SUPREME COURT OF QUEENSLAND

CITATION:	*R v Braithwaite* [2004] QCA 123
PARTIES:	**R** **v** **BRAITHWAITE, Marcus Lee** (appellant)
FILE NO/S:	CA No 48 of 2004 DC No 123 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Kingaroy
DELIVERED ON:	23 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2004
JUDGES:	McMurdo P, McPherson JA and Holmes J Separate reasons for judgment of each member of the Court, McMurdo P and Holmes J concurring as to the orders made, McPherson JA dissenting
ORDERS:	**1. Appeal allowed and a new trial ordered** **2. The appellant is granted bail in the same terms as his prior grant of bail on this charge**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE - CONFESSIONS AND ADMISSIONS – whether evidence of conversation between appellant and police, obtained without complying with *Police Powers and Responsibilities Act*, inadmissible by statute or in exercise of common law discretion – whether appellant excluded from scope of the Act by s 246(2)(b) CRIMINAL LAW – EVIDENCE - IDENTIFICATION EVIDENCE – whether trial judge should have given a *Domican* direction – whether proviso should be applied *Police Powers and Responsibilities Act* 2002 (Qld), s 246, s 249(1), s 258(1) *Transport Operations (Road Use Management) Act* 1995 (Qld), s 46 *Bunning v Cross* (1978) 141 CLR 54, cited *Domican v The Queen* (1992) 173 CLR 555, applied *Festa v The Queen* (2001) 208 CLR 593, considered *R v Zullo* [1993] 2 Qd R 572, considered

COUNSEL:	S R Lynch for the appellant M J Copley for the respondent
SOLICITORS:	Michael Mason Solicitors for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I have read the reasons for judgment of McPherson JA in which the facts and issues are clearly stated. I will repeat only those necessary to explain my reasons for reaching a different conclusion. It is my view that the appeal against conviction must be allowed.

The adequacy of the judicial direction on identification

[2] The learned primary judge gave the following direction on identification.

> "The next question is whether the prosecution has proven that it was the accused man who was driving the vehicle at that time. Now, there's been a lot said about identification evidence and indeed identification evidence needs to be approached very carefully. By identification evidence I mean where along comes a witness and says, "Yes, I identify this person. I saw them to do this. I recognised them or I recognised them later, that was definitely the person who did it." That's identification evidence and that needs to be – evidence like that needs to be approached carefully because there have been some notorious cases of misidentification and an identification witness like that can be very convincing because they truly believe that what they're saying is true.
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> With the identification evidence such as that a fact finding Tribunal, be it a jury or a judicial officer sitting alone, always needs to have a good look at the circumstances in which the identification was made. What was the light like? How long did they have them under observation and so on. What is the identification? Is it recognition of somebody they knew well? Is it based on a brief glimpse of them? Did they have them under observation for a fair period of time in good light and so on.
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> *But this case isn't really a case of that nature because it's not based on these police officers really saying, "Look, I recognise this fellow from his facial features as the man driving that car."* Neither police officer got a very good look at him, obviously enough, and they don't purport to say they did. The car was approaching them very rapidly, they were looking through windscreens. They could see certain things such as sunglasses, short darkish hair. Robinson thought he had chiselled sort of features and Sergeant Murphy caught a glimpse of a shirt which he thought was one of those Holden type polo shirts. He saw a bit of red, some black as the vehicle approached him and went past. . . .[N]either police officer got a good look at him, just a general quick look." (my emphasis)

[3] His Honour then reminded the jury of the other facts in the case and continued:

> "Now, it's plain at that point of time the police officers believed that the accused man was the driver of the car on the highway and the reasons they believed it are fairly obvious. One, he was similar to the man they'd seen. Robinson in fact said that when he saw the fellow in the car he knew him, he recognised him, he'd seen him before but he couldn't place where it was. But he plainly did later on place where he knew him from. He'd seen him on the 11th of April. We don't know why but for some reason or another he'd seen him on the 11th of April.
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> So, at that point in time when they see this fellow in the circumstances they saw him driving past 44 Oliver Street where this car was registered to, apparently leaning down for some reason or another in a red Falcon, wearing a shirt like the shirt, or at least of similar colour to the shirt they'd seen on the fellow driving past, wearing sunglasses, they formed the view that he was the driver.
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> Now, it doesn't matter what view they formed. Their opinion isn't the end of the matter. Your opinion is what matters. The decision is yours. Are you satisfied beyond a reasonable doubt on the evidence that the accused man was the driver of that car as it drove down the highway. I've just referred to the evidence about that. It's what the police officer[s] saw, the glimpses they got, the registered number, the car, the address, who lived at the address, the accused in the red Falcon driving past shortly after apparently out of sight until they passed Sergeant Murphy trying to wave the Falcon down, the Falcon doesn't stop when he does try and wave it down and so on.
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> So, it's a matter for you, members of the jury. To find the accused person guilty on evidence like that you must be satisfied his guilt is a reasonable inference from the evidence and the only rational inference the evidence allows you to draw."

