IN THE COURT OF APPEAL [1999] QCA 140

SUPREME COURT OF QUEENSLAND

C.A. No. 364 of 1998

Brisbane

[R v Fox]

THE QUEEN

v

WILLIAM KELVIN FOX

(Applicant) Appellant

McMurdo P

Pincus JA

Shepherdson J

Judgment delivered 23 April 1999

Separate reasons for judgment of each member of the Court, each concurring as to the orders made.

THE APPEAL AGAINST CONVICTION IS DISMISSED.
THE APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE IS GRANTED AND THE APPEAL ALLOWED TO THE LIMITED EXTENT OF

ADDING TO THE ORDERS MADE BELOW THE FOLLOWING DECLARATION:
IT IS DECLARED THAT THE COURT'S RECOMMENDATION THAT THE APPLICANT NOT BE CONSIDERED FOR PAROLE UNTIL THE AUTHORITIES ARE AS CONFIDENT AS HUMANLY POSSIBLE THAT THE APPLICANT IS NO LONGER A RISK TO THE COMMUNITY FORMS NO PART OF THE SENTENCE OR JUDGMENT OF THE COURT.
OTHERWISE, THE SENTENCE IMPOSED BELOW IS CONFIRMED.

CATCHWORDS: **CRIMINAL LAW - APPEAL AGAINST CONVICTION - attempted murder - entry into dwelling house at night with intent to commit indictable offence - whether judge misdirected jury on complainant's identification - whether *Domican* direction should have been given - whether jury should have been directed that prior inconsistent statement of appellant should have been evidence of truth according to s101 *Evidence Act* 1977 - whether trial judge erred in allowing prejudicial and inflammatory propensity evidence - whether miscarriage of justice**

CRIMINAL LAW - APPEAL AGAINST SENTENCE - whether trial judge erred in making recommendation that appellant not be released until "as satisfied as humanly possible" that no longer threat to community - purpose of O VIII r 3 calendar - whether legitimate indefinite sentence - whether days served in pre-custody properly accounted for.

***Domican v R* (1992) 173 CLR 555**
***R v Chapman* CA No 65 of 1993, 9 June 1993**
***R v Condren* (1990) 49 ACrimR 79**
***R v Jones* CA No 63 of 1997, 27 May 1997**
***R v Pfennig* (1995) 182 CLR 461**
***R v Skedgwell* CA No 434 of 1997, 27 March 1998**
***R v Turnbull* [1977] QB 224**
***R v Wood* CA No 429 of 1994, 14 December 1994**

***Evidence Act* 1977 ss18, 101**
***Criminal Practice Rules* 1900, O VIII r 3**
***Penalties and Sentences Act* 1992 ss157, 158, 161, 163(3)**

Counsel: Mr P Callaghan for the applicant/appellant.
Mr D Bullock for the respondent.

Solicitors: Legal Aid Queensland for the applicant/appellant.
Director of Public Prosecutions (Queensland) for the respondent.

Hearing Date: 2 March 1999

REASONS FOR JUDGMENT - McMURDO P

Judgment delivered 23 April 1999

1 The appellant was convicted in the Supreme Court at Brisbane on 14 September 1998 of attempted murder of Barbara Hellwich and entering her dwelling house at night-time with intent to commit an indictable offence. He was sentenced to life imprisonment and 5 years imprisonment respectively. The offences were committed on 22 April 1992.

The facts

2 The appellant had a de facto relationship with Colleen King for 10 years from 1982. They maintained separate, adjoining rural residences at Glenwood, between Maryborough and Gympie. A son was born of the relationship and a custody dispute arose when the relationship ended in early 1992.

3 Barbara Hellwich and the appellant had known each other for about 6 years prior to April 1992. When Hellwich's son was born in 1990 she was deserted by the father, King's brother, and she stayed with King for about five months. Hellwich and Peter Fox, who was 14 in 1992, had had a relationship, but Hellwich claimed privilege when asked about it.

4 In 1992, King left Queensland with her son, and the appellant attempted to trace her. He pestered Hellwich about King's whereabouts. Hellwich and King went to a women's shelter, and Hellwich returned to her caravan on the Gold Coast about 2 weeks before the offence. On 22 April 1992 King visited Hellwich and they were drinking together in Hellwich's caravan. Hellwich's two year old son was asleep. At about 3.30 a.m., Hellwich said she was going to go to bed. King went to the toilet and when she returned touched Hellwich on the knee and said, "Bill." Hellwich was sitting in the lounge

area and the lights were on. Hellwich said she turned and saw the appellant, with a long rifle with a wooden stock, standing next to King. He had a moustache and full beard and was wearing nothing on his head. Hellwich said, "Oh shit." He shot her in the face before she had properly risen from her seat. She covered her face, turned and fell to the floor on her knees. Her son ran in crying, and Hellwich called him to her and held him. She felt the gun against the back of her head and she was shot for a second time, her head jolting forward. She felt extreme pain and begged him not to shoot her son. She could see his leg to her right, then the gun was placed under her right arm and she was shot a third time, feeling great pain then losing consciousness.

5 When she revived, the appellant and King were gone and her son was still in her arms. She eventually managed to call 000 and get assistance. She did not name or describe her attacker in the phone call. Hellwich told police that the appellant was her attacker.

6 In hospital, she was interviewed by two police officers in a tape-recorded interview. The tape had been lost, but the transcript of the taped interview, which had not been verified against the tape, but which the police officer involved believed was accurate, recorded her as saying when describing the weapon:

> HELLWICH: "Lightish, not light brown but sort of, you know, when you dabble wood."
> Q: Alright, yes?"
> HELLWICH: "That sort of colour."
> Q: Right. Did anything else stand out on it at all?"
> HELLWICH: No. It ... I didn't even see his face, all I saw was the gun."
> Q: "Alright, but how did you know it was him then?"
> HELLWICH: "Well, I did see his -- "
> Q: "Right, yeah."
> HELLWICH: "But you know that is what really attracted me, attracted my attention... It was him, I know it was him."
> Q: "Do you know what he was wearing?"
> HELLWICH: "No, it just happened real quick."

