SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brown* [2011] QCA 16
PARTIES:	**R** **v** **BROWN, Arthur Richard** (appellant)
FILE NO/S:	CA No 202 of 2010 DC No 23 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	15 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 February 2011
JUDGES:	Margaret McMurdo P and Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – appellant convicted of burglary by break with violence, grievous bodily harm, rape and stealing – trial judge admitted similar fact evidence of a prior conviction for common assault – trial judge admitted evidence of photoboard identification – appellant submitted the similar fact evidence should not have been admitted because there was no "striking similarity" – appellant submitted the identification evidence had no probative value because the complainant did not actually identify the appellant – whether the evidence should have been excluded CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – trial judge admitted similar fact evidence – trial judge admitted evidence of appellant's flight – trial judge admitted evidence identifying property found in the possession of the appellant as garments owned by the complainant – appellant submitted the evidence was weak due to the fact that the complainant made no actual identification of the garments –

whether trial judge should have warned the jury as to the dangers of convicting on such evidence where its reliability is disputed

Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, cited
Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, followed
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, followed
Phillips v The Queen (2006) 225 CLR 303; [2006] HCA 4, considered
Pitkin v The Queen (1995) 130 ALR 35; [1995] HCA 30, cited
R v Lowe (1997) 98 A Crim R 300; [1997] NSWSC 160, cited
R v Turner (2000) 76 SASR 163; [2000] SASC 27, cited

COUNSEL: P E Smith for the appellant
M J Copley SC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** This appeal against conviction should be dismissed for the reasons given by Muir JA.

MUIR JA: Introduction

[2] The appellant was convicted in the District Court in Toowoomba on 2 August 2010 of one count of burglary by break with violence, one count of grievous bodily harm, one count of rape and one count of stealing underwear, the property of the complainant. He appeals against his convictions on the grounds set out below.

[3] Before considering each of the grounds of appeal, it is desirable to give a brief account of the evidence before the jury.

The evidence

[4] The 61 year old complainant was attacked by an intruder in the bedroom of her house in Toowoomba on 28 April 2008. After retiring to bed, she heard a noise, got out of bed and checked that the doors were locked, returned to her bedroom and was then knocked unconscious. She recalls seeing "this dark shape punching" her. She was unable to state whether her attacker was a man or a woman but recalled that the person had short hair and was much bigger than her. She identified her assailant in a photoboard identification as a person who looked like one of the persons in photos 2, 7 and 12. Each of those persons was dark skinned and appeared to be aged between mid 20s and late 30s. Photo 7 was that of the appellant.

[5] In cross-examination concerning what the complainant could recall of the appearance of her assailant, the complainant said that "Because I can't remember anything, but it's just this thing that just stands out … The shape and … and the - I -

just a vision, sort of". She then reaffirmed that the person was "Larger than [herself]". She said that she didn't hear the person speak.

[6] The appellant was found by police officers on 3 May 2008 in Stephen Street, Toowoomba, hiding under a clump of bushes, carrying a blue, white and red striped bag, which was subsequently identified as having been left by its owner, Mrs Moore, in her Pajero 4-wheel drive vehicle. The appellant was extricated from the bushes by police officers. Just prior to hiding there, he had been seen by police officers jumping over a fence. He provided limited resistance but was seen to be pulling items of clothing, including two pair of underpants, alleged by the prosecution to belong to the complainant, from about his person, seemingly in an attempt to dispose of them. Also found on or with the appellant was a Swiss Army knife left by Mrs Moore in her Pajero and the keys to the vehicle.

[7] When in hospital, the complainant was shown a photograph of the underpants in the possession of the appellant when arrested. She said that she had underpants like the ones shown to her in the photograph but that she couldn't be sure that the underpants in the photo were hers until she went home. When she returned to her home and looked for them, she couldn't find them. They had "gone missing". In response to a leading question, the complainant agreed that prior to 28 April 2008 she had "pairs of underwear that matched those" in the photograph and that she hadn't seen "those two pairs of underwear since". In cross-examination, the complainant said that she had purchased the underpants, probably in Target "Or Kmart or somewhere". She agreed that they were "just common ones" which could be purchased in packs and that the size was a common one.