[4] In *Domican v The Queen*[1] the High Court unanimously observed that

> ". . . the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that courts of criminal appeal and ultimate appellate courts have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue.
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> Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed "as to the factors which may affect the consideration of

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1 (1992) 173 CLR 555, 561-2.

> [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." (footnotes omitted)

[5] The learned primary judge's directions to the jury did not comply with these principles because the judge had the view that the police officers did not identify the appellant. That view was inconsistent with the evidence. Police officer Robinson undoubtedly purported to identify the appellant when he apprehended him shortly after 5.00pm on 21 April 2003 as the person he saw driving the Statesman at 4.10pm that afternoon. He said "It was apparent to me that it was the same person." He "was able to say that that was the same person, yes, that had been driving the Statesman." "I could say it was definitely the same person . . . it's just the fact that I knew that was the driver I recognised as a person I'd seen before and it was definitely the same person in the red Falcon sedan."

[6] Police officer Murphy also purported to identify the appellant. He "believed it was the same person" and had "no doubt it's the same person was driving that car."

[7] This was not, as his Honour told the jury, simply a circumstantial case where the police description of the driver was similar to the appellant's appearance and the prosecution relied on that fact combined with the other circumstantial facts in the case to establish the appellant's guilt. The police officers gave evidence that they clearly and unequivocally identified the appellant as the driver of the Statesman. The police officers could have merely described the person they saw driving the car. The similarities between this person and the appellant when combined with the other circumstantial facts would have provided a very convincing prosecution case. But that was not the prosecution case. It also relied on the police officers' identification. The identification evidence represented a significant part of the prosecution case. Defence counsel at trial requested the judge to direct the jury in terms of *Domican* but the judge refused that request. A careful direction to the jury warning of the dangers of convicting on identification evidence generally and of the specific weaknesses here was required. Not only was the warning not given but the learned trial judge misled the jury by telling them the identification evidence was not of the type which needs a careful approach.

[8] His Honour should have warned the jury of the danger of acting on the identifications made by the police officers and told them that an honest and convincing identification witness can be mistaken. He should have identified the following weaknesses in the identification. Police officer Robinson had only seen the appellant on one prior occasion for an unknown period of time. Police officer Murphy did not know him at all. Police officer Robinson's identification was made partly through the front windscreen of a vehicle from a distance and partly through a tinted window. The vehicles were driving in a general westerly direction late on an April afternoon. In the brief period during which Robinson made his identification he was focussed on the Statesman's registration number. There was no evidence that the police officers recorded in their notebooks or elsewhere a description of the driver of the Statesman shortly after 4.10pm. On the facts of this case there is a danger that their identification of the appellant has been corrupted by their

observations of him later that afternoon and of the photograph of him then taken. Whilst his Honour did remind the jury that the police officers' opportunity for making the identification was very brief and in fast moving vehicles, he should have warned them of the danger of an honest but mistaken identification with such fleeting glances.

The evidence of the conversation between the appellant and police officer Murphy

[9] I agree with McPherson JA that the evidence of the conversation between the appellant and police officer Murphy was irrelevant but I am not persuaded that it was not prejudicial.[2] It is impossible to know what the jury would have made of this conversation because it commences with a question from police officer Murphy about a "white Commodore" when the car involved in the dangerous driving was a "white Statesman". The appellant's answer "at Kingaroy" may have been taken by the jury to be an evasive answer if in answer to a question about a white Statesman. It may in fact have been a sensible response to a question about an unspecified white Commodore. The later response from the appellant, "I haven't been driving", is of no weight in that it could have been a reference to the fact that he was a mere passenger in the red Falcon. It certainly did not unequivocally refer to the driving of the white Statesman.

[10] The learned primary judge in his summing up to the jury did not seem to regard the evidence of significance and referred to it only in this way:

> "Sergeant Murphy said, "Where's the white Commodore you were driving?" and so on."

The jury were not given any further assistance as to its meaning, weight or use. There is a danger that the jury could have placed undue influence on it. It was potentially prejudicial and had no relevance. It should have been excluded.

