# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Janissen* [2013] QCA 279 |
| PARTIES: | **R**<br>**v**<br>**JANISSEN, Christopher**<br>(appellant) |
| FILE NO/S: | CA No 298 of 2012<br>DC No 981 of 2012 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 27 September 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 July 2013 |
| JUDGES: | Chief Justice and Holmes and Gotterson JJA<br>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 – OTHER CASES – where the appellant was convicted following a trial of four offences relating to entering a dwelling at night whilst in company and armed, and assaulting and robbing the occupants – where the appellant upon conviction was sentenced to a head sentence of eight years with a fixed parole eligibility date – where the trial judge admitted evidence of a taped prison conversation with the defendant referring to getting rid of "boxing gear" – where the occupants were robbed of a bag containing boxing gear – where the trial judge ruled that the recording was admissible and relevant despite its capacity to be prejudicial – where the appellant contended that the trial judge erred in making such ruling – whether the trial judge erred in admitting the taped prison conversation into evidence – whether the prejudice suffered by the appellant as a result of the evidence being deemed admissible outweighed its probative effect<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – OTHER |

MATTERS – where the appellant was identified by the two complainants in a photo board identification and by physical descriptions of the appellant given to police – where one of the appellant's co-offenders was known to one of the complainants – where that complainant searched the known co-offender's Facebook page for the appellant's photo prior to the photo board session but stated that she could not see the Facebook photo properly – where the trial judge gave directions to treat the evidence of identification 'with care' and encouraged the jury to be 'cautious' when considering it – where the appellant contends that the physical descriptions proffered by the complainants differed from the appearance of the appellant shown in the photo board photograph of him or as otherwise described in evidence – where reference was also made to evidence concerning the quality of lighting in the house – whether these factors diminished to any significant extent the cogency of the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where the trial judge in summing up directed the jury to treat the evidence of identification 'with care' and encouraged the jury to be 'cautious' – where the appellant contends that there should have been a warning as to regarding the dangers of convicting on identification evidence where its reliability was disputed – whether the trial judge erred in not giving such a warning

*Criminal Code* 1899 (Qld), s 339, s 409, s 411, s 419
*Evidence Act* 1977 (Qld), s 130

*Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13, applied
*Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72, cited
*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited
*Michaelides v The Queen* (2013) 87 ALJR 456; (2013) 296 ALR 1; [2013] HCA 9, cited
*Pitkin v The Queen* (1995) 69 ALJR 612; (1995) 130 ALR 35; [1995] HCA 30, cited
*R v Girardo & Michaelides* [2012] QCA 166, distinguished
*R v Murphy* [1995] QCA 568, cited
*SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: M J Foley, with R W Taylor, for the appellant
M R Byrne QC for the respondent

SOLICITORS: Michael Hefford Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree that the appeal should be dismissed, for those reasons.

[2] **HOLMES JA:** I agree with the reasons of Gotterson JA and the order he proposes.

[3] **GOTTERSON JA:** After a trial over four days in the District Court at Brisbane, Christopher Janissen ("the appellant") was convicted on 12 October 2012 of four offences. A co-accused, Rosario Amato, was charged with the same offences on the same indictment.

[4] The counts on which the appellant was convicted were all alleged to have been committed at Mitchelton on 3 February 2012. They are as follows:

1. Count 1: entering the dwelling of Luke John Phillips and Amy Leigh Mullaly with intent to commit an indictable offence therein in the aggravating circumstances that the entry was at night and by means of a break, and that the appellant used actual violence, was armed with dangerous weapons, was in company with another, and damaged property (*Criminal Code* (Qld) s 419);
2. Count 2: assaulting Phillips causing him bodily harm whilst armed with dangerous weapons and in company (*Criminal Code* (Qld) s 339(3));
3. Count 3: robbing Phillips whilst armed with dangerous weapons, namely, two shotguns and a pool cue, in company and using personal violence to him (*Criminal Code* (Qld) ss 409, 411(2));
4. Count 4: robbing Mullaly whilst armed with those dangerous weapons, in company and using personal violence to her (*Criminal Code* (Qld) ss 409, 411(2)).

[5] The appellant was sentenced to eight years imprisonment on each of counts 1, 3 and 4 and four years imprisonment on count 2. All sentences are concurrent but cumulative upon an existing sentence. A parole eligibility date of 21 April 2017 was fixed.

[6] The appellant filed a notice of appeal against conviction on all counts on 9 November 2012.