7 She had no recollection of telling police that she did not see the assailant, emphasising her physical and mental state and her medication. The conversation with Hellwich was often interrupted by hospital staff. At committal Hellwich said her attacker was wearing gloves but at trial she said she was mistaken and he was not wearing gloves. At trial, she was adamant she saw her attacker's face and that she recognised the appellant. Hellwich described the extent of her opportunity to observe her assailant as a "quick glimpse", demonstrating this to the court. Nowhere in the record is there any description of that demonstration.

8 Hellwich suffered a bullet wound to the face, left of the nose, which penetrated the nasal cavity and lodged in front of the spine below the base of the skull; another bullet fragment is lodged close to the spinal column. The third bullet entered the right back, fractured a rib, passed through the right lung, diaphragm and liver and was embedded in the left chest wall.

9 The cartridges found on the caravan floor were fired from the same .22 rifle.

10 The appellant's son, Peter Fox, gave evidence. On a date he believed was 21 April 1992, he and the appellant drove from Gunalda to near the caravan park at the Gold Coast where Hellwich lived. They sat and watched the caravan park. The appellant disappeared for a few hours, and returned after dark. He told Peter that he had listened at the window of the caravan to King and Hellwich and that they were drinking. After seeing his father leave again, Peter returned to the car and fell asleep. When the appellant next returned he was carrying a .22 bolt action rifle and said "I've shot Barsha." 'Barsha' was a diminutive for Barbara Hellwich.

11 The appellant put the rifle behind the driver's seat and he and Peter drove back to

Gunulda via a circuitous route. They slept in the car at the back of their property and evaded police. After some moving around and "going bush", the appellant built an underground bunker with a shed on top of it and they lived there for a year and a half. Peter asked his father to hand himself in, but without success.

12 At one time, the appellant asked Peter to falsely confess to shooting Hellwich but he refused. His father asked him to go to a solicitor's office and make up an alibi for him: he did so but what he told the solicitor was not true. The .22 rifle was kept in the shed above the bunker for some months until it disappeared. He stayed with his father because he had nowhere else to go. During cross-examination, Peter Fox said he had once heard the appellant ask a friend to shoot King.

13 After two and half years in hiding, the appellant was finally apprehended on 5 October 1995 in a car driven by Peter Fox. The appellant gave a false name and details.

14 The appellant gave evidence: he denied going to the Gold Coast, pursuing King, owning the .22 bolt action rifle, shooting Hellwich, and confessing to Peter Fox. He went into hiding after being told by a Gympie police sergeant that police would shoot him down in the street. No weapon which could be linked to Hellwich's shooting was found in his possession.

15 Colleen King was not called to give evidence because she could not be found.

The appeal against conviction

16 The grounds contained in the notice of appeal were abandoned and leave was given to add three new grounds of appeal.

Identification

17 The first is that the directions given by the learned trial judge to the jury as to the

manner in which they should approach the evidence of identification were inadequate in the circumstances.

18 This was a case of recognition rather than identification of a stranger. Hellwich had known the appellant for about 13 years by the time of the trial. It was nevertheless appropriate on the facts of this case that the trial judge give the jury a warning as to the evidence of recognition which has the authority of the judge's office behind it.

19 The prosecutor said that "in terms of the advice in *Domican's case*[1] your Honour should highlight the strong points of evidence and identify the weak points". The learned trial judge gave the following direction:

> "You will all understand the need for special caution before accepting and relying on identification evidence. An honest witness may make a mistake in identification and mistakes in recognition, even of close friends and relatives. There are examples of those that occur from time to time in criminal trials. The risk of mistake is obvious where there is a fleeting encounter in which the eyewitness's mind is focused on something other than identity. It may also be that a witness will have a preconceived understanding of the identity of the person involved in an incident or will form such an understanding by a mental process in which actual visual identification plays no part.

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1 *Domican v The Queen* (1991-1992) 173 CLR 555.

> You will need to bear those matters in mind in deciding whether you should accept or reject Miss Hellwich's identification of the accused. More specific matters which you may wish to take into account, and I suggest should take into account are these: on the positive side for the Crown, the fact that he had been well known to her over a considerable period of time. Obviously it is easier to identify somebody whose characteristics you are familiar with than attempting to identify and remember a perfect stranger; the fact that the distance between Miss Hellwich and her assailant was no greater than about 3 metres, that is, at the time of the first shot; thirdly, there is evidence that the lighting was quite good in the caravan.
>
> Matters which you should take into account in deciding whether it would be safe to accept the identification evidence which are favourable to the accused are these: the fact that on the day the incident happened, Miss Hellwich seems to have said to an interviewing police officer that she didn't

see the person who shot her. You will recall that evidence and I will read it out to you later so you can make your own assessment of what it means; the fact that the incident took place very quickly; the fact that Miss Hellwich on her own evidence had consumed a considerable quantity of beer, admittedly over a long period of time, but nevertheless, she says three to four bottles; the shock and fright involved being confronted by a person armed with a rifle pointed at her in a threatening manner; and the fact that there was no opportunity for voice recognition, only one of her senses thus came into play, namely her vision. In relation to that, you might recall when there was evidence of which she admitted that it was a glimpse, but that she took in the whole picture now.

As for the interview with the police officer, you will wish to consider the physical and mental condition of Miss Hellwich at the time she had that interview in the hospital. Miss Hellwich had sustained a very serious injury and was being fed pain killers at the time. Those matters may have affected the way she considered and said things. Would her condition have caused her to forget about seeing the accused's face or would her condition have led her to say something which, on normal sober reflection, she would not have said? Those are matters for you, members of the jury, applying as you must your experience of life and your common sense."

20 In *Domican*, the High Court stated:

"... 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 a 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 argument 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."[2]

21 The first complaint of Mr Callaghan, who appears for the appellant, is that the trial judge's direction on identification did not specifically include the word "danger". The

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2 (1991-1992) 173 CLR 555 at 561-2.

warning is not required to follow any special formula: it must be tailored to the needs of the case so as to be relevant, convincing and clear. The direction here met those criteria. Although in many cases the warning will include a reference to "danger", it is not always necessary for a trial judge to specifically use that word: here the phrase "the need for special caution before accepting and relying on identification evidence" was adequate.