[8] From time to time the complainant went to stay with one or other of her two daughters and for that purpose she kept a bag packed, presumably with items of clothing such as underwear. She verified that she had checked that the missing underpants were not in such bag and that she had checked out the homes of her daughters to ensure the missing garments were not there.

[9] The complainant's daughter said the underpants depicted in Exhibit 4 were similar in style to the style that her mother "would wear".

[10] On 25 April 2008, Mrs Moore parked her Pajero outside her house in Campbell Street, Toowoomba. Inside it was the striped bag referred to earlier and the Swiss Army knife. The vehicle was stolen overnight after the car keys located on the appellant had been stolen also. The vehicle was photographed by a speed camera on the New England Highway at Tenterfield at 3.49 am on 26 April and was seen at 6.50 am that day by a police officer at Applethorpe. It was heading back towards Toowoomba and being driven by a male in his mid to late 20s with tanned skin. On 28 April, the appellant withdrew $100 from an ATM in Toowoomba.

[11] At 9.45 pm on 28 April, a resident of Diosma Street, Toowoomba, Mrs Smith, was woken by the engine noise and lights of a vehicle she subsequently identifies as similar to a Pajero "four-by-four" vehicle, dark coloured but not black. It was parked in the street outside her house with its headlights on and engine running for about 15 minutes. Mrs Smith's house was described in the summing-up as being "not far from [the complainant's] house". There was no objection to that description and it seemed clear from the evidence that it would be possible to walk from Mrs Smith's house to the complainant's through a small park in a few minutes.

[12] The appellant pleaded guilty to a common assault committed at about 11.40 pm on 18 March 2006 in which the victim, a woman of mature age who lived alone, was assaulted at her Toowoomba home. She heard noises at the front door, went to investigate and saw a person leaning against the wall of her residence next to the kitchen screen door. To get a better look, she opened the door and was grabbed by her left arm by the appellant, who attempted to pull her out the door. He was rubbing his clothing over his genital area with a hand. The victim called out for help, managed to free her arm and pushed him away with the walking frame she was using. He then backed off and walked away. He was located by police a short time later in a park. The appellant remained silent throughout the incident.

[13] It is now convenient to turn to a consideration of the grounds of appeal.

The evidence of the circumstances of the offence committed by the appellant on 18 March 2006 (the similar fact evidence) was erroneously admitted by the primary judge

[14] The primary judge admitted the similar fact evidence over defence counsel's objection. Counsel for the appellant argued that there was no "striking similarity" between the similar fact evidence and the circumstances of the subject offence and, further, that the similar fact evidence had insufficient probative force to transcend its prejudicial effect.[1] It was submitted that it could not be said that the similar fact evidence was not evidence of which "the objective improbability of its having some innocent explanation [was] such that there [was] no reasonable view of it other than as supporting an inference that the accused [was] guilty of the offence charged".[2] Counsel for the appellant pointed out a number of dissimilarities in the circumstances surrounding the offences. Differences he identified included: one offence was constituted by a violent rape, the other offence was a simple assault; one took place inside the residence, the other took place outside. In one, unlike the other, the appellant quickly broke off his attack and no "trophy" was taken.

[15] Counsel for the respondent relied on similarities between the circumstances of the two offences, including the circumstance that in each case:

1. The offence was committed in the night;
2. The intruder made a noise that caused concern that was sufficient for the victim to check the noise;
3. The victim was a mature aged woman;
4. The victim was alone in her house;
5. The intruder did not speak;
6. The intruder acted alone;
7. The intruder used violence without resort to a weapon; and
8. It was open to be inferred that the attack was sexually motivated.

[16] Although the subject offence involved considerable violence and actual rape, and the earlier offence involved a relatively slight degree of violence and no rape, the more significant feature of the two offences, in the circumstances of this case, was

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1 *Phillips v The Queen* (2006) 225 CLR 303 at [54].