**Circumstances of the alleged offending**

[7] Phillips and Mullaly occupied a house at Mitchelton. Both gave evidence in the prosecution case. Phillips[1] said that about 9.30 pm on Friday, 3 February 2012, he was attracted to the front door by some noise. He opened the wooden door and saw two men of similar height, each armed with a shotgun which they were pointing towards the locked screen door. There was a third person behind them. Phillips recognised one of the armed men as a "Rosco" whom he had met once before. He did not know the other armed man.

[8] Phillips slammed the wooden door shut. He told Mullaly what had happened. They ran into the walk-in wardrobe in the main bedroom where they attempted to hide. They could hear the front door being kicked in. A little later, they could hear the wardrobe door being charged. After a threat, Phillips eased off the door and the intruders made their way through. Rosco hit Phillips on the nose with the back of a shotgun.

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[1] AB 33; Tr2-24 L45-AB 40; Tr1-31 L15.

[9] Rosco also took their mobile phones as they were attempting to ring 000. Phillips walked out of the wardrobe and was struck at least twice on the forehead with his pool cue. His skin was split and the wound bled. He dropped back onto the bed in shock and pain.

[10] Rosco asked Phillips for $40,000. At that point, only those two and Mullaly were in the bedroom. She was in a corner of it. After denying he had $40,000, Rosco accused him of lying and struck him a few more times in the rib area and on the legs.

[11] Phillips evidence was that at that point he saw "another bloke pop his head in around the corner of the bedroom door" for 30 to 45 seconds. This person was the other armed man. He said something and then disappeared. Mullaly was then taken from the bedroom. Rosco struck Phillips several times more with the pool cue asking for money.

[12] Eventually, the intruders left the house. Phillips saw the second armed man with a red and black Nike duffle bag that Phillips owned over his shoulder. He was walking towards the front door and then changed direction towards the garage. It was the same bag that Phillips used to store all his boxing and training gear. At the time it had a pair of black grappling gloves, some yellow and grey focus mitts, a skipping rope with red and black handles and a pair of black "Everlast" boxing gloves in it.

[13] Mullaly's[2] evidence corroborated that of Phillips with respect to events in the walk-in wardrobe. The second armed man was standing at the wardrobe door. He was pointing a gun towards her. He told her to leave the wardrobe. At that point she was crouching on the floor at the wardrobe door. She saw Phillips being assaulted with the pool cue. The second armed man left the bedroom and later returned after "probably only a couple of minutes". He left the bedroom and returned for a second time at which point he asked Mullaly where her purse was. She said it was in her handbag in the garage. She followed him down the hallway to the garage. Once there, he began asking her where Phillips' wallet was. She could hear the sound of hits in the bedroom and Phillips moaning. Then she noticed her handbag in the Nike duffle bag. She tried unsuccessfully to retrieve it. She opened the roller door in the garage so that all three intruders would leave through it.

[14] The prosecution case was that the appellant was the second armed man. The appellant, who did not give or call evidence at the trial, challenged the prosecution's identification evidence. That evidence included photo board identification of him as the offender concerned by each of Phillips and Mullaly. This and other identification evidence is elaborated in discussion of the grounds of appeal.

**Grounds of appeal**

[15] As amended in accordance with leave granted at the hearing, the grounds of appeal are as follows:

> "1. The verdict was unreasonable and cannot be supported having regard to the identification evidence and in particular:
>
> (a) discrepancies between the photo board identifications of the defendant (appellant) and the

[2] AB 109; Tr2-15 L35-AB 114; Tr2-20 L40.

witnesses' prior descriptions of the offender which included:

(i) scarring on the offender's face (not present on defendant (appellant));

(ii) the height of the offender (about six feet) but the defendant (appellant) is significantly shorter (167 centimetres);

(iii) no tattoo referred to in descriptions of offender but the defendant (appellant) has a prominent tattoo on his neck;

(iv) a cut under the left eye of the offender not present on the defendant (appellant).

(b) the evidence of lack of opportunity of an identifying witness to adequately view the offender as, after an initial fleeting glance, the witness had been struck in the face with a rifle and thereafter only observed the offender for twenty seconds in a poorly lit room, with a light source behind the offender and whilst being subject to continued beating with a pool cue by a co-accused;

(c) the inconsistency between the said witness's evidence of the room being 'pretty lit up' as 'the light was on' with evidence of another witness that 'the light did not work' and also with the police evidence that the light did not work and that the room had such poor lighting so as to require use of a torch for illumination;

(d) an attempt by the identifying witness (Mullaly) to identify the offender through *Facebook* with the attendant risk of a 'displacement' effect on the witnesses of photographs on a *Facebook* page (to use the terminology of Stephens J in *Alexander v The Queen* (1980-81) 145 CLR 395 at 409);

(e) the close personal relationship between the two identifying witnesses and the attendant danger of contamination or reinforcement of evidence;

(f) the use of a photo board rather than an identification parade; and

(g) the unusually quick identification by the identifying witnesses of the defendant (appellant) in the photo board identification process.