22 Mr Callaghan submits the direction as to Hellwich's conversation with police at the hospital was insufficiently strong. His Honour isolated as an important weakness in the identification, Hellwich's conversation with police at the hospital where she said she did not see the face of her attacker. The transcript, which was not able to be verified against the original tape by anyone, let alone the jury, records a conversation between Hellwich and police about the rifle. It is in that context that Hellwich said, "No, it - I didn't even see his face, all I saw was the gun." It may be that she was saying she did not see his face at the time she was looking at the gun. She later said, "Well, I did see his ....", the answer being either unfinished or indecipherable. His Honour invited the jury to make their own assessment of the transcribed conversation and read it to them in full. He properly referred them to evidence of Hellwich's physical and mental condition and her medication at the time of the conversation. His Honour, having identified it as a weakness in the identification, properly left the matter to the jury to assess. There is no error in this direction.

23 Mr Callaghan next complains that *Domican* does not require the judge to refer to the strengths of the identification. The primary judge was perfectly entitled to point out matters which supported the identification as long as the weaknesses were highlighted.

Such an approach is consistent with that suggested in *R v Turnbull*.[3]

24 Mr Callaghan submits that not enough care was taken in warning the jury of the possibility that the identification or recognition has been tainted by King's statement, "Bill". Early in the summing up, the learned trial judge reminded the jury that they "may look only at the evidence actually given in the case, and in that regard you may or may not recall that in the course of Miss Hellwich's evidence, she said, 'My son was there and he saw the shooter and Colleen King was there and she saw the shooter.' I'll ask you to disregard that and in fact I give you a direction that you should do so. That doesn't constitute evidence in admissible form, neither of those persons have given evidence to say what they saw, or what they didn't see, or where they were." Importantly, during his directions on identification, the trial judge drew to the jury's attention the possibility that a witness could make an identification not based on what the witness actually saw but on a preconception. This, combined with his Honour's earlier comments that there was no evidence that King had identified Hellwich's assailant was sufficient to adequately warn the jury to take particular care to ensure the recognition or identification was not tainted by King's statement, "Bill".

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3 [1977] QB 224.

25 His Honour reminded the jury that the incident took place very quickly, that Hellwich had been drinking beer, had been in a traumatic situation, that there had been no voice recognition and the identification was based only on a glimpse. His Honour told the jury that mistakes can occur even in recognition of close friends and relatives, a significant factor in this case. He then told the jury that the risk of mistake is increased where the observation is only "fleeting" and not focussed on identification.

26 No application for redirection was made in any respect of the trial judge's directions to the jury on identification.

27 This is not a case which depended solely on identification evidence. The Crown also relied on Peter Fox's evidence that the appellant went to the caravan at the relevant time, had access to a rifle, returned from the caravan and admitted shooting Hellwich. Furthermore, there was evidence against the appellant of his flight.

28 In all the circumstances, there has been no error in the learned trial judge's direction to the jury as to identification on any matter specifically complained of, or in a general sense.

The use to be made of prior inconsistent statements - s 101 of the Evidence Act 1977

29 The appellant's second ground of appeal is that the learned trial judge erred in failing to direct the jury as to the use which could be made of prior inconsistent statements. Mr Callaghan submits that no direction was given to the jury consistent with s 101 of the *Evidence Act* 1977 as to the use they could make of Hellwich's statement that she did not see her assailant's face.

30 Section 101 of the *Evidence Act* 1977 relevantly provides:

> "(1) Where in any proceeding -
>
> (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; ...
>
> that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible."

31 Section 18 of the *Evidence Act* 1977 relevantly provides:

> "**Proof of previous inconsistent statement of witness.**
> **18.** (1) If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly

> admit that the witness has made such statement, proof may be given that the witness did in fact make it."

32 His Honour told the jury in the course of his summing up that they must decide this case on the evidence before them in the trial, explaining that evidence consisted of evidence from witnesses and documents and other things which have been tendered and received into evidence in the case. In directing the jury as to how they should assess the evidence of witnesses, his Honour noted:

> "You should have regard, of course, to whether a witness has made an inconsistent statement or given inconsistent evidence in the past.
>
> If you conclude that the witness has done so then the nature and extent of the divergence will obviously be a matter for your consideration in working out the reliability which you should attach to the witness's evidence here in court."

33 Mr Callaghan submits that if the jury accepted that Hellwich made a prior inconsistent statement to the police in hospital, the jury would be entitled to treat that prior inconsistent statement as evidence of the truth of the statement that Hellwich did not see her attacker's face pursuant to s 101 of the *Evidence Act* 1977. Whilst that is a correct statement of law, the defence case was not conducted on that basis, nor was any such direction requested by defence counsel below. The inconsistent statement was very much in issue as to the reliability of the identification and was canvassed in defence counsel's address to the jury. As has been noted, his Honour, in his summing up, dealt with the matter with some care.

34 Mr Callaghan has referred us to the case of *R v Condren*[4]. In *Condren's case* the defence case relied on a confession to murder made out of court by Albury, which the defence claimed was true. Albury was called at Condren's trial but denied making the

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4 (1990) 49 ACrimR 79 at 88.

confession. Albury's confession was proved as an inconsistent statement. Here the defence case was that the identification or recognition was unreliable and the statement made by Hellwich to police at the hospital demonstrated its unreliability. This issue was carefully and adequately dealt with in the judge's summing up to the jury. A trial judge cannot be expected to give a direction under s 101 of the *Evidence Act* 1977 in these circumstances when no request was made by counsel for such a direction or redirection. There is nothing in this ground of appeal.

Inflammatory and prejudicial evidence from Peter Fox

35 The final ground of appeal is that the witness Peter Fox gave evidence which was inflammatory and prejudicial and that as a result the jury should have either been discharged, or not have been reminded of this evidence or, having been reminded of this evidence, received special directions about the use to be made of it.

36 The evidence complained of is as follows:

> MR CLIFFORD: "You came back some time early that week and then went camping with your father?"
> PETER FOX: "That is right - no, sorry, what happened was we had been down to the Gold Coast before that and he actually had a rifle at that time and it was actually asked John Alexander to go and shoot Colleen through the window of the premises they were staying at."
> MR CLIFFORD: "I see. This is another story, is it, Mr Fox, is that right, another story? You obviously want to tell the truth at the moment, don't you?"
> PETER FOX: "Yes. I am telling the truth."
> MR CLIFFORD: "Well, I have this statement 1/9/98, that is this month, you didn't think that was important to tell the authorities?"
> PETER FOX: "As I said before, there is a lot happened in my life in the last few years and it may have slipped my mind."
> MR CLIFFORD: "I understand that, but I only want you to concentrate on this particular set of events. Now you are saying that your Dad in front of you asked someone else to shoot Barbara Hellwich?"
> PETER FOX: "No, not Barbara, I don't believe Barbara was there."
> MR CLIFFORD: "Right?"
> PETER FOX: "I am sure it was Colleen King and she was living or staying at her brother's place."