Is this an appropriate case for the proviso?[3]

[11] The prosecution case was undoubtedly strong. I am not persuaded however that this is an appropriate case for the use of the proviso. The appellant's conversation with police officer Murphy on its own was not of much significance and could not alone have caused a miscarriage of justice in the face of such a strong prosecution case. The seductive effect of identification evidence is, however, notorious. The jury were not warned as they should have been of its dangers. When the absence of appropriate directions as to the identification evidence is combined with the irrelevant and prejudicial evidence of the conversation between the appellant and police officer Murphy, I am not persuaded that the appellant has not lost a real chance of an acquittal.[4] The appeal should be allowed and a new trial ordered. The appellant was sentenced on 29 January 2004 to a period of 12 months imprisonment suspended after six months with an operational period of two years. It is a matter for the prosecuting authorities whether, bearing in mind the time he has now spent in custody, he should be re-tried.

ORDERS:

1. Appeal allowed and a new trial ordered.

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2 See McPherson JA's reasons for judgment at para [17}

3 Section 668E(1A) *Criminal Code.*

4 *Wilde v R* (1988) 164 CLR 365, 371-2.

2. The appellant is granted bail in the same terms as his prior grant of bail on this charge.

[12] **McPHERSON JA:** At about 4.10 pm on Easter Monday 21 April 2003, Snr Const Robinson was driving a police vehicle patrolling the D'Aguilar Highway between Nanango and Yarraman. He was travelling at 74 kph in the direction of Yarraman in a 100 kph zone when he saw a vehicle coming towards him at a speed which the radar equipment showed as 121 kph. He commenced to pull over and activated the flashing red and blue lights on the police vehicle as well as the radar recorder with which it was fitted. The other vehicle, a white Holden Statesman registration number 231-GXW, did not stop but passed him going in the opposite direction towards Nanango. He turned his police vehicle round and began following it, at the same time carrying out a radio search of the vehicle registration through the police service, which yielded 44 Oliver Road, Nanango, as the address of the registered owner.

[13] At that time in April 2003, the appellant in this appeal against his conviction under s 328A(1) of the Criminal Code for dangerous driving or "operation" of a motor vehicle, lived at that address with the woman who was the registered owner of the vehicle reg no 231-GXW, which was a white Holden Statesman sedan. A week later on 28 April, she brought it to the police station where it was seen and photographed by Robinson. That photograph, together with photographs of the appellant taken at 44 Oliver Road on Easter Monday 21 April, was admitted in evidence at the trial.

[14] In the meantime Snr Const Robinson had been talking by radio to Police Sgt Jim Murphy. At the time, he was travelling in another police patrol vehicle on the same Highway but closer to Yarraman. He directed Robinson to go to the address at 44 Oliver Road, and he himself looked out for the white Holden. While he was driving in the direction of Nanango, he saw a vehicle travelling from his rear also towards Nanango at a very fast speed recorded on the radar as 196 kph. He activated the lights and sirens on his vehicle, moved to the left of the road, and extended his right arm through the open window signalling that the approaching vehicle should stop. Instead, it continued on past him at speed. He then saw it overtake two vehicles ahead of him in an undulating stretch of the highway, crossing over the double white centre lines to do so before disappearing out of sight. It was a white Holden Statesman with a registration number that incorporated the letters GXW. Murphy travelled on to Nanango and met Robinson at 44 Oliver Road. It was by then a little after 5 pm.

[15] Despite sounding their horns to draw attention, the two police officers were unable to raise anyone at the property and were preparing to leave and continue to search for the white Holden when they saw a red Ford Falcon come up Oliver Road (which is a cul de sac) driven by its only occupant. Shortly afterwards it came back out of the road. Sgt Murphy stood out in the road signalling to the driver to stop. Instead, he accelerated around him and went on. The two police officers took off after the Falcon in their respective vehicles with lights and sirens going. The Falcon stopped about 600 m further on, and they placed their vehicles on either side of it. Robinson went round to the driver's side, spoke to him, and obtained his name, which was Lawrence Taylor. At the time of the trial the police were unable to locate him for the purpose of calling him to give evidence.