2. The learned trial judge failed to give the jury a sufficient warning of the special need for caution in acting on the identification evidence herein having regard to the specific dangers in the Crown case and as identified in the preceding paragraph 1 (a) - (g) hereof.

3. The learned trial judge wrongly admitted into evidence an irrelevant and inadmissible taped prison conversation with the defendant (appellant) referring possibly to getting rid of 'boxing gear' on the misconceived basis that it could amount to an admission of attempting to secrete the proceeds of robbery.

4. In the alternative the said evidence of a taped prison conversation with the defendant (appellant) was wrongly admitted into evidence when its prejudicial effect outweighed its probative value."

[16] With reference to ground 1, it need be borne in mind that the question which arises where a verdict is challenged as unsafe or unsatisfactory is whether the appellate court thinks that upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[3] As Mason CJ, Deane, Dawson and Toohey JJ observed in *M*:

> "The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'."[4]

[17] Although ground 1 is referenced to the identification evidence only, the enquiry that it requires be undertaken extends to all of the evidence before the jury. That evidence would include the conversation evidence the subject of grounds 3 and 4 provided that it had been properly admitted. Since those two grounds challenge the admission of the conversation into evidence, it is appropriate that they be considered first.

**Ground 3**

[18] On the first day of the trial, the learned trial judge ruled admissible certain parts of a telephone conversation which had taken place between the appellant and a Megan McInnes. The phone call occurred at 11.31 am on 13 February 2012 and at a time when the appellant was in custody at a prison and she was at an unknown location outside the prison.[5] The telephone call was recorded. A version of the recording was prepared in accordance with the ruling. Certain irrelevant and prejudicial matter as agreed by counsel was edited from it. The edited version was played to the jury[6] and then tendered.[7] The identity of Ms McInnes was not revealed to the jury.

[19] The ruling arose out of the appellant's objection to the admission of the telephone conversation and followed upon argument on a voir dire on the issue. The prosecution sought to tender the conversation on the basis that statements made by the appellant in it were admissions of possession on his part of the boxing gear that had been taken from the house in the duffle bag.

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3 *M v The Queen* (1994) 181 CLR 487, per Mason CJ, Deane, Dawson and Toohey JJ at 493, Gaudron J concurring at 508; *SKA v The Queen* [2011] HCA 13, (2011) 243 CLR 400, per French CJ, Gummow and Kiefel JJ at [11]; and *Michaelides v The Queen* [2013] HCA 9 at [3], [4].

4 At 492-493 (footnotes omitted).

5 AB 242; Tr3-30 LL2-5.

6 AB 240; Tr3-28 L15.

7 Ibid L25; exhibit 9.

[20] Reliance was placed on the following two exchanges during the telephone conversation:

> "MCINNES: Yeah Well I still got um your boxing gear
>
> JANISSEN: Yeah yeah yeah yeah yeah fucken um that's what I wanted to talk to you about fucken getting rid of the shit
>
> MCINNES: Yep
>
> JANISSEN: Yeah so um., is there any chance you or Levi could book in a visit? Or probably you'd be better cos um you'd be able to visit me a lot quicker.
>
> MCINNES: Yep
>
> JANISSEN: And um there's a few messages I want to pass on to Levi as well,
>
> MCINNES: Yep ('the first exchange')
>
> …[8]
>
> JANISSEN: Yeah but fucken yeah they haven't got much but yeah like I said can't really say much till I see you in person
>
> MCINNES: Yeah
>
> JANISSEN: But thanks heaps man, I appreciate, you're a good friend um
>
> MCINNES: That's alright
>
> JANISSEN: Write me a letter and send the address of your new place I wont give it anyone, ill just keep it myself
>
> MCINNES: Yeah no problem
>
> JANISSEN: And um yeah I need to get that um shit picked up
>
> MCINNES: Yep
>
> JANISSEN: And dropped off somewhere so
>
> MCINNES: Well its out of the house but (indistinct)
>
> JANISSEN: Yeah no that's alright yeah as long as it's fucken yeah. I just don't want it in your or Levi's possession
>
> MCINNES: Yeah."[9] ("the second exchange")

[21] On the voir dire and on appeal, the appellant submitted that the admission on his part for which the prosecution contended was one of inference dependant upon two assumptions, firstly, that the words "getting rid of the shit" was a reference to boxing gear and, secondly, that the boxing gear to which reference was made was Phillips' boxing gear taken during the armed robbery. The appellant's submission

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8 AB 339.
9 AB 343.

noted that during the whole conversation, the appellant used the word "shit" on four different occasions, sometimes with different meanings, one of which was a reference to the predicament to which his own son might be exposed through his arrest.