> MR CLIFFORD: "You've never told your legal representation about this?"
> PETER FOX: " What legal representation?"
> MR CLIFFORD: "You haven't told the Crown, the prosecution, about this?"
> PETER FOX: "No, I only just - when you mentioned that we went down there, I put that together, remembered that."
> MR CLIFFORD: "I find that amazing, Mr Fox, that you could forget something like that. I certainly suggest to you that didn't occur at all?"
> PETER FOX: "No, that is not true."
> MR CLIFFORD: "You just would say about anything, wouldn't you ----?"
> PETER FOX: "No."
> MR CLIFFORD: "--- to get even with your Dad."

37 Undoubtedly, this evidence, which was not responsive to the question asked by counsel, was both highly prejudicial and inadmissible, being evidence only of propensity: see *Makin v Attorney-General (New South Wales)*[5] and *Markby v The Queen*.[6] No application to discharge the jury was made then or later in the trial. His Honour was not asked to and did not give any direction as to what use, if any, the jury could make of that evidence. To the contrary, his Honour in his summing up told the jury he would remind them of some of the more important aspects of the evidence of the more important witnesses. When summarising Peter Fox's evidence he said:

> "He said that the accused in his presence on an earlier occasion had asked a friend to shoot Colleen King. That was a matter which Mr Clifford commented on, you might recall, because it didn't appear to be a matter which had surfaced in evidence or in any statement at any earlier date."

38 Later in the summing up, when reminding the jury of the defence case, his Honour said:

> "In relation to the credibility of Peter Fox, he [defence counsel] referred to that piece of evidence of the accused asking a person by the name of Alexander to kill Colleen King."

39 It seems defence counsel decided not to ask for a retrial following Peter Fox's

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5 [1894] AC 57.

6 (1978) 140 CLR 108.

prejudicial and inadmissible outburst, but rather to use it to discredit the witness generally. This appears to have been a significant feature of defence counsel's address to the jury.

40 At a discrete time after the prejudicial evidence had been given by Peter Fox, his Honour should have raised the matter with both counsel in the absence of the jury and invited submissions as to the most desirable course to follow. Options would include a mistrial, immediate directions to the jury to disregard the evidence, directions in the summing up, or a decision to ignore the evidence completely, to avoid highlighting it to the jury. Here, apparently without discussion with the judge, a tactical decision was made by defence counsel to conduct the trial highlighting Peter Fox's outburst in order to discredit his evidence generally. In these circumstances, whether or not it was requested by counsel, his Honour should have told the jury that they could not treat that statement as evidence as to the guilt of the appellant, and stressed that it related only to his credit, as submitted by defence counsel. His Honour's directions to the jury left them to consider inadmissible, prejudicial evidence of propensity with no warning as to the limited use to be made of it. His Honour erred in law in failing to give those directions in this case.

41 The next issue then is whether this is an appropriate case to dismiss the appeal on the basis that no substantial miscarriage of justice has actually occurred. That question is answered by determining whether the appellant lost a chance of acquittal which was fairly open to him: see *R v Stafford*[7] and *R v Wilson*.[8] The case against the appellant was strong, regardless of Peter Fox's unresponsive answer in cross examination. Although the appellant gave evidence denying that he committed the offences, Hellwich recognised her

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7 CA No 40 of 1997, unreported, delivered 23 September 1997.

8 CA Nos 200 and 333 of 1996, unreported, delivered 12 August 1997.

attacker as the appellant. There was evidence of the appellant's flight after the attack on Hellwich. Peter Fox gave important evidence as to the appellant travelling to the Gold Coast, observing Hellwich's caravan on the night she was attacked and later returning with a rifle and telling Peter Fox that he had shot Hellwich. It is understandable that defence counsel took the unexpected opportunity which arose through Peter Fox's unresponsive answer in cross-examination to attack his credit. Even had his Honour properly directed the jury that they could not regard Peter Fox's evidence that the appellant had asked John Alexander to kill Colleen King as evidence relevant to the guilt of the appellant and as relevant only to his credit or, alternatively, even had that evidence not been given at all, there was no realistic prospect that the appellant would have been acquitted. As a result, this case is one where no substantial miscarriage of justice has occurred.

42 I would dismiss the appeal against conviction.

Application for leave to appeal against sentence

43 The appellant committed these offences whilst on bail in New South Wales for abduction, aggravated sexual assault and assault occasioning bodily harm upon his former de facto wife, Colleen King. He was on bail for these offences when, on 27 August 1996, he murdered his former wife, and attempted to murder his son Peter, his son’s girlfriend and a neighbour with whom he believed his wife was having an affair. He was convicted of the last mentioned offences in the Supreme Court, Brisbane on 9 February 1998 and was sentenced to a mandatory life sentence, together with other fixed terms of imprisonment.

44 The applicant seeks leave to appeal against his sentence on these offences only to the extent of clarifying the status of a recommendation as to parole made by the sentencing

judge.

45 After imposing sentences of life imprisonment and five years imprisonment respectively and making a declaration as to time already served by way of pre-sentence custody, his Honour, noting the similar remarks made by Lee J on 9 February 1998, recommended "that you not be considered for parole until the authorities are as confident as humanly possible that you are no longer any risk to the community. I order that a copy of these reasons, your criminal history, and the submissions of counsel here today be made available and sent to the Corrective Services Commission." His Honour also recommended the appellant be provided with expert advice and treatment by a psychologist and psychiatrist with a view to assisting towards his ultimate rehabilitation. There is no complaint about the last mentioned recommendation.

