SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sharkey* [2013] QCA 259
PARTIES:	**R** **v** **SHARKEY, David John** (appellant)
FILE NO/S:	CA No 74 of 2013 DC No 282 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	13 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2013
JUDGES:	Margaret McMurdo P and Holmes and Gotterson JJA Separate reasons for judgment of each member of the Court, Holmes and Gotterson JJA concurring as to the orders made, Margaret McMurdo P dissenting in part
ORDERS:	**1. The appeal is allowed.** **2. The conviction is quashed.** **3. A re-trial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant was convicted of robbery with personal violence – where the complainant described his attacker as having tattoos of geckos on either side of his neck – where an affidavit tendered as fresh evidence showed that the appellant's tattoos in fact consisted of a name written in ornate script and a skull and cross bones – where defence counsel at trial deposed that she had not elicited or led evidence about what the appellant's tattoos actually were because the tattoos would have been visible to the jury – where defence counsel in her closing address informed the jury that the appellant's tattoos were not geckos – where the trial judge instructed the jury to disregard the purported statement of fact and reminded them that there was an absence of evidence regarding the nature of the appellant's tattoos – whether defence counsel's failure to establish that the attacker's tattoos as described by the complainant were different from the appellant's or to seek a direction that the jury were entitled to have regard to what they could see of the

appellant's tattoos deprived the appellant of a real chance of acquittal – whether a miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION AND NON-DIRECTION – where the appellant was convicted of robbery with personal violence – where the complainant, having previously given a description of his attacker, identified a photograph of the appellant on a photoboard as depicting the man who had attacked him – where none of the other images on the photoboard were of persons whose description met that given by the complainant – where defence counsel raised no issue as to the adequacy of the composition of the photoboard, and where the trial judge did not warn the jury regarding its inadequacies – whether there was any forensic reason for defence counsel not to raise the issue – whether the trial judge erred in failing to give a warning

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISCARRIAGE OF JUSTICE – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was convicted of robbery with personal violence – where the appellant appeals his conviction on the basis that the verdict was unreasonable because the identification evidence was unreliable – where the complainant said that he recognised the attacker as residing at the appellant's premises – where a photoboard identification was unsatisfactory because only one photo, that of the appellant, resembled the description given by the complainant of his attacker – where the complainant's initial description of his attacker's neck tattoos did not include a prominent tattoo on the appellant's Adam's apple – where evidence as to a discrepancy between the appellant's tattoos and those described by the complainant was not placed before the jury – whether on the whole of the evidence, the jury could be satisfied beyond reasonable doubt of the appellant's guilt

Bulejcik v The Queen (1996) 185 CLR 375; [1996] HCA 50, cited
Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, cited
M v The Queen (1994) CLR 487; [1994] HCA 63, cited
R v Katsidis; ex parte A-G (Qld) [2005] QCA 229, cited
R v Main (1999) A Crim R 412; [1999] QCA 148, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: G M McGuire for the appellant
P J McCarthy for the respondent

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

[1] **MARGARET McMURDO P:** The appellant, David Sharkey, appeals against his conviction for robbery with personal violence. He was granted bail pending appeal on 19 June 2013. The prosecution case turned solely on the complainant's identification or recognition evidence. I agree with Holmes JA's reasons for concluding that this trial miscarried and that the appeal must be allowed and the conviction quashed. I do not, however, consider that a retrial should be ordered. For the reasons which follow, I would direct a verdict of acquittal.

[2] There is no doubt that, on 13 March 2011, the unfortunate complainant, a student from Burma, was violently robbed of his wallet containing $400 cash and some cards. The incident occurred in broad daylight and lasted about three or four minutes. The offender head-butted the complainant causing a brief loss of consciousness. The complainant reported the incident to a Burmese caseworker the following day. On 26 March 2011, almost two weeks after the offence, he reported the offence to police. Police took his first statement on 30 March 2011. The complainant told them that the offender had two "gecko" tattoos on his neck. The evidence does not suggest the complainant made any mention of any "star" tattoo in the centre of the offender's neck.

