IN THE COURT OF APPEAL [1999] QCA 170

SUPREME COURT OF QUEENSLAND

C.A. No. 453 of 1998

Brisbane

[R v. Tran]

THE QUEEN

v.

MIEN DUY TRAN

Appellant

McMurdo P.
Pincus J.A.
Atkinson J.

Judgment delivered 14 May 1999

Judgment of the Court

APPEAL AGAINST CONVICTION DISMISSED

CATCHWORDS: Criminal law - identification - whether Domican direction

required - Domican concerned with risk of mistaken, not merely dishonest, identification - whether Domican direction would have assisted the appellant.

Domican (1992) 173 C.L.R. 555
Heustan (1995) 81 A.Crim.R. 387
Lewis (C.A. No. 252 of 1996, 18 October 1996)

Counsel: Mr S Hamlyn-Harris for the appellant.
Mr D Meredith for the respondent.

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

Hearing Date: 29 April 1999.

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 14 May 1999

1 The appellant was convicted after a trial in the District Court on a charge of having unlawfully wounded one Olsen. The evidence showed that Olsen was stabbed in the course of being assaulted by a number of prisoners at Etna Creek prison, in which Olsen was himself an inmate. The argument advanced for the appellant is that his conviction was flawed in that the learned primary judge did not adequately sum up on the question whether the appellant was properly identified as the person who did the stabbing and in particular did not give a Domican direction. It is clear from the evidence that the stabbing was done by one of 24 people who were the inmates of the appellant's cell block and that the appellant looked different from the other 23 inmates. There are photographs of each one of them in evidence and the appellant is the only one whose appearance is Asian. His features are easily distinguishable from those of any of the others.

2 Olsen had been a prisoner in the cell block for four days and he knew the appellant, having played chess with him during that period once or twice. Olsen's

evidence was given in rather an incoherent fashion, but he conveyed plainly enough that he took hold of the appellant, that the appellant had a knife and that the appellant stabbed him. These allegations were supported by the fact that Olsen bled copiously and that the appellant's clothes were found to have blood on them which matched Olsen's. The appellant gave no evidence.

3 Since there was, according to the evidence, adequate natural lighting, one would hardly expect the appellant to be mistaken about the identity of the person who stabbed him, a person known to him and having an appearance which enabled him easily to be distinguished from the others present.

4 Evidence identifying an accused person as the one who committed an offence may be rejected because the jury suspects that those who claim to have identified the accused as the offender were lying, or suspects that they were mistaken - or the jury might simply not be satisfied by the identification evidence, thinking it to be either deliberately untrue, or mistaken. The language used in

Domican (1992) 173 C.L.R. 555 suggests that what the High Court was concerned about was the possibility that juries might not fully appreciate how easily a witness might come to a firm but mistaken conclusion about the identity of an offender; the view generally taken of the case is that it has to do with the risk of mistaken, not merely dishonest, identification. In Heuston (1995) 81 A.Crim.R. 387, Hunt C.J. at C.L. remarked at 399:

> "The whole point of the decision of the High Court in *Domican* is that the judge must ensure that the jury are aware of the seductive effect of *honest* evidence relating to identification which may nevertheless be unreliable. Although it is common in other situations to speak of the reliability of a witness's evidence as including matters relating to his or her honesty, that is not the sense in which the High Court was using the word when placing the obligation upon the judge to isolate and identify any matter of significance which may reasonably be regarded as undermining the '*reliability*' of the identification evidence. That 'special' rule in such cases does not apply to matters of credit".

See also the remarks of the same judge in Carusi (1997) 92 A.Crim.R. 52 at 73-74. We are in respectful agreement with these observations. In accordance with them, a Domican direction will not always be necessary, where the accused is a person well known to the identifying witness or witnesses, for then there will not

usually be a risk of mistaken identification.

5 In the present case a mistaken identification seemed quite unlikely and it would not have been expected that the jury would reject the complainant's identification evidence, other than because it was not satisfied that such evidence was honestly given. But one could not say that a mistake about the identity of the man with the knife was impossible, particularly as the Crown ran a case alternative to its principal contention which was that the appellant did the stabbing; reliance was also placed on the proposition that if he did not, he was liable under s. 7(b) or (c) of the *Code*.

6 Mr Hamlyn-Harris, for the appellant, relied on the decision of this Court in Lewis (C.A. No. 252 of 1996, 18 October 1996). There were particular features of the evidence there which could have been argued to throw doubt upon the accuracy of the identification; but nevertheless the case illustrates that a Domican direction may be necessary because of the possibility of mistake, even where the offender is

known to the identifying witness or witnesses. The Crown accepts that a Domican direction was necessary in the present case and, with some hesitation, we have come to the conclusion that that concession is correctly made.

7 The remaining question is whether, as the Crown contends, a Domican direction could not have assisted the appellant. It is not easy to think of points the trial judge could sensibly have made to emphasise difficulties in identification; there was no problem with the light, the offender's appearance was distinctive and, if the complainant was to be believed, he saw the appellant with a knife, then took hold of him and was stabbed. In these circumstances it would have been a difficult task for the judge to pick out weaknesses in the identification evidence and would have bordered on fatuity to warn the jury as to the dangers of convicting on the identification evidence, particularly as it was uncontradicted. The judge could have conveyed to the jury that it was no doubt possible that the only man present of Asian appearance, with long hair, who had the knife did not in fact stab the complainant; but, in contrast with Domican, there was not any special reason to

think that such an odd mistake might have been made.

8 We have come to the conclusion that the judge erred in not attempting to give a Domican direction, but that such a direction would not, in the particular circumstances of this case, have assisted the appellant.

9 We dismiss the appeal.