46 All recommendations made by his Honour were endorsed on the indictment. Mr Callaghan argues that the recommendation as to parole is not part of the sentence and ought not be endorsed on the indictment. He submits that such a recommendation is a backdoor method of achieving an indefinite sentence under Part 10 of the *Penalties & Sentences Act* 1992 ("the Act"). That Part requires the court to be satisfied that the offender is a serious danger to the community in terms of s 163(3) of the Act before sentencing an offender to an indefinite sentence. Once sentenced indefinitely, Part 10 provides for periodic review of the sentence and discharge of the indefinite sentence or reintegration programs for offenders where appropriate. Part 10 may apply to sentences of life imprisonment: see *R v Fletcher*.[9]

47 This case constitutes a very serious example of attempted murder. Hellwich was

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9 CA No 243 of 1998, unreported, delivered 25 September 1998.

amazingly fortunate that she was not killed. The applicant was on bail for offences of violence at the time he committed this offence and subsequently committed a murder and further attempted murders. Understandably, there is no submission that the sentence is manifestly excessive.

48 Mr Callaghan submits that parole recommendations can only be made under s 157(2) of the Act and a recommendation that the applicant not be released on parole until the authorities are as confident as humanly possible that he is no longer a risk to the community, cannot be made under s 157(2), which provides:

> "...
> (2) If a court imposes a term of imprisonment on an offender, it may recommend that the offender be eligible for release on parole after having served such part of the term of imprisonment as the court specifies in the recommendation."

49 Section 157(2) does not prevent parole recommendations being made after the prisoner has served at least half of the term to which he was sentenced: see *R v Griinke*[10] and *R v Cowburn*.[11] Any parole recommendation made by a sentencing judge is a recommendation only: a sentencing judge has no function in determining if and when a prisoner may be released by the Community Corrections Board. See *Solomon v R*[12] and *The Queen v Shrestha*.[13]

50 In *R v Wood*,[14] a sentence of seven years imprisonment was imposed for a conviction of rape, with a recommendation that the relevant authorities satisfy themselves

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10 [1992] 1 QdR 196.

11 CA No 135 of 1993, unreported, delivered 4 August 1993.

12 (1992) 62 ACrimR 296, 299; [1994] 2 QdR 97.

13 (1990-1991) 173 CLR 48, 68.

14 CA No 429 of 1994, unreported, delivered 14 December 1994.

"carefully, having regard to your history of violence towards women, whether you are and remain a risk to the community before you should be released" on parole and further adding "that that should be on very firm psychological and psychiatric evidence". The Court of Appeal deleted the recommendation without commenting on its lawfulness, but stated that the question of release on parole should be considered by the relevant authorities on the information before them, without regard to that recommendation.

51 There is no impropriety or unlawfulness in a court requesting its remarks be taken carefully into account when any application for parole is considered: see *R v Chapman*.[15] Indeed, it is desirable that the views of the sentencing judge be before the parole board when it performs its function. It is quite proper and, in appropriate cases, preferable for the sentencing judge to recommend, as here, that a copy of the reasons, the court transcript, the criminal history, and the submissions of counsel be made available and sent to the Corrective Services Commission. It may be appropriate to recommend or direct that other material, such as exhibited reports, be sent to the parole board.

52 A parole recommendation under s 157(2) of the Act is part of the sentence. The recommendation made by the learned sentencing judge here is not a recommendation under s 157(2) as it is not a recommendation that the offender be eligible for release on parole after having served part of a specified term of imprisonment: it is a comment in the course of sentencing remarks which may be considered by the parole board. As Pincus JA points out in his reasons, it is not part of the "judgment" which O VIII r 3 of the *Criminal Practice Rules* 1900 requires to be entered in the calendar which accompanies the prisoner

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15 CA No 65 of 1993, unreported, delivered 9 June 1993.

to the correctional centre, and upon which the Queensland Corrective Services Commission must act. It is hoped a parole board will as a matter of course consider the sentencing judge's remarks when exercising its discretion just as it is hoped that the Corrective Services Commission will consider a judge's recommendations as to treatment of prisoners whilst in prison. Such recommendations, whilst not part of the formal sentence or "judgment", may be included in the calendar to ensure the Queensland Corrective Services Commission is aware of them. As Pincus JA points out, it is important to those bound by the Court's judgment to understand what part of the calendar is the "sentence" or "judgment" with legal effect, and what part is a recommendation only. As he suggests, to remove all doubt, it is desirable in respect of the recommendation complained of here to declare that the recommendation is not part of the sentence or judgment of the court.

53 Mr Callaghan next submits that the pre-sentence declaration made in respect of these offences, that the pre-sentence custody of seven days from 5 October 1995 to 11 October 1995 and eight days from 31 January 1996 to 10 February 1996 was declared to be already served under the sentence pursuant to s 161 of the Act, did not recognise the full period spent by the applicant in pre-trial custody.

54 In *R v Fox (No 1)*,[16] it was noted that the appellant, after his arrest on 1 February 1997, spent 371 days on remand before being sentenced for those offences on 7 February 1998. On 9 May 1997, his bail on these charges was formally revoked and from that time he was in custody not only for the *Fox (No. 1)* offences nor only for these offences but in respect of both lots of offences. As a result, in relation to the *Fox (No 1)* offences only 98

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16 CA No 50 of 1998, unreported, delivered 12 June 1998.

of the 371 days were able to be declared under s 161 of the Act as "time that the offender was held in custody in relation to proceedings for the offence and for no other reason". The remaining 273 days were similarly not able to be declared under s 161 of the Act as time served only in respect of these offences. Section 158 of the Act also applies only to periods in custody in relation to proceedings for the offence "and for no other reason". *R v Skedgwell*[17] recognises that a sentencing court is entitled to take into account periods of pre-sentence custody not covered strictly by ss 158 or 161 of the Act by making a parole recommendation. *R v Jones*[18] allows for recognition of such periods by reducing the length of the head sentence. Those cases can have no application to a life sentence such as this. The learned sentencing judge was correct in making the declaration under the Act as to the period of "time that the offender was held in custody in relation to the proceedings for the offence and for no other reason".

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17 CA No 434 of 1997, unreported, delivered 27 March 1998.

18 CA No 63 of 1997, unreported, delivered 27 May 1997.

55 In *Fox (No. 1)*, the court commented on the need for legislative intervention to provide for pre-sentence custody which is not covered by ss 158 or 161 of the Act to be taken into account. For what it is worth, I would join in that court's call for legislative intervention to remedy the current injustice whereby the appellant, and others in a like position, receive no credit for time spent in custody not covered by ss 158 or 161 of the Act.