[22] On the voir dire the learned trial judge listened to a recording of the whole of the telephone conversation and was provided with a transcript of it.[10] In ruling in favour of admission, his Honour said:

> "I do think that the recording is admissible in - certain parts of it and it'll take a lot of editing because there's a lot of material that's not relevant and quite prejudicial unless there are some reasons why the defence wants it played, but I understand it this way; that the way to understand this evidence is it's a conversation in which the defendant acknowledges possession of something that he needs to get rid of that's opened by the female caller who talks about his 'boxing gear.' There's evidence that boxing gear or what somebody might think is boxing gear was taken from the home that was burgled the subject of the offence - of the charge, I mean. And so it's open to the jury to infer that it's an admission of recently stolen property from the particular offence and so that's a circumstantial fact the jury might take into account.
>
> It might well be open to other inferences or explanations and the jury has to be directed that it's only if they're satisfied that it is demonstrative of consciousness of possession of recently stolen property from this burglary that it's of any value. I think it is admissible and relevant and even though I appreciate that there can be some difficulties for a defendant trying to give an explanation consistent with innocence of this charge of which might be in other ways prejudicial.
>
> I mean, I think that's – that's not a sufficient reason to exclude the evidence which I otherwise find to be relevant and admissible."[11]

[23] In my view, it was clearly open to the jury to link the phrase "getting rid of the shit" in the first exchange to the boxing gear which McInnes described as the appellant's. That phrase follows as part of his immediate response to her observation that she still has his boxing gear. The context in which the word "shit" is used in the second exchange indicates that what was referred to was something physical and moveable and not, for example, a state of affairs. That the word was used later in the conversation with different meanings does not confer ambiguity on the meaning it apparently has in the first exchange. Further, other evidence that the jury would hear would link the second armed man to the boxing gear which was taken. As noted, the evidence of Phillips was that it was that man who had the duffle bag over his shoulder.

[24] The two assumptions identified by the appellant are ones which it was open to the jury to make. Moreover, the justification for drawing an inference of admission on his part was enhanced by two other aspects. The urgency with which the appellant discussed the "shit" evident in the first exchange and the appellant's wish that the "shit" not be in McInnes' physical possession evident in the second exchange support an inference that his possession and control over it was illegitimate.

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10 Exhibit MFI "A".

11 AB 24; Tr1-15 L5-AB 25; Tr1-16 L3.

[25] This ground of appeal cannot succeed.

**Ground 4**

[26] This ground of appeal contends that even if ground 3 is not made out, the evidence of the telephone conversation should not have been admitted in exercise of the general law unfairness discretion to exclude evidence which is confirmed by s 130 of the *Evidence Act* 1977. In written submissions, the appellant relied on only one circumstance of prejudice to advance this ground. The ground was not developed further or supplemented with any other circumstance during the course of oral argument of the appeal.

[27] The circumstance relied upon is this: in the course of the voir dire, the appellant's counsel submitted that it would be unfair to the appellant to tender the conversation because he would be forced to make a choice between two options, either one of which could impact prejudicially upon his defence. The appellant could volunteer an "innocent explanation" which identified the "shit" as other property which he possessed illegitimately, or to avoid that outcome, he could claim privilege against self-incrimination in cross-examination which could also have an adverse impact. Fairness required, it was submitted, that the appellant not be placed in a position of having to make that choice.

[28] His Honour acknowledged this difficulty for the appellant in his ruling. He concluded that the matter could be dealt with by directions to the jury that the appellant's statements were relevant only if it was satisfied that they were demonstrative of consciousness of possession of property which had been stolen in this burglary.

[29] In the course of summing up, his Honour carefully and extensively gave the directions that he had foreshadowed. They were in the following terms:

> "I want to talk to you now about the evidence of the phone call. The prosecution relies on the phone call that you recently heard as evidence that Janissen is conscious that he at the time of talking was in possession of certain property that was taken from Phillips, namely, the boxing gear. That's what that comes down to. That's how it's been relied on. There is Phillips' evidence of certain items that a person might refer to as boxing gear, the various mitts and gloves and skipping rope. The prosecution asks you to infer that that is what the defendant is talking about on the phone, or more to the point that is what the female caller asks him about.
>
> Whether you draw that inference is a matter for you. You've heard arguments about both sides as to whether you should. This is not a direct admission of guilt. It's not something that can support a finding of guilt on its own. You must be really careful using this piece of evidence. If you are satisfied the defendant was in effect admitting that he was in possession or control of items taken from Phillips, the prosecution argument is you may use that evidence along with the other evidence to support the prosecution case that Janissen was involved in the incident as the second person. Unless you are satisfied that Janissen is effectively making that admission - that is, he is in possession of items he knows are stolen from Phillips - unless you are satisfied he's actually making that admission you