[3] The evidence is confusing but suggests that the complainant discussed the identity and address of the offender with others in the neighbourhood.[1] On 3 June 2011, almost three months after the offence, the complainant went to the local police station to see if he could identify the offender from a photoboard. Apparently for the first time, he told police that the offender lived at 13 North Road, Woodridge, across the street from his own residence. Police ascertained that Mr Sharkey lived at that address and for that reason included his photo amongst the 12 photos in the photoboard.[2] Mr Sharkey's photo was the only one of the 12 which clearly depicted a man with tattoos on each side of the neck. The identification procedure was video recorded.[3] The footage shows that the complainant, when shown the photoboard, immediately and convincingly identified as the offender the person depicted in photograph 9 (Mr Sharkey). Later, the complainant is recorded telling police through the interpreter that he had regularly seen the person depicted in photograph 9 in the neighbourhood as part of a group of people.

[4] Police took a further statement from the complainant on 13 September 2012. During this process, he drew a diagram of the offender's tattoos and indicated on diagrams of the male body where they were located. He drew a large star tattoo with gecko–like creatures on either side, and indicated that the tattoos were in the middle of the neck and on each side of the neck.[4]

[5] At trial on 11 March 2013, two years after the offence, the complainant gave evidence through an interpreter. He said he had an opportunity to look directly into the offender's face. He described the offender as about the same height as himself but with gingery-reddish hair and tattoos which he described as a star around his Adam's apple and what looked like geckos on each side of the neck.

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1 T 1-37 – T1-39.
2 Ex 1.
3 Ex 3.
4 Ex 2.

[6] The appellant did not give or call evidence.

[7] At the appeal hearing, Mr Sharkey's counsel sought to adduce further evidence from a lawyer at Legal Aid Queensland, Thomas Zwoerner, to the effect that exhibited photographs of Mr Sharkey depicted the tattoos on his neck. These photographs show that Mr Sharkey is a fair skinned man with short light brown hair, perhaps with a slight reddish tinge. He has three prominent tattoos on his neck. In the centre, covering his Adam's apple, is a large five pointed star. To the right is "Billy" in large cursive script with ornamentation. On the left is a large skull and crossbones with a hat. He also has a much less prominent, small "x" tattoo below his right eye. At the hearing, this Court gave leave to Mr Sharkey's counsel to read the affidavit so that the Court could determine whether to receive the evidence.[5]

[8] In determining that question, there is an important legal distinction between fresh evidence and further or new evidence. Fresh evidence is evidence which either did not exist at the time of trial or which could not then with reasonable diligence have been discovered: *Ratten v The Queen*;[6] *Lawless v The Queen*;[7] and *R v Katsidis ex parte A-G (Qld)*.[8] It is often difficult to resolve whether evidence is fresh or new, but there is no such difficulty in this case. It is plain that the evidence now sought to be adduced both existed at the time of the trial and could and should have been adduced at trial with the application of reasonable diligence. It is not fresh evidence but new or further evidence.

[9] Where an appellant in a criminal appeal relies on new or further evidence, there is a residual discretion to receive that evidence on appeal if to refuse to do so would cause a miscarriage of justice. See *Ratten*;[9] *R v Condren; ex parte Attorney-General*;[10] *R v Young (No 2)*;[11] *R v Daley; ex parte A-G (Qld)*;[12] *R v Main*[13] and *Katsidis*.[14]

[10] In determining an appeal which turns on new or further evidence, there are strictly two questions for the court. The first is whether it should receive the evidence. The second is whether, if the evidence is received, when combined with the evidence at trial, it demonstrates that the conviction should be set aside to avoid a miscarriage of justice. Frequently, those two questions merge.[15]

[11] The reliability of the further evidence here is not in question. The more difficult question is whether the photographic evidence of Mr Sharkey's neck tattoos, considered together with the evidence led at trial, establishes that the conviction amounts to a miscarriage of justice.