2 *Pfennig v The Queen* (1995) 182 CLR 461 at [481] - [482].

that the attack was sexually motivated. It may be readily inferred that the earlier attack would have escalated in its severity had the victim not had the strength of character and presence of mind to act as she did.

[17] The fact that one assault was inside the house and one outside was simply a function of where the assailant was in relation to his victim when the assault commenced. The frustration of the appellant's attack in the earlier offence ensured that there was no "trophy". Counsel for the respondent made the point that it is a reasonable inference that noise was deliberately made prior to both attacks with a view to the assailant being able to make sure that his victim was alone. The silence of the assailant also appears to me to provide some basis for a conclusion that there are "striking similarities" or similar "unusual features" of both attacks.

[18] Of course, the existence of "striking similarities", "unusual features" or an "underlying unity", "system" or "pattern" is not an essential pre-requisite to the admissibility of such similar fact evidence.[3] But evidence of the type under consideration is admissible only if there is no reasonable view of such evidence, considered together with the other relevant evidence in the case which is consistent with the innocence of the accused.[4]

[19] The correct approach to the determination of the admissibility of such evidence was stated by Hayne J in *HML v The Queen*[5] quoting from the reasons in *Phillips v The Queen*:[6]

> "In deciding the question of admissibility presented by *Pfennig*, the trial judge is not called on to decide whether the evidence which the prosecution intends to adduce does or does not establish the accused's guilt.
>
> …
>
> 'the test [in *Pfennig*] is to be applied by the judge on certain assumptions. Thus it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case (as revealed in evidence already given at trial or in the depositions of witnesses later to be called) may be accepted by the jury. *Pfennig v R does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused of the offence or offences with which he or she is charged*.' [Emphasis added.]'" (Citations omitted)

[20] Counsel for the appellant argued that the following passage from the judgment of the Court in *Phillips v The Queen*[7] marked a change in the test propounded in *Pfennig*:

> "'[S]triking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence, though usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics.'
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> Despite that passage, and despite the reformulation of the tests stated in *Pfennig v The Queen* in *R v O'Keefe*, neither of those cases departed from

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3 *Pfennig v The Queen* (*Supra*) at [482].
4 *Pfennig v The Queen* (*Supra*) at [481] and *HML v The Queen* (2008) 235 CLR 334 at [21] and [118].
5 (2008) 235 CLR 334 at [118].
6 (2006) 225 CLR 323-4 at [63]; 224 ALR 216 at 232.
7 (2006) 225 CLR 303 at 320, 321.

> a fundamental aspect of the requirements for admissibility: the need for similar fact evidence to possess some particular probative quality. The 'admission of similar fact evidence … is exceptional and requires a strong degree of probative force'. It must have 'a really material bearing on the issues to be decided'. It is only admissible where its probative force 'clearly transcends its merely prejudicial effect'. '[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind'. The criterion of admissibility for similar fact evidence is 'the strength of its probative force'. It is necessary to find 'a sufficient nexus' between the primary evidence on a particular charge and the similar fact evidence. The probative force must be 'sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused'. Admissible similar fact evidence must have 'some specific connection with or relation to the issues for decision in the subject case'. As explained in *Pfennig v The Queen*:
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> > '[T]he evidence of propensity needs to have a specific connection with the commission of the offence charged, a connection which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it.'" (Citations omitted)

[21] I have difficulty in understanding how the construction urged by counsel for the appellant could be placed on the words used and it is abundantly plain from *HML v The Queen*[8] that *Pfennig* contains an authoritative statement of the test for the admissibility of similar fact/propensity evidence.

[22] In considering the admissibility of the similar fact evidence, the primary judge was entitled to have regard to the following:

(a) the evidence linking the underpants found in the appellant's possession with the complainant;

(b) the evidence linking the appellant with the Pajero, including the bag, army knife and car keys found in the appellant's possession;

(c) Mrs Smith's evidence of a dark coloured four wheel drive vehicle similar to a Pajero parked outside her house on the night of the offence with its engine running and headlights on;

(d) the evidence establishing that the appellant was in Toowoomba at the time of the offence; and

(e) the evidence that, when arrested, the appellant had an injury to his right hand which was at least 24 hours old and which was consistent with an injury caused by punching.