> should just ignore this piece of evidence because unless he's making some admission of being in possession of items that he knows are stolen from that event, then the phone call's irrelevant.
>
> Even if you are satisfied that Janissen is effectively saying that, it's then for you to decide whether that actually assists the prosecution in the proof of a case against Janissen. That is, it's for you to decide whether an admission of possession of property taken from Phillips leads, with all the other evidence, to the conclusion that he was the second person in the house. In other words, even if you are satisfied that Janissen's on the phone talking about property that he knows was stolen from that house on that night, that's not the end of it. That's not an admission of guilt. That's not evidence necessarily that he was there. That requires you to make further inferences."[12]

No redirection was sought.

[30] Clearly his Honour took into account the one circumstance on which the appellant now relies. That being so, conformably with the principles in *House v The King*,[13] this Court might intervene only if that circumstance so overwhelms all other relevant circumstances and considerations as to compel the discretion to be exercised against admission of this evidence.

[31] To my mind, the discretion was soundly exercised here. This evidence was of significant probative value for the prosecution case. The directions given catered for any risk of misuse by the jury. Furthermore, in cross-examination of both Phillips and an investigating police officer,[14] the appellant's counsel exposed that the prosecution case had not conclusively proved that the boxing gear to which the appellant was referring did belong to Phillips.

[32] Accordingly, this ground of appeal must also fail.

**Ground 1**

[33] As the particulars of this ground reveal, the appellant's criticism of the sufficiency of the identification evidence to found the verdict on all counts is at two levels: the photo board identification of him by both Phillips and Mullaly, and the physical descriptions of the second armed man given by them.

[34] **Photo board identification**: Both Phillips and Mullaly attended photo board identification sessions on 5 February 2012. They were shown different photo boards which were tendered.[15]

[35] Each photo board had a photograph of the appellant on it but not in the same position.[16] Each witness identified the appellant as the second armed man.

[36] The appellant submitted that there were "great objections" to photo board identification. Reference was made to the dangers of the "displacement effect" and the "rogues gallery effect" which Gleeson CJ noted in *Festa v The Queen*[17] are

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12 AB 285; Tr4-29 L29-AB 286; Tr4-30 L55.
13 (1936) 55 CLR 499, per Dixon, Evatt and McTiernan JJ at 504-5.
14 AB 56; Tr1-47 L55-AB 242; Tr3-30 LL10-25.
15 Exhibit 3B (Phillips) AB 195; Tr2-101 LL30-40; Exhibit 6 (Mullaly) AB 194; Tr2-100 LL10-40.
16 Phillips – No 7: Mullaly – No 10.
17 (2001) 208 CLR 593 at 602-3.

inherent in selection from a group of photographs. No attempt was made to avoid those risks by use of an identification parade, it was said.

[37] The appellant's counsel have refrained from submitting that the photo board identification was inadmissible. They did so in frank acknowledgement that for at least 20 years, courts in Australia have recognised that the use of photographs of suspects by law enforcement agencies for the purpose of indentifying an offender is a necessary and justifiable step in the course of efficient criminal investigation, albeit one that is attended with some danger of consequential and unfair prejudice to an accused.[18]

[38] Particular emphasis was placed by the appellant on the displacement effect in the case of Mullaly. It was submitted that the suggestibility inherent in it was palpable in her case having regard to adventure on her part within two days of the intrusion. She testified that on the following Sunday (and before the photo board session) she visited Rosco's Facebook page where she saw pictures. Her evidence-in-chief was as follows:

> "(PROSECUTOR): What did you do next? What did you do online?-- I picked out who I believe could have possibly been the blond guy who I know as the second guy.
> Yes?-- And the third guy.
> Okay?-- I couldn't see the photo properly so I - you know, I'm - to say that that is the second guy, I can't, like, to not even be able to see the photo properly."[19]

[39] During her cross-examination, the following exchanges occurred:

> "HIS HONOUR: My note of the evidence-in-chief is that the witness typed in Rossco and my only other note is 'Picked out a guy who could be the blonde guy and the third guy' and then 'couldn't see the photo properly'.
> MR TAYLOR: You found a photograph on Facebook?-- Yes.
> That looked like, what, is it either the blonde guy or the third guy or did you find a photograph for both of them?—I found a photograph who I believed to be the third guy.
> The third guy?-- Yes, but I couldn't be certain. He was wearing a hoodie.
> It wasn't the second guy that you found a photograph about?-- There was another guy in that same photo but I couldn't see his face properly to be able to identify him as the second guy.
> No. So it was - there was someone there but you couldn't even make out his features?-- Yes."[20]