[12] Identification evidence, even recognition evidence, is notoriously unreliable. An honest but mistaken witness can be most persuasive. It is especially problematic because of its seductive potential to persuade, despite its unreliability. Having seen the photographs of Mr Sharkey's prominent neck tattoos, I find it highly significant

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5 Appeal transcript 1-8 line 45.
6 (1974) 131 CLR 510, 516-517.
7 (1979) 142 CLR 659, 674-676.
8 [2005] QCA 229, [2] and [11]-[36].
9 Barwick CJ, 519, McTiernan, Stephens and Jacobs JJ agreeing.
10 [1991] Qd R 574, 579.
11 [1969] Qd R 566.
12 [2005] QCA 162.
13 (1999) 105 A Crim R 412, [16]-[17], [22]-[24].
14 [3], [10]-[19], [36].
15 *Main*, above, [22]-[23]; *Katsidis*, above, [4], [19], [36].

and most concerning that the complainant did not initially describe the offender as having tattoos resembling the distinctive and unusual combination of tattoos adorning Mr Sharkey's neck. Instead, the complainant initially described the offender as having only tattoos of geckos on each side of his neck. He made no mention of the large eye-catching star tattoo on the Adam's apple. Whilst the appellant has tattoos on each side of his neck, they do not in the least resemble geckos. Of less significance, the complainant made no mention of the offender having a small "x" tattoo below the right eye. There is a real possibility that the complainant discussed the identity and address of the offender with others before making the identification.

[13] For this and other reasons, I am unable to give the photoboard identification evidence any weight. The only photo which clearly showed a man with tattoos on both sides of the neck was Mr Sharkey's photo. The police included it in circumstances where the complainant, almost three months after the offence, told police for the first time that the offender lived across the road from him and after ascertaining that Mr Sharkey lived at that address. There was a real risk that in the photoboard identification the complainant identified, not the offender with the two gecko neck tattoos, but a person whom he had subsequently mistakenly associated with the incident, that is, Mr Sharkey, whose tattoos were quite different from those the complainant first described as adorning the offender. The complainant's subsequent statements and evidence may well have been similarly tainted by this honest but mistaken identification by recognition during the photoboard process.

[14] There is no doubt that the complainant was an honest witness who was the victim of a cruel and vicious robbery. But after considering the new evidence in this appeal, together with the evidence at trial, I am of the view that it was not open to a reasonable jury properly instructed to convict Mr Sharkey. To do so would amount to a miscarriage of justice. It follows that I am persuaded this Court should receive the new evidence. For these reasons, together with those given by Holmes JA, the conviction should be set aside to avoid a miscarriage of justice.

[15] The next question is whether a retrial should be ordered or whether a verdict of acquittal should be entered. Mr Sharkey's counsel contends that the jury verdict was unreasonable and not supported having regard to the evidence in terms of s 668E(1) *Criminal Code* 1899 (Qld). In determining this ground, the question is whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of Mr Sharkey's guilt: *M v The Queen*[16] and *SKA v The Queen*.[17] After considering the new evidence together with the evidence at trial, set out earlier in these reasons, I do not consider it was open to a properly instructed jury on the admissible evidence to be satisfied beyond reasonable doubt of Mr Sharkey's guilt.

[16] For those reasons, I would make the following orders:

1. The Court should receive the further evidence.

2. The appeal should be allowed and the guilty verdict set aside.

3. A verdict of acquittal should be entered.

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16 (1994) 181 CLR 487, 493-495.
17 (2011) 243 CLR 400, [12].

[17] **HOLMES JA**: The appellant was convicted by a jury of robbery with personal violence. His appeal turns, in essence, on the quality of identification evidence given by the man robbed, Mr Nai. Originally, the appeal was based solely on a ground that the guilty verdict was unreasonable. The appellant was, however, given leave to adduce fresh evidence in the form of photographs showing tattoos on his face and neck. Those on his neck consisted of a skull and bones on one side and the word "Billy" written in ornate script on the other, with a star at the front centred on the appellant's Adam's apple. Less significant was a small, crudely executed cross on his face, below his right eye.