[23] Acting on the principles stated above, the primary judge was entitled to conclude that the similar fact evidence supported an inference that the appellant was "guilty of the offence charged, and [was] open to no other, innocent, explanation."[9] There was a sufficient connection between the similar fact evidence and the other evidence relied on by the prosecution and the similar fact evidence had sufficient probative force to warrant its admission.

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8 (2008) 235 CLR 334.

9 *HML v The Queen* (*Supra*), para [108].

The primary judge erred in failing to give a direction as to the weakness of the evidence identifying the underpants found in the possession of the appellant

[24] Counsel for the appellant submitted that the evidence identifying the underpants found in the possession of the appellant as garments owned by the complainant was weak. These points were made:

(a) Some of the answers given by the complainant and her daughter, Teresa, were equivocal as to whether or not the underpants were in fact the complainant's;

(b) Neither witness was shown the underpants;

(c) There was no evidence of the out of court identification made by the complainant of the underpants;

(d) Items of clothing of the complainant might have been kept in either a drawer or a suitcase. It is not unusual for items of clothing such as underpants to go missing; and

(e) The underpants were of a generic brand but no evidence was placed before the Court of the brand of the underpants shown in Exhibit 4 (a photograph of underpants) and Exhibit 22 (two pair of underpants).

[25] Reliance was placed on the following passage from the joint judgment in *Domican v The Queen*:[10]

> "The foregoing statements are applicable to all criminal cases including those where the prosecution relies on identification evidence as the whole or part of the proof of guilt of an offence. Nevertheless, the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that courts of criminal appeal and ultimate appellate courts have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue.
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> Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence." (Citations omitted)

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10 (1992) 173 CLR 555 at 561, 562.

[26] Reference was made to *R v Turner*[11] in which it was observed that in *R v Lowe*[12] it was held that there was no distinction in principle between visual, voice and object identification insofar as the warnings and directions regarded as appropriate in *Domican* were concerned.

[27] The relevant part of the summing-up is as follows:[13]

> "Now, the Crown also says that, during the attack, these panties, Exhibit 22, were stolen from [the complainant's] bedroom by the defendant. She said that when she returned to her house some weeks later, she couldn't find the panties which had been in a drawer in the bedroom. They were not at home, they were not in her bags and they were not at the houses of her two daughters. She agreed that they were an ordinary type, a very common brand and size, nothing distinctive about them, probably bought from Target or Kmart.
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> Now, she said when shown a photograph later, in hospital, Exhibit 4 - she was shown this photograph of the panties, Exhibit 22, in hospital, and she said that her panties matched the panties shown in that. As to whether they were her panties, she had to wait until she returned home, looked for them, see if she could find them. She said she looked for them but couldn't find them. So the Crown asked you to conclude that these Exhibit 22 panties, which are the same as the ones in the photograph, are her panties and were stolen from her bedroom by the attacker on the night she was attacked."

[28] The primary judge then dealt with the absence of relevant DNA on the underpants and at the conclusion of that discussion, said:[14]

> "So that is evidence which you can use to also connect the defendant with those panties. I mean, he was clearly connected with them by other evidence as well because he was trying to get rid of them later on. You have to be satisfied that these are [the complainant's] panties."

[29] Contrary to the appellant's counsel's submissions, the evidence established that the underwear shown to the complainant in Exhibit 4 were "Rio" brand.[15] There was evidence also that they were size 10-12, the size which the complainant wore.

[30] The direction made it plain that the complainant made no actual identification of the underpants found in the possession of the appellant, but had identified the ones in the photograph as similar to hers and that the evidence which strongly linked the underpants found in the possession of the appellant to the complainant was the absence of the two pair of underpants from the complainant's house. Added to that was the finding of the panties in the possession of the appellant no more than five days after the attack on the complainant and the appellant's efforts to get rid of them when apprehended. In these circumstances, the primary judge's directions were sufficient. It is relevant that there was no request for a redirection in this regard. Presumably, defence counsel considered the direction unobjectionable in light of his address on the identification problems.