[40] Thus, on Mullaly's account, if there had been a photograph of the appellant on the Facebook page and she saw it, the photograph was not one that she could see clearly. In her own words, whatever she saw was insufficient to identify him as the second armed man. Evidently, the clear photo board photograph of the appellant was different from the photograph that she saw on Facebook. In these circumstances whilst there was a risk of error associated with displacement, it was not a risk markedly above the ordinary.

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18 *Pitkin v The Queen* (1995) 130 ALR 35 per Deane, Toohey and McHugh JJ at 38; *R v Murphy* [1995] QCA 568 per Thomas J at pp 7-8 (McPherson and Pincus JJA concurring).

19 AB 118; Tr2-24 LL38-47.

20 AB 146; Tr2-52 LL 19-29. This accords with Senior Constable Keep's evidence of what Mullaly said at the photo board session: AB 200; Tr2-105 L38-AB 201; Tr2-106 L15.

[41] No objection was taken to the admission of the photo board evidence at the trial. The independent identification of the appellant as the second armed man was of substantial probative value to the prosecution case. Phillips identified him readily, stating in cross-examination that it was not "a face I'd forget".[21] There is no basis in the evidence for any justified suspicion that his readiness in identifying the appellant was due to undue haste or casualness on his part.

[42] It is appropriate to observe at this point that the jury had before it two pieces of evidence which cogently identified the appellant as the second armed offender. They were the photo board evidence and the admission in his telephone call from the prison. In my view, those pieces of evidence together provided a sound basis on which a properly directed jury could have been satisfied beyond reasonable doubt of the appellant's guilt. The directions that were given with respect to the identity evidence are reviewed in the analysis of ground 2.

[43] **Physical description evidence**: The appellant has catalogued a number of instances where descriptions of the second armed man given by Phillips and Mullaly differ from the appearance of the appellant as shown in the photo board photograph of him or as otherwise described in evidence. Reference was also made to evidence concerning the quality of the lighting particularly at the front door and within the main bedroom at the house.

[44] Having considered those matters, I am unpersuaded that they diminished to any significant extent the cogency of the evidence to which I have referred in paragraph [40] of these reasons or undermined the basis it provided for the jury to be satisfied beyond reasonable doubt of the appellant's guilt. I say this for the following reasons:

[45] There was evidence from a police officer who is 169 centimetres tall that the appellant is about the same height as him.[22] Mullaly, who is 162 centimetres tall, gave evidence that the second armed man would have been a few centimetres taller than her.[23] She said that that offender and Rosco were about the same height[24] but acknowledged in cross-examination that had one of them been 11 centimetres taller than the other, she would have noticed such a height difference.[25]

[46] Phillips also testified that they were about the same height but in cross-examination he put their heights at about six feet.[26] Each witness had, at best, limited opportunity to study their heights for any length of time. Phillips saw them side by side for about five seconds.[27] Mullaly said that she was focussing on the weapons they were carrying and not their heights.[28] Neither witness had cause to make a considered assessment of the height of the second armed man. They were left with impressions of it gained in a dynamic situation. The jury may well have considered that the impressions gained in such circumstances were not reliable comparators with the appellant's true height such as to raise doubt, particularly with

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21 AB 79; Tr1-70 LL45-47.

22 AB 222; Tr3-10 LL1-10. The appellant's written submissions state that he is, in fact, 167 centimetres tall: paragraph 11.

23 AB 117; Tr2-23 LL1-10.

24 Ibid LL25-27.

25 AB 124; Tr2-30 LL30-40.

26 AB 61; Tr1-52 LL30-55.

27 Ibid L42.

28 AB 124; Tr2-30 LL38-40, AB 134; Tr 2-40 LL55-56.

respect to their photo board identification of the appellant. In any event, if the appellant's true height is 167 centimetres (as his written submissions suggest), then Mullaly's impression of the height of the second armed man being a few centimetres more than 162 centimetres would be quite accurate.

