] UKPC 9, [2000] 4 LRC 460 at [11].

Subsection (4) sets out a list of circumstances that provide such a good reason.

[19] The requirements for a formal procedure are expressed in a way that includes an identification parade or the use of a photo montage. Under subs (3)(a) the procedure must be "observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency". Consequently, the procedure should take place during the investigation or soon after an arrest. That provides a time-frame for when a good reason under subs (1) should exist.

[20] The expression "that evidence" in subs (1) obviously refers back to "visual identification evidence" earlier in the subsection and must encompass, where a formal procedure has been followed, both the circumstances of the alleged offending in relation to which the witness identifies the alleged offender and the circumstances of the formal procedure.[20]

[21] Where there has been a formal procedure or good reason for dispensing with one, the visual identification evidence is presumed to be sufficiently reliable to be considered by the judge or jury, but it remains open to the defendant to prove on the balance of probabilities that in fact it is unreliable. If the defendant can do that, the evidence is not admissible.

[22] Subsection (2) applies where there has been no formal procedure and no good reason is shown for failing to follow one. The evidence is not automatically excluded merely because the prosecution cannot point to such a procedure or a "good reason". But in their absence the hurdle for the prosecution is much higher. The visual identification evidence will be inadmissible under subs (2) unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced an identification that is sufficiently reliable to be admitted as part of its case and assessed by the fact-finder along with the rest of the evidence. In other words, it must be established to that standard of proof that the

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[20] The definition would also encompass a dock identification but, as Lord Hoffmann said in *Goldson* (at [13]) with reference to a jury trial, if an identifying witness has not made a previous identification of an accused, a dock identification is unsatisfactory and ought not to be allowed. Indeed, only in the most exceptional circumstances should any form of dock identification be permitted: *Constance v The State* [1999] UKPC 56, [2000] 4 LRC 118 at [13]–[14] and *R v Young* [2009] NZCA 453 at [29].

surrounding circumstances were conducive to an accurate identification so that, if the jury believes the evidence of the witness, they can properly rely upon it.

[23] No formal procedure is relied upon by the prosecution in this case and all but one of the six "good reasons" for not following a formal procedure listed in subs (4) clearly can have no application. Mr Harney did not refuse to take part in a procedure and a photograph of him must have been available to the police in any event, given his criminal history. It is not suggested that he was of singular appearance or that his appearance substantially changed after the alleged offending. No identification of him was made to police soon after the reporting of the offence and in the course of the investigation. (Typically this would occur when the witness accompanies or approaches a police officer in the initial stages of the investigation and points out the offender.) There was no subsequent chance meeting between Constable Vallender and Mr Harney.

[24] Therefore the only "good reason" mentioned in subs (4) which could apply is:

> (d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant ...

This requires a consideration of whether, viewed objectively but from the perspective of the police during their investigations, it would have been reasonable to conclude that there would not be a challenge to the identification evidence.

[25] The list in subs (4) is not expressed to be exhaustive and it would not be sensible to so read it. It is true that the Law Commission did recommend that the list be exhaustive, as is indicated by its inclusion of the words "and no others" in the introductory part of its draft of subs (4).[21] But those words were removed during the parliamentary process. The subsection would otherwise have produced anomalies.

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[21] See Law Commission *Evidence* (NZLC R55, 1999) vol 2 at 132.

[26] We are satisfied that where the visual identification evidence takes the form of a recognition by the eyewitness of someone already known to the witness (whether through personal contact or from photograph or film and whether or not the person is known by name to the witness), that can constitute a further good reason for not following a formal procedure. That was the position, rightly in our view, taken by the Court of Appeal in *R v Edmonds*.[22] As the Court said in that case, endorsing a submission from the Crown, the formal identification procedures in subs (3) are primarily directed towards identification of strangers and the risk factors differ with identifications of persons previously known to the witness. The Court referred with approval to the Crown's submission that a formal identification procedure in these circumstances would reduce the real force of the witness's identification, which derived from its spontaneity, and it would not identify any error in the witness's recognition.[23] *Edmonds* was a case where the defendants were well known to the witness but the Court had earlier held that a challenge to the evidence should nonetheless have been anticipated in terms of para (d), although not actually directly signalled, because it was clear the defendant was disputing his presence at the scene. It would be unfortunate if a defendant who had been recognised did signal a challenge while investigations were still continuing or upon being arrested and the police then had either to choose against their better judgment to carry out a formal procedure, which might be misleading in the way described by Lord Hoffmann, or to decline to do so and face the need to prove reliability of the evidence to the higher standard under subs (2).