[16] Robinson said in evidence that as the Falcon passed him on the inward journey up Oliver Road, he had seen no one in it apart from the driver in the vehicle. However, as the vehicle was passing him on the outward journey, he saw someone sit up in the front passenger seat, as if that person "had been slumped down or crashed down in the seat". Murphy said that, after the Falcon accelerated past him, he turned around to get the registration number, and saw a figure come up from the front passenger seat - "just appear in the front passenger seat" - whom he had not seen there before. "I could see this body come up and sit like this", he said. When the Falcon stopped, he went round to the passenger side of the car and saw a person seated there who, he said, "fitted the description" of the person he had seen driving the white Holden Statesman 231-GXW earlier on that day. Murphy had a conversation with him, after which he was arrested. He was the appellant Braithwaite.

[17] Sergeant Murphy obtained from him his name and address, which he was entitled to require under s 48(2)(b) of what is now rather impressively entitled the *Transport Operation (Road Use Management) Act 1995*. He was probably also entitled to demand this information under s 32(1) of the *Police Powers and Responsibilities Act 2000*. The conversation, which he recorded on a micro-cassette, then proceeded:

> "Murphy: "Right, Where's the white Commodore you were driving?"
> Appellant: "At Kingaroy"
> Murphy: "No worries, Put the drink down. Jump in the police car. You're detained under the provisions of the Police Powers and Responsibilities Act".
> Appellant "For what?"
> Murphy: "For dangerous driving".
> Appellant: "I haven't been driving".

The conversation in fact seems to have gone on beyond that point; but only that portion of it was tendered by the Crown or admitted in evidence by his Honour at the trial. Defence counsel objected to its admission. He did so on the basis of the general discretion at common law to exclude evidence unfairly obtained, and more specifically also on the ground that Sgt Murphy had failed to comply with s 249(1) of the *Police Powers and Responsibilities Act 2000*. Section 249(1) provides that, before a police officer starts to question a "relevant person" for an indictable offence, the police officer must inform the person that he or she may:

> "(b) telephone or speak to a lawyer … and arrange or attempt to arrange for the lawyer to be present during the questioning."

There are other material provisions in the Act, including s 258(1) which requires that persons be cautioned in the way required under the police responsibilities code before he or she is questioned by a police officer.

[18] Neither of these provisions was complied with. Each is contained in Part 3 of Chapter 7 of the Act which applies to a "relevant person", defined or described in s 246(1) of the Act as a person "in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence". At the time he was being questioned, the appellant was, I consider, then in the company of Sgt Murphy for the purpose of being questioned

about the indictable offence of dangerous operation of the Holden Statesman 231-GXW, which was the offence of which he was later convicted. On the face of it, therefore, Part 3 of Chapter 7 of the Act, including s 249(1) and s 258(1), applied to him as a "relevant person" within the meaning of s 246(1). But having so described it, s 246(2) of the Act nevertheless then goes on to add:

> "(2) However, this part [Part 3] does not apply to a person only if the police officer is exercising any of the following powers -
>
> (a) …
> (b) [a] power conferred under any Act to require the person to give information or answer questions".

[19] Chapter 2 of the Act contains what are described as **General Enforcement Powers**. Part 6 of it is entitled **Powers relating to vehicles traffic and animals**. Section 46, which is in Part 6 of Chapter 2, is as follows:

> "**46 Powers to require information about identity of drivers of vehicles etc.**
> (1) This section applies if a person alleges to a police officer or a police officer reasonably suspects a contravention of the Road Use Management Act involving a vehicle, tram, or animal has been committed.
>
> (2) A police officer may require any of the following to give to the police officer information that will identify or help identify the person who was in control of the vehicle, tram, or animal when the contravention happened -
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> (a) an owner of the vehicle, tram, or animal;
> (b) a person in possession of the vehicle, tram, or animal;
> (c) a person in whose name the vehicle is registered;
> (d) a person who may reasonably be expected to be able to give the information.
>
> (3) Also, a police officer may require the driver of the vehicle, tram, or animal to give to the police officer information about the identity of the owner of the vehicle, tram, or animal."

The Road Use Management Act is identified in the dictionary in Schedule 4 to the *Police Powers and Responsibilities Act 2000* as meaning the *Transport Operation (Road Use Management) Act 1995.*

[20] As can be seen, s 46(1) applies if a police officer reasonably suspects that a contravention of the Road Use Management Act involving a vehicle has been committed. Sgt Murphy had reason to suspect the commission of the offence of driving without due care and attention under s 83 of that Act because he had earlier that afternoon seen the Holden Statesman 231-GXW being driven on the D'Aguilar Highway at the speed and in the manner he described in evidence. Plainly, he reasonably expected the appellant of being able to give him information that would identify, or help identify, the person who was in control of that vehicle when the

contravention happened. It follows that Murphy had authority under s46(2)(d) of *Police Powers and Responsibilities Act 2000* to require the appellant to give him that information.