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11 [2000] SASC 27 at [93].
12 (1997) 98 A Crim R 300.
13 Record, 319.
14 Record, 322.
15 Record, 250.

The primary judge erred in failing to direct on the similar fact evidence in terms of Benchbook Direction No. 50.2, namely:

> "If you do accept that evidence, it can still be of no use to you unless you can be satisfied that there is so strong a pattern, that the conduct on each occasion is so strikingly similar, that as a matter of common sense, and standing back, looking objectively at it, the only reasonable inference is that the same sequence of events occurred on this occasion. If you are not satisfied of that, you should put the evidence out of your mind. It would be entirely irrelevant to this case and it would be wrong to use it against the defendant."

[31] Defence counsel did not seek such a direction. It would have been inappropriate to do so. The primary judge had ruled in the course of the trial that the similar fact evidence was not admitted to show *modus operandi* but was relevant only to the identity of the offender. It was not contended by the prosecution that there was a similar pattern or sequence of events.

The primary judge erred in admitting into evidence the photoboard identification evidence

[32] Counsel for the appellant submitted that the photoboard identification evidence in which the complainant had said that she had written on the back of the photoboard, "A person similar to 2, 7 and 12" was of no probative value and inadmissible. That was because, it was said, the complainant did not actually identify the appellant. Reliance was placed on *Pitkin v The Queen*.[16] In *Pitkin*, the appellant was convicted on the basis of the evidence of a witness, who had seen the appellant, identifying three photographs of him with the observation, "This looks like the person". The Court held that such evidence was, of itself, insufficient to sustain the conviction as, prima facie, all that was being said was that the accused "looks like" the person who in fact committed the crime. *Pitkin* is not authority for the proposition that such evidence is inadmissible. As McHugh J said in *Festa v The Queen*:[17]

> "But the weakness of relevant evidence is not a ground for its exclusion. It is only when the probative value of evidence is outweighed by its prejudicial effect that the Crown can be deprived of the use of relevant but weak evidence. And evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial only when the jury are likely to give the evidence more weight than it deserves or when the nature of the content of the evidence may inflame the jury or divert the jurors from their task."

[33] Gleeson CJ in *Festa* also expressed similar views.[18] However, this point is substantially academic in nature, as there was no objection to the giving of the evidence and failure to object is readily explicable on the basis of a forensic decision made by the appellant's counsel. The evidence of identification was plainly weak and that could be pointed out to the defendant's advantage in address.

[34] The relevant part of the summing-up is as follows:[19]

> "Now, you have to be very careful of identification evidence because mistakes are made with identification of people and I'll give you

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16 (1995) 130 ALR 35.
17 (2001) 208 CLR 593.
18 *Festa v The Queen* (*Supra*), para 14.
19 Record, 323, 339-341.

some specific directions in relation to that later, but this photoboard identification is relied on only so far as it goes, namely, that [the complainant] said 'the person who I have a recollection of attacking me is two' - someone like, someone similar to two, seven or 12. Now, on the Crown case she got it right as far as seven is concerned because other evidence connects the defendant as the attacker. So this photoboard identification is part of the circumstantial evidence, and circumstantial evidence can support each part of it, so other evidence is relied upon as confirming that one of these three, namely, number 7 was the person that attacked her, but she said she can't be sure who it was or which one it was. All she could say was the person was similar to two, seven or 12, 'but I can't be sure. It could be two, seven or 12.' Now, as I said, also at the hospital she said her panties matched the ones shown in this photograph.