[47] The photo board photograph of the appellant depicts a bluish ink tattoo on the left front of his neck running almost the length of it. Neither Phillips nor Mullaly recalled seeing a tattoo on the second armed man's neck. In cross-examination, Phillips gave the following evidence:

> "(DEFENCE COUNSEL): You didn't see any tattoos on his neck, did you?-- I didn't pay that much attention to tattoos. I didn't - no, I did not see a tattoo on his neck.
> You were in a position to have seen a tattoo on his neck had there been one there?-- Yes.
> But you don't recall ever seeing a tattoo on his neck?-- No."[29]

Mullaly's evidence in cross-examination was:

> "(DEFENCE COUNSEL): I'll move on. Right? You didn't see a tattoo on his neck, did you?-- No.
> You saw a mark on his head?-- Yes.
> But you didn't see a tattoo on his neck?-- No.
> There was no tattoo on his neck, was there?-- I don't know."[30]

By their responses, both witnesses indicated that they did not look out for any neck tattoo marks. Had the second armed man been the appellant, whether his tattoo would have been seen by casual observance of his facial area would have been influenced by factors such as the visibility of the tattoo, its colouration in artificial light, and any shadow effect, none of which were the subject of oral evidence. That neither witness observed a tattoo did not compel the jury in the circumstances to have a reasonable doubt about their identification of the appellant having regard to the totality of the identification evidence.[31]

[48] Phillips informed police on the evening of the intrusion that the second armed man had a three or four blade haircut[32] and that he had what looked like acne-type scarring on his cheeks that could have been from drugs.[33] Mullaly described the man as almost bald with a fair hairline showing. He had what she told police were "junkie-looking" scars on his face.[34] The photo board of the appellant was taken after his arrest during the afternoon of the 5 February 2012. It depicts him with a shaved head. There is no evident scarring on his cheek area. In the absence of evidence as to the true nature of the scarring it was open to the jury to have been satisfied that the passage of time between the intrusion and the appellant's having been photographed accounted for the difference in facial appearance in this respect. Likewise for the difference in hair length, given the opportunity that the appellant had had in the interim to shave his head. In this context, it may be noted that Phillips described the second armed man as having a cut underneath his left eye "like a scar" or "scratch".[35] Also, both he and Mullaly recalled a mark to his upper

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29 AB 101; Tr2-7 LL48-55.
30 AB 150; Tr 2-56 LL29-36.
31 Compare: *R v Girado & Michaelides* [2012] QCA 166 at [34].
32 AB 75; Tr 1-66 LL45-50.
33 AB 76; Tr 1-67 LL29-51.
34 AB 116; Tr 2-22 LL47-57, AB 147; Tr 2-53 L30-AB148; Tr 2-54 L52.
35 AB 79; Tr 1-70 LL1-15.

right forehead.[36] The photo board photograph depicts facial markings consistent with a healing cut or graze on the right upper forehead and a mark under the left eye.

[49] Phillips described the lighting at the front door as "a little dim but you could see clearly".[37] The light in the main bedroom was not working; however, that room was lit by the light in the ensuite,[38] to such a degree that he described the bedroom as "pretty lit up".[39] The lighting in the garage was "good".[40] Each witness had opportunities to view the face of the second armed man in lit circumstances – for Phillips, at the front door and in the main bedroom; and for Mullaly, in the main bedroom and in the garage. It was open to the jury to have been satisfied that each had been able to view his face sufficiently for the purposes of identification, particularly by means of the photo board process.

[50] For these reasons, I consider that ground 1 cannot succeed.

**Ground 2**

[51] In *Domican v The Queen*,[41] Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ observed:

> "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."[42]

[52] These observations had obvious applicability to this case. The learned trial judge directed the jury with respect to the issue of identification during the course of the summing up.[43] He told them that "the evidence of identification by the two complainant witnesses is really fundamental to the prosecution case".[44]

[53] The appellant has acknowledged in written submissions, that, in accordance with *Domican*, his Honour isolated, and summed up upon, numerous matters including

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36 AB 78; Tr 1-69 LL29-32; AB 148; Tr 2-54 LL51-53.
37 AB 33; Tr 2-25 L1.
38 AB 132; Tr 2-38 LL1-12.
39 AB 38; Tr 1-29 LL5-8.
40 AB 130; Tr 2-36 L54.
41 (1992) 173 CLR 555.
42 At 561-562 (footnotes omitted).
43 AB 275; Tr 4-19 L30-AB 285; Tr 4-29 L25.
44 AB 276; Tr 4-20 LL51-53.

lighting, vantage points, opportunity to view the second armed man, inconsistencies between the descriptions given by Phillips and Mullaly and photo board photograph of the appellant particularly with respect to scarring, the descriptions of the second armed man's height and hair length, and his unnoticed neck tattoo. No complaint is made about the accuracy of the directions on these matters or their balance in terms of highlighting difficulties in the evidence.