[21] It is true that the appellant was himself the person whom he suspected of having committed the contravention referred to. To that extent, s 46(2)(d) may displace the privilege at common law of refusing to incriminate oneself; but, whether or not it does, it is clear that the appellant was not, within the meaning of s 246(2), a "relevant person" for the purpose of Part 3 of Chapter 7 of the *Police Powers and Responsibilities Act 2000* and in particular ss 249(1) and 258(1) of it. At least that is so if the power conferred by s 46(2)(d) of the Act to require him to give information to identify or help identify the person who was in control of the Holden Statesman 231-GXW was a power that was being exercised by Sgt Murphy "under any Act" to require the appellant "to give information or answer questions". A power to do so in this instance was conferred by the *Police Powers and Responsibilities Act* itself; but I do not, for that reason, see that it was any the less a power being exercised "under any Act".

[22] In any event, the question at issue here is not whether the appellant could have been compelled to give information that incriminated him. He did not in fact object to doing so. That question might conceivably arise if the appellant had refused to give the information when required to do so, and in consequence was charged under s 445 of the Act with an offence of contravening such a requirement. In this instance, the operation of s 46(2)(d) had the result under s 246(2)(b) of excluding the application to the appellant of the protection otherwise afforded under Part 3 of Chapter 7 by virtue of his being a relevant person. The Act in short gave, but it also took away.

[23] It does not necessarily follow that the general discretion, on grounds of unfairness under *Bunning v Cross* (1978) 141 CLR 54, to exclude the appellant's statement to Sgt Murphy automatically also ceased to be available or exercisable in favour of the appellant at his trial. Counsel for the defence relied on it, submitting that the matter to be considered in that regard was the impact that the admission in evidence of the statement would have upon the fairness of the trial accorded to the appellant. He also contended that the confrontational or argumentative manner of the police questioning deprived the appellant of the opportunity to make a fair answer to the accusation against him that he had been driving the Holden. He submitted that the complete disregard of the requirement in the *Police Powers and Responsibilities Act* was both an additional ground of public policy for excluding the statement at common law and an independent statutory ground for excluding it.

[24] I have already disposed of the last of these matters. In the way in which I interpret the statutory provisions, there was no disregard of the requirement in that Act because in this instance there was no such requirement. So far as general fairness is concerned, the conduct of the appellant was, on the face of it, a defiant breach of the speed limits and the provisions of the Road Use Management Act, which on one view presented a serious threat to the safety of other road users. If disregarding the statutory requirements raised any apprehension about the fairness of the ensuing trial, it is not a breach of such a kind as would justify lasting concern for the integrity of the judicial system by reason of the admission of the statement in evidence at the trial. In so far as the appellant in his answer made any admission at all, he appears to have been quite able to take care of himself without legal advice,

and in fact he responded to the critical question or accusation by saying that he had not been driving. Above all, it appears to me that under s 46(2)(d) Sgt Murphy was legally entitled to require the particular information which he sought. Since, as I have concluded, the statutory requirements under ss 249(1) and 258(1) did not in any event apply to the appellant here, there can be no question of his deliberately disobeying them. In these circumstances, it is impossible to regard the fair trial of the appellant as having been fatally prejudiced by the admission in evidence of his statement to Sgt Murphy. I do not consider that the trial judge was bound to exclude the statement or that he exercised his discretion wrongly in not doing so.

[25] Quite apart from those considerations, it is not easy to see what advantage the prosecution hoped to gain from having the statement in evidence. Sgt Murphy asked about the whereabouts not of the white Holden Statesman 231-GXW but of a vehicle he described as a white Commodore. That this may have been a momentary slip of the tongue is suggested by the fact that elsewhere in his evidence he also used the description Commodore, when he was plainly intending to refer to the Statesman sedan. On the face of it, however, the reference to a Commodore was to a quite different model Holden sedan, which the appellant said was then at Kingaroy. The real sting was in the second limb of the question, which "you were driving", although it failed to specify the time of driving; and the appellant, when accused of dangerous driving, immediately asserted that he had not been driving. Although the defence objected at the trial to the admission of the statement, it may be that the Crown properly tendered it as an exculpatory statement by the appellant. All things considered, it can hardly have influenced the verdict against him. The most that can be said against its being admitted in evidence at the trial is that it was irrelevant. It is difficult to see that it was prejudicial.