[27] It does not follow, of course, that merely because identification evidence takes the form of recognition of a person known to the defendant, that factor will necessarily provide a good reason for dispensing with a formal procedure. It will not do so unless the appearance of the alleged offender was sufficiently known to the

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22 *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [65].
23 At [57].

witness before the time of the alleged offending that a formal procedure would be of no utility. Where a procedure would serve a "useful purpose"[24] from the point of view of the defence, in that it may expose an element of unreliability in the identification, there will not be good reason in terms of s 45(1).

[28] The sufficiency of the familiarity of the witness with the defendant's appearance and the utility of a formal procedure need to be gauged in the individual case. In determining the issue of utility of a formal procedure the judge who is ruling on admissibility needs to consider the particular circumstances in which the witness has previously seen the defendant and how, and with what degree of cogency, those prior circumstances demonstrate that the witness had the capacity to identify the defendant with accuracy. Where there has been extensive past association, that is likely to provide a powerful argument against a formal procedure.[25] On the other hand, if the prior acquaintance with the defendant's appearance is slight only, such a procedure will usually have value;[26] the potential weight of the witness's opinion may not be much greater than that offered by a complete stranger.[27] There can be, however, no formulaic requirement, such as that the defendant must have been "well" known to the witness.[28] The degree of prior contact or knowledge of appearance, and its sufficiency, must be assessed in each case taking account of all the circumstances.

[29] If the defendant does not accept that he or she was known to the identification witness before the alleged offending, a formal procedure will almost certainly be of utility in establishing whether the witness had the capacity to recognise the defendant.[29] A formal procedure may also have value if the last contact between the witness and the defendant was not recent. But the mere fact that it was not recent will not in itself mandate the use of a formal procedure.

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24 *R v Popat* [1998] 2 Cr App Rep 208 (CA) at 215 per Hobhouse LJ ("[t]here ought to be an identification parade where it would serve a useful purpose").

25 *R v Caldwell and Dixon* (1994) 99 Cr App Rep 73 (CA) at 78.

26 *Brown v The State* [2003] UKPC 10, (2003) 62 WIR 440 at [16].

27 *R v Bardales* (1995) 101 CCC (3d) 289 (BCCA) at [106] per Wood JA.

28 The UK Code of Practice for the Identification of Persons by Police Officers (Code D) at [3.12] now refers only to the suspect being already "known" to the witness who claims to have recognised them when seeing them commit the crime.

29 *John v The State of Trinidad and Tobago* [2009] UKPC 12, [2009] 5 LRC 259 at [16]–[17].

[30] In order to assess whether the identification evidence should be admitted under subs (1), the judge will also need to determine whether the ability of the witness to recognise the defendant from prior contact has translated into a reliable identification in the particular circumstances. All the circumstances in which the witness claims to have recognised the defendant and which may have enhanced or detracted from the quality of the recognition (lighting, distance, duration of observation, eyesight of the witness etc) will need to be taken into account. The remarks in the leading English case of *R v Turnbull*, although discussing directions to a jury, are apposite to a consideration by a judge under s 45:[30]

> How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

The judgment in that case also contains an important reminder:[31]

> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

[31] The judge's mind should also be turned to whether the identification may have been contaminated in some way, either at the time of the offending or later, perhaps because of an opinion as to identity expressed by someone else to the witness.

[32] In carrying out an assessment under subs (1) the judge is able to take into account not only the circumstances in which the identification was made (the *Turnbull*-type factors) but also any other evidence in the case which supports or raises concerns about the accuracy of the identification. In contrast, and as the Court of Appeal remarked in *Edmonds*,[32] if the prosecution finds it necessary to rely upon subs (2), its harder task under the standard of proof required by that subsection may

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30 *R v Turnbull* [1977] QB 224 (CA) at 228.
31 Ibid.
32 At [110]–[113].

be made even more difficult because it is only the "circumstances in which the identification was made" which may be considered. The prosecution cannot resort under subs (2) to other relevant evidence which could have been used by it under subs (1). The witness's prior knowledge of the defendant is, however, a circumstance of the identification and so can be taken into account under subs (2).

[33] It was submitted for the appellant that the confidence the witness expresses about his or her identification of the defendant should not be taken into account under s 45 – that it is a poor predictor of identification accuracy, even if confined to an expression of confidence at the time the identification is first made.[33] While that view cannot be dismissed, the Court of Appeal observed in *Edmonds* that other expert opinion takes a different view, at least where confidence is assessed at the time of first identification.[34] A judge should naturally be cautious about placing weight on this factor, even where the witness is someone accustomed to making observations like a police officer, but confidence cannot be completely disregarded. After all, the defence may want to have the judge take note of any hesitation by the witness concerning his or her identification of the defendant. If that is permissible, as it surely must be, then equally an expression of some degree of confidence cannot simply be put to one side. The reality is that they are opposite sides of the same coin and fine distinctions cannot be made in assessing the credibility of the witness depending upon the way in which the witness happens to indicate confidence or otherwise about the identification. The confidence with which the witness made the identification must accordingly be treated as one of the circumstances under both subss (1) and (2). What is of paramount importance is that too much weight should not be given to this factor, especially when it is not an expression of confidence at the time the identification was first made.[35] Certainly, as the President said in the

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33 Law Commission *Evidence* (NZLC R55, 1999) vol 1 at [198].