56 I would make the following orders:

1. The appeal against conviction is dismissed.

2. The application for leave to appeal against sentence is granted and the appeal

allowed to the limited extent of adding to the orders made below the following declaration:

It is declared that the court's recommendation that the applicant not be considered for parole until the authorities are as confident as humanly possible that the applicant is no longer a risk to the community forms no part of the sentence or judgment of the court.

3. Otherwise I would confirm the sentence imposed below.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 23 April 1999

1 I have read the reasons of McMurdo P. and adopt the explanation of the nature of the case and the issues raised which her Honour gives.

2 The first point raised was the direction which the judge gave in deference to the decision in Domican (1992) 173 C.L.R. 555. The judge drew attention both to points in favour of the identification on which the Crown relied and points against it. The principal criticism advanced by Mr Callaghan was that the judge did not isolate for the jury's benefit the weaknesses in the Crown's case on the issue of identification. The basis of the submission was the statement in Domican at 562:

> ". . . 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".

Of course the Crown's identification evidence may be weak or strong. Domican does not say that the judge cannot mention any strengths he perceives; nor does the reference to isolation in the passage I have quoted require that discussion of strong points be carefully separated from discussion of weak points. Although the Domican direction might, in the circumstances of the present case, perhaps have emphasised the Crown's difficulties more than it did, the judge's summing-up on the issue was not, in my opinion, a misdirection.

3 A lesser criticism of the judge's directions on identification was that his Honour did not sufficiently direct on the evidence that Colleen King, before Hellwich was shot, touched Hellwich on the knee and said "Bill"; this evidence is referred to in the reasons of the President. Again, the complaint is not entirely without substance, in my view, but I

have come to the conclusion that what the judge said on the topic was adequate.

4 The next point taken by Mr Callaghan was that the judge misdirected the jury as to the use which could be made of a prior inconsistent statement by Hellwich. Her evidence was to the effect that she recognised the person who shot her as the appellant, that she saw his face. But it was put to Hellwich in cross-examination that she told a police officer at the hospital after she was shot, with reference to the person who shot her: "I didn't even see his face, all I saw was the gun". In response, Hellwich said in effect that the conversation "quite possibly" took place, but she did not remember it. In view of Hellwich's response the case was brought within s. 18(1) of the *Evidence Act* 1977:

> "If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it".

It then became permissible for proof to be adduced of the statement suggested to have been made by Hellwich to Bennett, under s. 101(1) of the same Act. I cannot find in the record any proof of the making of that statement; it was referred to by counsel for the appellant below, in the course of cross-examining Bennett, as having been made and perhaps formal proof was implicitly waived. Assuming that to be so, then, s. 101(1) made the statement evidence that Hellwich did not see her assailant's face.

5 The judge did not explain the effect of s. 101(1) to the jury. His Honour referred to the inconsistent statement at two places in his summing-up and also told the jury, when discussing how to weigh witness evidence, that they should have regard "to whether a witness has made an inconsistent statement or given inconsistent evidence in the past". There is a difference in law between (a) a conclusion that Hellwich's evidence that she

saw the assailant's face should be disbelieved because she had previously asserted otherwise and (b) a conclusion that her evidence in court should be rejected because it was contradicted by other evidence, consisting in her prior inconsistent statement. But it does not appear to me that a juror would be likely to regard the difference between these approaches as having any significance. Assuming it was an error not to draw the jury's attention to the legal position created by s. 101 of the *Evidence Act* 1977, it was not one which could have affected the verdict; no redirection on the point was asked for below.

6 The third and last point taken by Mr Callaghan related to some evidence given by the appellant's son Peter, when being cross-examined by counsel for the appellant below, about events which occurred a few days before Hellwich was attacked. Peter Fox said, according to the transcript:

> "**. . .** what happened was we had been down to the Gold Coast before that and he actually had a rifle at that time and it was actually asked John Alexander to go and shoot Colleen through the window of the premises they were staying at".

In response to that counsel suggested that this was "another story" and a little later:

> (1) "Now you are saying that your dad in front of you asked someone else to shoot Barbara Hellwich?-- No, not Barbara, I don't believe Barbara was there".
>
> (2) "Right?-- I'm sure it was Colleen King and she was living or staying at her brother's place".

Counsel's reference in the question numbered (1) to Barbara Hellwich appears to have been an error on his part; what the witness intended to convey was that his father, the appellant, wanted Colleen King shot. Colleen King, who had been in a defacto relationship with the appellant, was present when Hellwich was shot. Mr Callaghan did not submit that the judge erred in not discharging the jury in consequence of Peter Fox's

evidence, just quoted; no application for discharge was made at the trial. But he said that the judge dealt with the point erroneously in his summing-up and I shall deal with the argument on the basis that the evidence in question was irrelevant.

7 After discussing legal questions and some other matters, at the inception of his summing-up the judge began an analysis of the evidence, explaining that he did not intend to deal with it all, but intended "to remind you of some of the more important aspects of the evidence of the more important witnesses **...**". In this section of the summing-up, the jury were given the judge's summary of Peter Fox's evidence, including the following:

> "He said that the accused in his presence on an earlier occasion had asked a friend to shoot Colleen King. That was a matter which Mr Clifford commented on, you might recall, because it didn't appear to be a matter which had surfaced in evidence or in any statement at any earlier date".

It appears that, in an effort to make the best of a bad situation, counsel for the appellant below had tried to use the evidence about the appellant wanting to have Colleen King shot as a factor which should induce the jury to disbelieve Peter Fox; that is presumably the reason why the judge mentioned this piece of prejudicial evidence in his Honour's summary of the more important aspects of the evidence. But it was an error to put this before the jury as a significant piece of evidence, in the absence of a direction that it was not relied on by the Crown as being relevant to the case against the appellant.