[26] It is the evidence going to identification of the appellant that formed the principal focus of the trial and of the appeal in this case. Both police officers said in evidence that they had a sufficiently good view of the appellant as he passed each of them on the highway to enable them when they saw him an hour later to identify him as the driver of the Statesman. Robinson said he had previously seen the appellant as recently as 11 April 2003, apparently in connection with some other matter; so that, when he saw him at about 5 pm at Oliver Road, he recognised him, although he did not then remember his name. It was, he claimed, "definitely the same person" that was in the Statesman, and who was also the passenger in the red Falcon sedan. He described him as having dark hair, and wearing sunglasses. He also said he had a fair complexion, with clean-shaven "chiselled" features, a flat-top sort of haircut, and was wearing shorts and a red, white and black Holden polo shirt. Part of this description was evidently based not on what Robinson claimed he had seen of the driver of the Statesman in the second and a half it took to flash past him on the highway, but upon his later sighting of the appellant at Oliver Road, as well as on the photographs taken that afternoon that were admitted in evidence. Robinson could not, for example, have seen that the person driving the Statesman had shorts on when he saw him driving the car on the highway. I should add that is not clear from his evidence that he was saying that he had done so at that time. There was nevertheless a risk that his view of the appellant later that afternoon was subconsciously influencing his process of recognising the appellant as the person he had seen driving the Holden vehicle about an hour earlier.

[27] Sgt Murphy's description of the driver of the Statesman was rather more circumspect. After he stopped, he said he looked at the driver of the vehicle as it

approached him down the highway. He could see that he had short dark hair, and that he was wearing sunglasses and what appeared to be a black polo shirt with white and red on it. In evidence he said he was later able to identify it as a Holden dealer shirt because he, Sgt Murphy, had one himself. Looking at the photographs of the appellant which Snr Const Robinson had taken, he said they depicted the same person he had seen driving the white Holden "Commodore" earlier that afternoon.

[28] There was at the trial naturally much detailed cross-examination by the defence of the two police officers about what each of them saw or could have seen of the appellant when he drove past them on the highway; about the speed at which the Holden Statesman was being driven; about the condition of light at the time; the angle of the sun in the sky; and other matters of that kind. The windows of the Holden were partly tinted, so that the opportunity for seeing the driver's face was to some extent limited to the view that, in the case of Sgt Murphy, he had of it through the windscreen as it came towards his vehicle after he stopped it at the side of the highway. The potential deficiencies in the process of identification that were stressed in the course of cross-examination and no doubt also in the defence address, were cogent. Nevertheless, approaching the question as a reasonable juror might be expected to do, the sightings on the highway that each of the police officers had of the driver would, I consider, have disclosed that at least he was a male, with short dark hair, wearing dark glasses and possibly also a black polo shirt with white and red on it. Those are obvious features of the appellant as he was seen and photographed at or near Oliver Road at about 5.00 pm later on that day.

[29] The learned judge was urged by defence counsel at the trial to give the jury a direction in accordance with the reasons of the High Court in *Domican v The Queen* (1992) 173 CLR 555, 562, instructing the jury in terms that drew attention to the particular weaknesses in the identification evidence in the circumstances of the case. His Honour declined to do so. He did direct the jury that identification evidence "needs to be approached very carefully". By identification evidence he said he meant where a witness said he recognised a person as someone whom he later claimed to have seen doing something. But this was, his Honour said, not such a case. He told the jury that "Neither police officer got a very good look at him, obviously enough, and they don't purport to say they did". He referred specifically to the speed of the Holden and the fact that the police officers were looking at the driver through a windscreen as the oncoming vehicle approached. They could see things such as sunglasses, short darkish hair, and red, black and white on the polo shirt; but "neither police officer got a great look at him, just a general quick look". Then his Honour went on to discuss the registration number of the vehicle and the events that happened at Oliver Road, and to direct the jury on how they should approach circumstantial evidence of guilt, giving them the conventional *Peacock* direction.

[30] It was accepted by the respondent on appeal that the directions given to the jury did not satisfy all of the requirements laid down in *Domican v The Queen* (1992) 173 CLR 555, 561, which apply:

> "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 …".

In those circumstances 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", as well as appropriate to the circumstances of the case. It must "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". No such warning was given in the present case, although it is evident that, at least so far as Snr Const Robinson was concerned, he was purporting to recognise the appellant as someone he recognised from having seen him on a previous occasion.