34 At [117]–[119] and the references cited therein.

35 In Richard Mahoney and others *The Evidence Act 2006*: *Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [EV45.05(1)] it is suggested that the relevant point would be immediately after the formal procedure:

> Once any feedback has been given from an enforcement officer, or the witness has been subjected to repeated questioning about their identification, the relationship between confidence and accuracy dwindles, with confidence being related also to the confirmation and repetition gained from questioning and feedback. In these situations, confidence may increase, but the likelihood of accuracy does not.

Court of Appeal, the confidence level of the witness cannot, in itself, satisfy a reliability test.

Should the evidence have been admitted?

[34] We begin by considering whether there was good reason under subs (4)(d) for not having a formal procedure. The defendant apparently did not expressly tell the police at any stage during their investigations that he proposed to challenge the constable's identification of him. Should the police nonetheless have reasonably anticipated that a challenge would be forthcoming? Unfortunately this crucial question was never explored at the trial. There was no challenge based on a lack of a "good reason" (and thus to admissibility) until the prosecution case had been closed. It seems that the Judge did not then consider allowing the prosecution to re-open its case and conducting a voir dire. In fairness to the Judge, this does not seem to have been applied for by the prosecutor. It is difficult to escape the conclusion, however, that as soon as the appellant indicated upon being arrested that he did not accept that he was guilty of any offence, he was signalling that he did not concede the question of identity – for it must surely have appeared to the police from an early stage that there was no other available line of defence. Moreover, the fact that the constable's sighting of the driver he identified as Mr Harney was of quite limited duration might also have suggested that the identification was likely to be challenged.

[35] Nor did the evidence given at trial provide a basis upon which it could properly be found that the constable's prior interactions with Mr Harney were a good reason for the lack of a formal procedure. The evidence directed to those prior contacts was scant. The constable said he had had two dealings with Mr Harney, one about seven years beforehand (the "incident in Waimate") and one a year or two after that "in a hotel". He was not asked by the prosecutor to expand upon those brief, and inadequate, details. The Court was left with no knowledge of whether the constable dealt with the defendant briefly or at length on those occasions. If he was with Mr Harney in close company for a substantial period at either time (especially if, as appears from the constable's use of the expression "dealt with", that was during an investigation), that might suggest that a police officer trained to make observations would have remembered Mr Harney's appearance and could have

recognised him even after a lengthy period. But that conclusion cannot safely be drawn on the basis of the material put before the Judge.

[36] The circumstances in which the purported identification occurred were also significant in this respect. At Glenavy Mr Harney's vehicle was moving in front of the constable, not stationary. The observation must have been for a matter of a few seconds only, through the windscreen and side-window of that vehicle, as it turned away from the constable. That would have afforded him only a relatively fleeting glimpse of the driver's face, which he says he remembered from at least five and perhaps six years earlier. We do not know whether he may have been assisted (or perhaps unduly influenced) in his observation by any suspicion which had been conveyed to him that the driver might be Mr Harney.

[37] On the basis of the very limited information as to past contact and the circumstances at Glenavy, it is not shown that a formal procedure complying with subs (3) would have served no useful purpose. It seems that the police did in fact embark upon a photo montage procedure but did not carry it through. That too was not explained. It was not said to have been abandoned because it would have had no utility.

[38] We conclude that the case is not one in which, on the basis of the material before the District Court, the evidence could properly be admitted under subs (1) of s 45. The Courts below erred in taking the view that the evidence of Constable Vallender provided a sufficient foundation for concluding that there was good reason for dispensing with a formal procedure. A more rigorous approach to the evidence was called for. It will also be plain from the foregoing discussion of the circumstances in which the identification was made that we are also of the view that the prosecution's burden of proof beyond reasonable doubt under subs (2) was not discharged. The expression of confidence by the constable (that he was "very sure") was nowhere near enough to satisfy that burden when only an inadequate account had been given by him of how he was able to recognise the defendant, and the circumstances of the purported recognition were not particularly favourable to a reliable identification.

Result

[39] The identification evidence should not have been admitted. The convictions therefore cannot stand. The appeal must be allowed. As Mr Harney has long since been released after serving the sentence imposed by Judge Erber, it is not appropriate that there should be a retrial.

Solicitors:
Crown Law Office, Wellington