…

Now, I mentioned before the identification evidence of [the complainant] such as it was, and I should just tell you this, ladies and gentlemen: that there is a need for special caution before convicting in reliance on the correctness of identification evidence, but if it's supported by other evidence that may place it in a different and more reliable category. So this is in relation to the observations and recollection or images of [the complainant] of what her attacker looked like. See, honest witnesses can be mistaken and honest witnesses have in the past made mistakes in identification. Notorious miscarriages of justice have sometimes occurred in such situations. This is more in the case where identification is the sole evidence against a person. It may be commonsense. I imagine each of you at some stage - I know I have - has seen somebody in the street that you think was someone you know and you get closer and you say, 'Hang on, it's not the same person.' So you have to take into account the circumstances in which identification or visual impression was made, how long did the witness have the person under observation, at what distance, in what light, was their observation impeded in any way, what were the circumstances, had she ever seen the defendant before, if so how often, what time elapsed between when she was attacked and when she gave this description or identified the three people in the photographs. But her evidence while important in itself should not though be regarded by you in isolation from the other evidence relied upon as connecting the accused to these offences because the other evidence which tends to implicate him and which I've referred to may be highly relevant and may support the identification evidence and may itself justify a conviction while the evidence of identification alone would be insufficient. So if the only evidence in this case was that the attacker looked like one of these three men and there was no other evidence, well, that by itself, would not be enough to convict. But if that evidence is considered with all of the other evidence, it assumes a different characterisation because human observations in the first place and human recollection in the second are both fallible and observation and recollection of observation are two quite different considerations. The statement that 'that is the person I saw' can never

> be more than an expression of opinion, namely, 'I believe that is the person I saw,' so you must bear in mind those matters, ladies and gentlemen, when you are considering this identification evidence but, as I said, the evidence of the photoboard identification is not the only evidence in this case. In fact, the other evidence supports the photoboard identification because that included number 7, the defendant, but it is a matter for you, ladies and gentlemen, and you should also bear in mind that identification by photographs is not quite the same as identification in person because photographic representations can sometimes differ from the real thing."

[35] It is arguable that the primary judge overstated the evidentiary value of the photoboard evidence, particularly having regard to the complainant's oral evidence recounted earlier. However, it was abundantly clear to the jury from the directions and from the evidence, that the photoboard identification was very limited in its effect and that no identification sufficient to justify a guilty verdict was possible without the addition of circumstantial evidence. The primary judge's admonition that the photoboard identification was relied on "only so far as it goes, namely, that [the complainant] said, 'the person who I have a recollection of attacking me is two - someone like, someone similar to two, seven or 12'". His Honour also pointed out that the identification was part of the circumstantial evidence and could not be considered alone.

[36] It was submitted also that the primary judge erred in that, although he warned of the dangers of identification evidence, he failed to inform the jury that the subject evidence did not in fact make any identification of the appellant. As has been said already, there was evidence relevant to identification. It did not matter particularly how it was described, as long as the jury understood the evidence and the use to which it could be put. The jury was adequately apprised of the limitations of the identification evidence and were not misled.

The primary judge erred in directing the jury on the basis that evidence of the appellant's flight indicated a consciousness of guilt

[37] Counsel for the appellant submitted that the circumstances of the appellant's flight "were intractably neutral and should not have been the subject of any direction concerning flight". The substance of the submissions was as follows: the obvious explanation for the appellant's fleeing was that he was running from a house which he had entered illegally; competing explanations for his flight included embarrassment at having the underpants in his possession, or the fact that he had stolen them and other things from persons other than the complainant.

[38] Counsel for the respondent submitted that the existence of competing reasons for the appellant's attempt to evade arrest necessitated the giving of a direction, as failure to direct about flight would have given rise to a significant risk that the jury may have attributed the conduct too readily to an appreciation of guilt of rape, burglary and grievous bodily harm.

[39] The direction was conventional and merited, for the reasons advanced by the respondent's counsel. The direction guarded against such reasoning because it drew the attention of the jury to some other possible explanations. The direction contained the important direction that "standing by itself it can't prove guilt …".

[40] Another ground, namely that the primary judge erred in failing to give a "*Shepherd*" direction was abandoned.

Conclusion

[41] None of the grounds of appeal have been made out. I would order that the appeal be dismissed.

[42] **CHESTERMAN JA:** I agree that the appeal should be dismissed for the reasons given by Muir JA.