[18] In connection with that evidence, the appellant was permitted to add a ground of appeal that there had been a miscarriage of justice through defence counsel's failure to lead evidence or cross-examine about the details of the appellant's tattoos or to seek a direction about the fact that Mr Nai had been shown a photoboard the majority of the images on which did not match his description of the robber. Leave was also given to add a further ground, that there had been a miscarriage of justice caused by the learned trial judge's failure to direct the jury about the deficiencies of the photoboard.

Mr Nai's evidence

[19] Mr Nai, a Burmese student in his early 30s, gave evidence through an interpreter. He said that on the afternoon of 13 March 2011, he was pushing his bicycle along a street at Woodridge when he was assaulted and robbed by a man whom, in giving evidence, he identified as the appellant. He did not know him personally, but had seen him "quite a number of times" around the Woodridge station. The man asked him for a cigarette, and as Mr Nai was passing it to him, grabbed him by the shirt and pulled him, demanding money. As Mr Nai was feeling in his pocket for his money, his assailant head-butted him and he lost consciousness. When he regained his senses, he found that his wallet containing $400 and various cards was missing.

[20] Mr Nai said in evidence that his encounter with the man lasted three to four minutes. The attack had happened about 4.00 o'clock in the afternoon, in clear weather and in broad daylight. He had the opportunity to look directly into the attacker's face when the latter pulled him by his shirt. He described him as about his own (unspecified) height, with gingery/reddish hair and tattoos on his neck. He could see a star around his Adam's apple and what looked like geckos on either side of his neck. The man was wearing a sports shirt.

[21] The following day, Mr Nai saw a Burmese caseworker who helped him by writing some notes to take to the police. On 26 March 2011, he went to the local police station where details were taken of his complaint, and four days later his statement was taken. In cross-examination, Mr Nai conceded that in that statement he told the police officer he had seen two gecko tattoos, one on either side of his assailant's neck, but had not mentioned a star in the centre of the man's neck; the police, he said, had not asked him about it. He also agreed that he had told the police officer he was informed by an unknown male person that the man who assaulted him lived in a unit on Defiance Road.

[22] In evidence-in-chief, Mr Nai said that he had not seen his attacker since the assault. However, defence counsel elicited evidence from him that on 3 June 2011, he went to the police station to be shown a photoboard. At that time, he told the investigating officer that the person who had attacked him lived at an address at

North Road, across the street from his own residence; he had seen him coming and going from there. The officer confirmed in evidence that the appellant lived at that address, about 400 metres from where Mr Nai was attacked. As a result of Mr Nai's information, she had included the appellant's photo on the photoboard.

Mr Nai's identification of the appellant

[23] The identification procedure was recorded. In the DVD footage, Mr Nai can be seen, immediately on being shown the photoboard, pointing to a particular photograph admitted to be that of the appellant. Mr Nai confirmed in his evidence that he had said some of the things which can be heard on the DVD. Through an interpreter, he said

> "Yes, I'm for sure that's him. I don't even have to look at it that closely, I can pick him up straight away. That's him I believe."

He added this qualification:

> "I can't pick up the actual tattoo at the – right at the front but honest, out of the few that's definitely him."

He went on to explain that the man in question was part of a group which was often around the local area, especially on the weekends.

[24] The photoboard shown to Mr Nai contained 12 photographs. The photo of the appellant showed that he had tattoos on either side of his neck (the detail of which could not be made out) with a very prominent star over his Adam's apple. Unfortunately, of the other 11 persons photographed, 10 had tattoos to only one side of the neck; the remaining man had a tattoo on one side of his neck and a shadow on the other which might or might not have been a tattoo. To show the complainant a photoboard on which only one of the persons depicted met the description previously given was lamentably poor practice, and, as was submitted for the appellant here, detracted considerably from the probative value of the exercise. However, defence counsel at the trial raised no issue at all about the matter. It does not appear that the inadequacy of the photoboard was the subject of comment in the defence address; the learned trial judge did not refer to it in her summary of the defence contentions and was not asked for any re-direction.