[31] There is, it seems to me, some confusion about what is meant by identification evidence in this context. Depending on its relevance to the issue of identity, even fingerprints and DNA fall into that category when it is evidence that tends to identify a particular person as a participant in events that have occurred at the scene of the crime: cf *Festa v The Queen* (2001) 208 CLR 593, 599. No one has so far suggested that the *Domican* direction must be given in the case of evidence like that; so to apply it would reduce the requirements of that decision to the level of a ritual incantation that could only confuse the jury. There is, it might be thought, an obvious difference between circumstantial evidence, and the testimony given by a witness of his or her visual or aural recognition of a person based on previous knowledge, sighting or experience.

[32] In *Festa v The Queen* (2001) 208 CLR 593, 610-611, McHugh J distinguished between positive identification, consisting of direct evidence which identifies the person who committed the act constituting the crime, and what is sometimes called circumstantial identification evidence consisting of general appearance or characteristics, including age, race, stature, colour, voice or other distinctive mark or gait. His Honour's view was that when circumstantial identification evidence has no element of positive identification, it usually does not have the potential unreliability of positive identification evidence, and "a judge is not automatically required to warn the jury concerning the dangers of circumstantial identification evidence". On the basis of this distinction, McHugh J in *Festa* disapproved (see 208 CLR 593, 612) of the decision in *R v Zullo* [1993] 2 Qd R 572, in which the accused was identified as the offender in a fatal stabbing in the course of a street mêlée by reference to his red shirt. Having myself dissented on the appeal from the first trial of *Zullo*, I retain some reservations about its correctness; but in this Court its authority survives and it ought to be followed until overruled. In that context, I observe that in *Festa v The Queen* (2001) 208 CLR 593, 658-659, Hayne J and also, it would appear, Kirby J (208 CLR 593, 642-643) did not indorse the evidentiary classification suggested by McHugh J, or agree with the suggestion that it relieved a trial judge of the duty to apply *Domican*. Identity is after all, as their Honours' reasons say or imply, no more than the sum total of particular attributes which we subconsciously combine in performing the process of recognition of another person or a thing.

[33] It follows, in my opinion, that the trial judge in this case ought to have acceded to defence counsel's request to direct the jury in accordance with the requirements laid down in *Domican v The Queen*. That he did not do so has the result that this ground must succeed and the appeal be allowed unless the proviso, as it is still known, in s 668E(1A) of the Criminal Code can properly be applied. For

convenience of reference, the provision is set out as a footnote to the reasons for judgment of Callinan J in *Festa v The Queen* (2001) 208 CLR 593, at 671.

[34] *Festa v The Queen* is one of several recent decisions of high authority concerning the application of the proviso. Like this, it was a case involving identification of the accused. The starting point there was, as it is here, that there had been "the wrong decision of any question of law", founded partly on failure to give a *Domican* direction. In *Festa*, McHugh J repeated that a trial judge was not absolved from the duty of giving general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence which, if accepted, is sufficient to convict the accused (208 CLR 593, 618). In *Festa*, all of their Honours nevertheless held that the case against the appellant was so strong that her conviction was inevitable and that no substantial miscarriage of justice had occurred.

[35] In determining this question, the Court must do so according to its own assessment on appeal of the facts of the case as disclosed in the evidence before the jury at the trial: see *Festa v The Queen* (2001) 208 CLR 593, 631-632, 661. Here we must start with the incontrovertible propositions that on 21 April 2003 there was only one white Holden Statesman reg no 231-GXW, and that at some time between 4 and 5 pm on that day, it was being driven on the D'Aguilar Highway in the direction of Nanango. The question is, Who was driving it at that time? The vehicle was registered to a woman who lived at 44 Oliver Road, Nanango, which is where the appellant also resided at that time. It was not suggested that she herself was driving it on the highway at the relevant time. The most obvious candidate for the role of driver was the man she lived with, who was the appellant. He was not at home at the time the police arrived, but came soon after the offending driving had taken place. He did so, however, not as the driver of the Statesman but as a passenger in the red Ford Falcon driven by Lawrence Taylor.

[36] It may have been simply a coincidence that he turned up at home at about that time, having perhaps innocently spent the afternoon with Taylor. At the speed he had been travelling, it might have been expected that he (if it was indeed he) would have got there ahead of the police. The evidence of the time and distance travelled by the police to Oliver Road raises the hypothesis that he had not returned home directly, but had gone to Taylor's place and persuaded him to drive him home so that he would be there without the Statesman when the police arrived. If so, the ruse was at least partly unsuccessful; but police searches in the vicinity failed to uncover the whereabouts of the Statesman at any time before the appellant arrived.