8 At first sight one might think that the proviso could not apply to this situation, but I have come, in the end, to the conclusion that what the judge did could hardly have made any difference to the verdict. When the evidence emerged, counsel for the appellant decided to attempt to use it against acceptance of Peter Fox's evidence, as being an incredible accusation by Peter Fox. From the judge's account of the submissions made by

the defence below, it appears that this tactic was pursued in address as well as in cross-examination. It might, at least in theory, have been helpful to the defence if the judge had told them not to use the evidence against the appellant, in proof of the Crown case. But in practice that would not I think have helped to erase the adverse impression of the appellant which, if the jury believed Peter Fox, they must have derived from the evidence about the appellant's desire to have Colleen King shot. And if the jury believed Peter Fox the appellant had no real chance of acquittal, for Peter's other evidence, if accepted, practically concluded the case against the appellant. I agree, with respect, with the President's view that no substantial miscarriage of justice occurred.

9 I have as indicated dealt with this last point on the assumption, which both counsel made, that the evidence was irrelevant to the Crown case; but I have some reservations on that score. The attempt on Barbara Hellwich's life occurred, according to the Crown case, on 22 April 1992. Hellwich's evidence was that before this the appellant had made some inquiries of her of the whereabouts of Colleen King, who had been his defacto. The only issue was whether it was the appellant who made the attempt; who was the person with a rifle who on the occasion in question came into the caravan containing King and Hellwich? Some six weeks before the alleged offence, the appellant accosted Hellwich at the place where she resided and asked her where she had been; she replied, according to Hellwich, "Up the road", to which he responded, "No, you haven't, you have been with Colleen". Hellwich said that she spent some time at a women's shelter after that, apparently to escape the appellant's attentions. She said that the appellant contacted her again about two days before he shot her.

10 The inference was open, from this evidence, that the appellant was trying to contact Colleen King and might have thought that Hellwich had something to do with his inability to find her. Peter Fox's evidence was that after Colleen King left the appellant early in 1992, the appellant attempted to trace her, over a period of weeks. He said that on 21 April 1992, in the afternoon before Hellwich was shot in that caravan park, he and the appellant went to the Miami Caravan Park, sat and watched. He said his father went into the caravan park for some hours and, when he returned, said he was listening at a window where Colleen and Barbara were "drinking or something". The appellant then left Peter, who went to sleep. When he woke up, the appellant, according to Peter, came back to the car with a rifle and said he had shot "Barsha", apparently a reference to Hellwich. It is in this context that the admissibility of evidence that, a week before Hellwich was shot, the appellant asked someone to shoot Colleen King has to be considered; a possible view was that the appellant's hostility, related to King's leaving him, was directed at both women. Ordinarily evidence that an accused had, shortly before the time that he is alleged to have shot A, expressed a desire to have B shot, would not support that allegation because it would not be evidence of an inclination to shoot A.

11 It is not the law that evidence of a "disposition towards a particular crime" is simply inadmissible; such evidence may be admissible if it has a "specific connection" with the commission of the offence alleged: Pfennig (1995) 182 C.L.R 461 at 484. Here, the evidence of an intention to have Colleen King shot, in the factual context I have set out, could have helped a rational jury towards the conclusion that it was the appellant, rather than some other person, who attacked Hellwich in the caravan in which she sat with Colleen King. But it is unnecessary to state a conclusion on this question of admissibility,

which was not argued.

12 As to the application for leave to appeal against sentence, Mr Callaghan made complaint of the judge's recommendation that the applicant "not be considered for parole until the authorities are as confident as humanly possible that you are no longer any risk to the community". The power of judges to make recommendations relating to parole is entirely statutory. The court is empowered by s. 157 of the *Penalties and Sentences Act* 1992 to recommend that an offender be eligible for release on parole "after having served such part of the term of imprisonment as the court specifies in the recommendation" - s. 157(2); under s. 157(3) the recommendation relates to a "period of imprisonment" not a "term of imprisonment". It is clear as is pointed out in the reasons of the President that the recommendation made in the present case was not one made under s. 157. The distinction is important, for a recommendation under s. 157 affects legal rights, by making it lawful to release the prisoner on parole at the time recommended and subject to s. 166(4) and (5), unlawful to release him on parole earlier than the recommended date.

13 The reason why the judge's recommendation in the present case was not one under s. 157(2) is that it did not specify a date at which, or period after which, the applicant would be eligible for release on parole. The judge had no power to impose a legal restraint on the exercise of the power of the Queensland Community Corrections Board to release the applicant on parole by preventing release on parole until the authorities might be "as confident as humanly possible" that the applicant was no longer a risk to the community. His Honour did not intend to impose such a legal restraint; all his Honour wished to do was to place on record his opinion as to the way in which any application for

parole should be approached.

14 The difficulty is that the status of the recommendation in question - namely as having no legally binding effect - might not be clear to the parole authorities. The risk that this will occur is enhanced, in the present case, by the circumstance that the relevant calendar includes under the heading "Sentence or Order of the Court":

> "Recommend that the accused not be considered eligible for release on parole until the authorities are as confident as humanly possible that the accused is no longer any risk to the community".

The content of the calendar is defined by O. VIII r. 3 of the *Criminal Practice Rules* of 1900. There is to be entered in it -

> ". . . a short memorandum of the verdict and of the judgment, if any, pronounced upon [each person tried or sentenced]".

One purpose of the calendar is set out in O. VIII r. 3(c):

> "Such . . . calendar shall be sufficient warrant for the execution of the judgments thereby appearing to have been pronounced".

15 It seems clear, from O. VIII r. 3, that a judicial utterance has no place in the calendar unless it is a "judgment". Assistance as to the meaning of that word is usefully set out in Ah Toy v. Registrar of Companies (1985) 10 F.C.R. 280 at 285, 286; I set out some of what is to be found there, by way of definition:

> "the formal order made by a Court which disposes of or, deals with, the proceedings then before it": Ireland (1970) 126 C.L.R. 321 at 330.
>
> "operative judicial acts": Driclad Pty Ltd v. Commissioner of Taxation (1968) 121 C.L.R. 45 at 64.

"it is the essence of a judgment within the meaning of the Constitution that it is binding upon parties and definitive of legal rights": Minister for Works (WA) v. Civil and Civic Pty Ltd (1967) 116 C.L.R. 273 at 277.

16 The present is not an occasion on which there is a need to attempt to set out all that a judge may do, on sentence, which will constitute a "judgment" in the relevant sense. But putting aside, as not relevant to the present discussion, orders of a procedural or merely ancillary kind, judicial utterances on sentence are unlikely to be judgments within the meaning of the Criminal Practice Rules unless they are exercises of specific statutory power.