[54] The appellant's criticism of the directions on identification is centred upon the photo board identification of the appellant by Mullaly against the background of her having accessed the Facebook page. The direction that his Honour gave whilst summing up was this:

> "…there are two other features that you are asked to consider. One is whether having opened Facebook Ms Mullaly must have seen an image of Janissen and so it prompted her to pick him out in the [photo board] from an image she saw on Facebook rather than from her memory of the offender, and there was one other feature that I must warn you about. The evidence is clear that the photograph, Exhibit 7, was taken after Mr Janissen was apprehended and you'll be satisfied, I think, that it's a part of that photograph that's been put into the gallery of 12. It's a pretty unhappy gallery of people to be put next to and the police obviously had the photographs of these other people, all right? But it's clear that the photograph they have of Janissen is the one they took when they apprehended him. You don't draw any inference against a person because his face appears in a gallery of 12 like that and you must guard against that prejudice."[45]

[55] In terms of displacement, the learned trial judge later told the jury:

> "…There was a notation on the wall of the Facebook that Janissen had become a friend on the 18th of January, I think it was, so you have to be aware of the danger that she saw Janissen on the Facebook page and displaced his face for the six foot scarred faced person that was apparently the offender and she picked out the Facebook page picture from the gallery of 12."[46]

[56] After the jury had retired, they requested clarification of the concept of displacement. They were recalled and his Honour gave the following further directions:

> "I will talk about displacement first. The question precisely is could I explain the term 'displacement' with respect to its use in the Criminal Code. It isn't in the Criminal Code, it is not a term of art in criminal law. There's no section of the Criminal Code that talks about displacement.
>
> As I understand the term that it was being used - as to how it was being used today, it was simply an argument based on the phenomenon - a suggested phenomenon that a person who sees an image might replace or displace the image of the person who committed an offence with the image seen later, so that by the time the person is shown the line-up, the photo line-up, there's a danger that the person they choose in the line-up is the one they've seen

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45 AB 284; Tr 4-28 L51-AB 285; Tr 4-29 L26.

46 AB 291; Tr 4-35 L49-AB 292; Tr 4-36 L2.

> more recently in a photo, not the one they saw committing the offence earlier in time. That's all I understand this term to mean.
>
> So there was an argument that because Mullaly had gone on Facebook and looked at Amato's Facebook page, and there was evidence from the police that on that Facebook page was a notation that Janissen had become a friend of Mullaly – of Amato - how many times have I said that - of Amato, there was the danger that there was an image of Janissen on the Facebook page and so there was a danger that when she looked at the photos at the police station she was recognising not the offender but the person she had seen on the Facebook page.
>
> I can't do any better than that because it's not a legal term that I can define for you but if that's not good enough ask me another question about it and I'll try. All right."[47]

[57] The appellant's trial counsel raised an issue with respect to this redirection which his Honour addressed, to counsel's apparent satisfaction, by a further redirection as follows:

> "Members of the jury, sorry to interrupt your deliberations but it was brought to my attention after I finished talking to you before that when I was talking to you about displacement I used the phrasing that it's not a legal term but it's a suggested phenomenon which occurred in this case on the defence case. I didn't mean by that to - what I meant by that is that it's a phenomenon which in this case the defence asks you to consider as something occurred. I didn't mean by saying a 'suggested phenomenon' that it might not be a real thing. Okay.
>
> So if I should rephrase that and make it clearer I might say that displacement is not a legal construct but it's recognised phenomenon which the defence asks you to consider as possibly having occurred in this case for all of the reasons that I've recently gone through with you, and, on the other hand, the prosecution says there's no basis for you concerning yourself with. All right. Thank you. I ask you again to retire."[48]

The summing up and redirections were all given on the same day.

[58] The appellant submits that the redirections "fell far short of warning the jury of the dangers of a displacement effect". That submission cannot be sustained. In addition to accurately describing the displacement effect in detail, his Honour referred to "danger" inherent in it in two dimensions: danger that there was an image of the appellant on the Facebook page and danger that when Mullaly looked at the photo board, she was not recognising the second armed man but the image she had seen on Facebook. Arguably these specific directions favoured the appellant in that the jury was not at that point reminded that Mullaly's evidence was that she had not been able to see the Facebook image clearly.

[59] In their totality, the directions on the identification issue were appropriately comprehensive. This ground of appeal is without substance and must be rejected.

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47 AB 302; Tr 4-46 :L26-AB 303; Tr 4-47 L24.

48 AB312; Tr 4-56 L55-AB 313; Tr 4-57 L30.

**Disposition**

[60] All grounds of appeal having failed, the appeal must be dismissed.

**Order**

[61] I would propose the following order:

1. Appeal dismissed.