[37] Standing alone, the combination of these circumstances might not be enough to justify beyond reasonable doubt a conclusion that it was the appellant who had been driving the Statesman. But this is to reckon without the evidence of what happened at Oliver Road when the red Falcon arrived there. If, having innocently spent time that afternoon with Taylor, he was then driven to his home, it is surprising that the appellant did not get out of the car then and there. Instead, the Falcon drove on with the appellant crouching or lying down on the front passenger seat. No cross-examination was directed to this aspect of the police evidence and it appears to have gone unchallenged. The only rational explanation for the appellant acting in this way was to avoid detection by the police who, from their presence at or near the address, were evidently waiting for him. If (which was not suggested) he was innocently picking something up off the floor, it is inconceivable that the Falcon,

instead of stopping to let him off, should have driven off the way it did after going round Sgt Murphy standing on the road and ignoring his signals to stop until the police hue and cry began.

[38] A reasonable jury would, in my opinion, have had no doubt that the appellant, was with the assistance of Taylor, trying to escape detection and arrest. The assessment is as McHugh J recognised in *Festa* necessarily subjective; but looking at the evidence on appeal, I personally have no doubt of it. To reach a contrary conclusion would also be to ignore the other evidence from the police of what they claimed to have seen of the appellant on the highway. It was, it is true, not the subject of the full direction required for identification evidence; but, as in *Festa*, that omission did not render the evidence inadmissible or unavailable for the purpose of considering whether or not to apply the proviso on this appeal. Unlike jurors, judges are acutely conscious of the shortcomings of visual identification evidence. Even so, as I have already said, I consider that, fully recognising the difficulties presented by the speed at which the appellant was travelling and the shortness of time in which he could have been seen by the police officers, it would nevertheless have been possible to see that he was a male with short dark hair, together possibly with some of the detail of the colour of his shirt. With the benefit of only those identifying features, there could not have been any doubt that the appellant was the driver of the Holden Statesman at the relevant time. To suppose that some other person of that general description and attire was driving the Holden Statesman 231-GXW at that time and place defies rational credulity. It is not a reasonable hypothesis.

[39] In this regard, it is to be borne in mind that the question on appeal is not whether the jury accepted the two police witnesses as honest in giving their evidence at the trial. The guilty verdict manifests the jury's view of that question. They first retired to consider their verdict at 2.44 pm, but returned at 2.47 pm for a brief re-direction before retiring again at 2.48 pm. At 2.50 pm they returned with their verdict of guilty. The alacrity with which they evidently made up their minds may, as counsel suggested on appeal, have been a reflection of the absence of an adequate *Domican* direction; but it clearly had nothing to do with any doubt they might have had about the honesty of the two police witnesses or any adverse impression they might have formed of the way in which they gave their evidence.

[40] In *Festa v The Queen* (2001) 208 CLR 503, 657, Kirby J said of the appellant there:

> "Although she was not bound to give evidence, the lack of any evidence [from her] necessarily meant that the case went to the jury on the compelling basis established by the prosecution. The case against the appellant was therefore irresistible. Her conviction was inevitable."

In my opinion, the same applies to this case. The admissible evidence against the appellant was such that, even if the jury had been adequately instructed in accordance with the requirements of *Domican v The Queen* (1992) 173 CLR 555, the appellant would inevitably have been found guilty of the offence charged. The appellant's conviction involved no substantial miscarriage of justice.

[41] It follows in my opinion that the appeal against conviction should be dismissed.

[42] **HOLMES J:** I have had the advantage of reading the reasons for judgment of both the President and McPherson JA. I agree with them that, the police officers having purported to identify the appellant in terms of recognition of his facial features, the *Domican* direction ought to have been given.

[43] This was a strong circumstantial case, when one added together the sightings of the white Statesman, registered to another occupant of the appellant's address, and the appellant's apparent desire to conceal himself when he saw the police in the vicinity of that address, about 50 minutes after the Statesman was last seen. In addition, there were the police officers' descriptions of the driver of the Statesman as having dark short hair, sunglasses and in the case of one officer, a red white and black polo shirt; all those details matching the appellant's appearance on that day. (Those descriptions must however be treated with some caution, given the apprehension and photographing of the appellant shortly afterwards.) But I do not think that those circumstances, compelling as they might be, amounted to a case of such strength that one could say that the jury must inevitably have convicted with or without proper direction on identification.

[44] I agree, therefore, with the President's conclusions that the proviso ought not be applied and with the orders she proposes.