17 There is specific statutory power to make a recommendation as to the date of eligibility for release on parole under s. 157 of the *Penalties and Sentences Act* 1992, as I have mentioned; another example is the power to make a declaration under s. 161B of the same Act. There is no statutory power to set out as part of the sentencing process considerations to be taken into account on an application for parole, nor to give directions as to the way in which the person sentenced should be treated in prison. The absence of such power does not mean that judicial suggestions on these subjects may not be made, but they are if made to be treated as part of the reasons for sentence and not part of the court's formal judgment.

18 The distinction just discussed is, although some may think it to be a technical matter, an important one; judicial authority is not enhanced if those bound by a judgment are left uncertain as to what part of the judge's pronouncements are legally enforceable.

For this reason it appears to me undesirable that sentencing judges should use expressions which give rise to such uncertainty; in view of the content of s. 157 of the *Penalties and Sentences Act* 1992, which uses the word "recommend" it would probably be better for sentencing judges not to use that word or the word "recommendation" as applicable to mere suggestions as to the way in which the parole authorities should act.

19 It should be added (although no complaint is made about this by Mr Callaghan) that another part of the content of the calendar in the present case which should not, in my respectful opinion, be there is a recommendation that the applicant be provided with certain advice and treatment; that is no part of the formal judgment of the court because, unlike a recommendation under s. 157, it creates no rights or obligations. But it appears to me that procedural and administrative directions of an ancillary kind, given under the court's inherent powers, such as an order that a copy of the reasons be sent to the Corrective Services Commission, may properly be included in the calendar.

20 The practice, I understand, is that the calendar is made up from the endorsement on the indictment, although I notice that in the present case the two do not precisely correspond; the official record of the court's judgment is the calendar. In my opinion, to avoid the possibility that the legal status of the judge's "humanly possible" recommendation might be misunderstood, the preferable course would be to declare that that recommendation is no part of the sentence or judgment of the court.

21 The other sentence point taken by Mr Callaghan related to pre-sentence custody, but was not pressed. The judge ordered that two periods of 7 days and 8 days in custody

be regarded as time spent in serving the sentences his Honour imposed and no complaint is or could be made about that declaration.

22 I would make the following orders:

1. The appeal against conviction is dismissed.

2. The application for leave to appeal against sentence is granted and appeal allowed by adding to the orders made below the following declaration:

> It is declared that the court's recommendation that the applicant not be considered for parole until the authorities are as confident as humanly possible that the applicant is no longer a risk to the community forms no part of the sentence or judgment of the court.

3. The said application is otherwise dismissed.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

C.A. No. 364 of 1998

Brisbane

Before McMurdo P
Pincus JA
Shepherdson J

[R v. Fox]

THE QUEEN

v.

WILLIAM KELVIN FOX
(Applicant) Appellant

REASONS FOR JUDGMENT - SHEPHERDSON J

Judgment delivered 23 April 1999

1 I have read in the separate reasons for judgment prepared by the President and Pincus JA.

2 I agree with the orders each proposes.

APPEAL AGAINST CONVICTION

3 This raises a number of issues and I now set out my views on these:

1. Identification of the appellant

4 On this issue I agree with the President who when speaking of Hellwich's evidence said: "This was a case of recognition rather than identification of a stranger". I agree generally with the reasons of both members of the court on this issue. However, I have concluded that the present case was not one where the learned trial judge was called on to

address on Hellwich's evidence of identification strictly in accordance with *Domican.* The present case was one where it could not be truly said that Hellwich's evidence of identification "represents any significant part of the proof of guilt" of the offences (*Domican* p 561).

5 The relevant passages at pp 561 and 562 of *Domican* read:

> "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 (18). The terms of the warning need not follow any particular formula (19). But it must be cogent and effective (20). It must be appropriate to the circumstances of the case (21). 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' (22). A warning in general terms is insufficient (23). The attention of the jury 'should be drawn to any weaknesses in the identification evidence' (23). 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 (24). 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."
>
> The numbers in brackets refer to footnoted cases.

6 As the relevant facts cited by McMurdo P show, the evidence against the appellant included, along with the evidence of Hellwich, other evidence which was circumstantial and other evidence which was confessional - all that other evidence pointing to the appellant and no-one else having committed the offences. This evidence came from Peter Fox ((see paras 10, 11 and 12) (save for the last sentence of para 12) of the reasons of McMurdo P).

7 Even if one ignored the evidence of Hellwich as to recognition of the appellant as the person who shot her, the remaining evidence in the Crown case pointed conclusively to the appellant and no-one else as having been that person. Of course, if Hellwich's

evidence as to recognition was not ignored it gave even greater strength to the Crown case.

8 Conversely, it may be said that if one ignores entirely the evidence of Peter Fox, then the evidence of recognition by Hellwich may be said to represent a significant part if not the whole of the proof of the appellant's guilt, and so *Domican* would assume greater significance in the summing-up.

9 In my view in the present case, it was unnecessary for the learned trial judge to address the jury in as detailed a fashion as that contended for by Mr Callaghan and as required by the High Court in the above quoted extract from *Domican.* Hellwich's evidence of recognition was part of the evidence in a strong Crown case against the appellant. A *Domican* direction becomes necessary if the evidence of identification represents a significant part of the proof of guilt and in the present case it did not meet that criterion although, if the jury had rejected entirely the abovementioned evidence of Peter Fox, then it would have represented a significant part.

10 Although each case will depend on its own facts, I do not see it as a duty of the trial judge in the present case to have assumed that the jury would reject entirely the evidence of Peter Fox and thus be left with only Hellwich's evidence identifying the appellant as the person who committed the offences and therefore be required to address strictly in accordance with the *Domican* requirements. I agree with other members of the court that the learned trial judge's directions were adequate.

11 I add for completeness that the jury, by their verdicts, have shown rejection of the appellant's evidence at the trial that he did not shoot or point a gun at Hellwich and that he did not enter the caravan on the night of 21 April 1992.

2. The prior inconsistent statement point

12 I agree with the reasons of Pincus JA.

3. Prejudicial evidence from Peter Fox

13 I agree with the reasons of Pincus JA.

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

14 I agree with the reasons of Pincus JA and generally with what the learned President has written.