

## *Regina -v- Amos Wilson*

Supreme Court No. 9605784

Judgment of Kearney J delivered 20  
November 1998

### *Criminal Law - Identification Evidence Discretionary Exclusion*

The accused was charged with one count of attempted rape, the offence allegedly having been committed near Borroloola in March 1996.

A voir dire was held at the commencement of the trial to determine the admissibility of a purported identification of the accused by the victim at the Borroloola Police Station about one week after the alleged assault.

The alleged victim's complaint to Police was prompt and she described distinctive shorts worn by the alleged offender. These shorts were never located by Police. She could not identify her assailant by name but stated that she had once previously seen him on a barge near her residence two days prior to the alleged assault.

The accused was arrested by Police a few hours prior to the alleged victim being brought to the station for the purpose of "...revising her statement".

The accused was placed in a cell, the door of which was visible from a window of the Police Station near to where the alleged victim was seated by Police. She told the Court that, in response to a noise from outside, she took a "quick little glancing look" through the cyclone meshed window and immediately identified the accused who was standing behind his cell door holding the bars. He was eighteen metres away.

Police had arrested the accused for the purpose of having him participate in an identification parade and an electronically recorded record of interview. By the time of the purported identification Police had ascertained that neither procedure could be conducted on this occasion at Borroloola. In any event, the accused had not been asked if he wished to participate in either procedure.

An officer who was with the alleged victim at the time of the identification saw the accused from the same position as the alleged victim but could only identify a man with curly hair. Another officer told His Honour that by virtue of the distance and the "minimal" lighting in the cell he was surprised that the alleged victim was able to identify the accused.

The Crown sought the admission of the identification into evidence as a spontaneous identification by a victim of her assailant, the circumstances of the identification not having been contrived by Police.

The defence sought the exclusion of this evidence on the grounds that it resulted from an unlawful arrest and, in any event, its admission into evidence would be unfair to the accused.

#### **Held**

1. The identification evidence was of very poor quality and reliability; it was of low probative value but very prejudicial to the accused.
2. The evidence should be excluded from the evidence at trial because its probative value would be exceeded by its prejudicial effect and this would give rise to an unacceptable risk that the accused's right to a fair trial would be detrimentally effected.

His Honour emphasised the importance of a suspect being asked if he or she wished to participate in an identification parade, whether or not the suspect is in custody (*R -v- Shannon* approved). His Honour found it not necessary to determine whether the arrest of the accused had been unlawful but stressed that detention for the purpose of questioning is unlawful (*Foster -v- the Queen*).

In relation to the circumstances of the purported identification, His Honour found there to have been no impropriety by Police but emphasised the importance of investigating Police taking "...every precaution reasonably available to guard against the miscarriages of justice that can occur, and have in fact occurred, because of honest but mistaken evidence of identification" (*Alexander -v- the Queen* per Gibbs CJ).

Justice Kearney found the circumstances of the identification to be "suggestive" in view of the alleged victim's admission that, in her belief, the man she saw was behind bars because Police thought he was her assailant.

#### **Appearances**

Prosecution

Counsel: Rogers  
Solicitors: DPP

Defence

Counsel: Kilvington  
Solicitors: CAALAS

## **BOOKS FOR REVIEW**

The Law Society has received copies of the following books, published by LBC Information Services, for review.

- Graw, *An Introduction to the Law of Contract*, 3e
- Edwards, Knott & Riley, *Australian Schools and The Law*,
- Wallace-Bruce, *Employee Relations Law*,
- Roberts, *Evidence: Proof & Practice*,
- Loughlan, *Intellectual Property: Creative and Marketing Rights*,
- Fleming, *The Law of Torts*, 9e,
- Atherton & Atherton, *Tourism, Travel & Hospitality*,

Those members interested in reviewing any of the above books for *Balance* can contact Libby Rose at the Law Society on 8981 5104.

#### **Commentary**

Following His Honour's decision the Director of Public Prosecutions filed a nolle prosequi.

In the course of his judgment Justice Kearney considered interstate authorities (primarily from New South Wales) dealing with accidental identifications at Police Stations. These included *R -v- Meier* (unreported Court of Criminal Appeal 21 May 1996) in which the alleged victim said he was asked by Police to go to the station to - "identify his attacker"!

Mark Hunter

## **BALANCE**

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