[25] In September 2012, police asked Mr Nai to draw his attacker's tattoos. He depicted a gecko on either side of the figure's neck, with a star in a circle in the centre. However, given that process post-dated his having been shown the photoboard, on which the star tattoo was clear, that process was also of very doubtful probative value.

The summing-up on identification

[26] The trial judge gave the jury conventional directions as to the caution necessary in assessing the identification evidence, before pointing to the following specific weaknesses. The attack itself was a distressing and traumatic event, during which Mr Nai lost consciousness. It was three months between the attack and his identification through the photoboard process of the appellant. By that stage Mr Nai had seen the appellant at the house across the road, so that it was possible that his identification was, in truth, simply an identification of the appellant as a nearby resident and someone who was often around the area. During the identification

process, he had initially referred to the appellant as someone whom he saw in the area, rather than as the person who had robbed him. There was also a possibility that the selection of the appellant's image was tainted because of conversations Mr Nai had had with the unknown person about the appellant's living locally, before giving his statement to police. Mr Nai had not mentioned the star tattoo in his initial complaint to police and raised it only after he had seen the appellant on the photoboard.

Unreasonable verdict

[27] Counsel for the appellant here (who did not appear for him at trial) submitted that the verdict was unreasonable because of the unreliability of the identification evidence, largely for the reasons about which the trial judge had warned the jury. Mr Nai had not noticed or described the obvious star tattoo at the front of the appellant's neck, although he had ample time to observe his attacker. There was a significant gap in time between the incident and the photoboard identification. The identification occurred after he had seen the appellant as a nearby resident. He had conversations with an unknown person about the offender before the identification process. In addition, the skewing of the photoboard images detracted from Mr Nai's identification of the appellant.

[28] It seems to me that showing Mr Nai a photoboard on which only one image clearly met his description of the offender was very much akin to showing him only one photograph, that of the appellant. Its probative value was very slight. If the case for the appellant's being the offender turned on that evidence alone, there would be force to the submission that the verdict was unreasonable. But there was, in this case, the added factor of Mr Nai's saying that he recognised the man who approached him, having seen him previously. Added to that was the promptness of Mr Nai's selection of the appellant's image on the photoboard, which suggested an immediate recognition.

[29] It was open to the jury to accept that Mr Nai did recognise the appellant's face as that of his attacker and was aware of the existence of tattoos on his neck, but had forgotten, or not registered, until being shown the photoboard, the star which appeared on the front of the appellant's neck. There was no evidence before the jury which would have contradicted Mr Nai's recollection of the tattoos on the side of the appellant's neck being geckos. (It was impossible to discern from the photoboard image what any of the appellant's tattoos, other than the star, actually was.) On the evidence before them, I do not consider that the guilty verdict returned by the jury was unreasonable.

The failure to lead or elicit evidence about the appellant's tattoos

[30] In view of the added ground concerning defence counsel's conduct of the case, the appeal was adjourned to allow the obtaining of an affidavit from her, which was duly provided. Counsel said that she had not cross-examined or called evidence about what the tattoos on the sides of the appellant's neck actually were because the trial was conducted in a very small courtroom and the tattoos on the appellant would have been visible to the jury. It could be seen that they were not geckos.

[31] As counsel for the respondent here pointed out, it was not impermissible for the jury to have regard to the appellant's appearance as he sat before them in the dock.

Bulejcik v The Queen[18] is highly persuasive authority for that proposition. That case concerned, not visual identification, but use of a recording of the accused's unsworn statement for voice comparison purposes. However, all members of the court adverted for the purposes of analogy to the jury members' entitlement to look for themselves at the accused's appearance:

> "[*T*]*he physical appearance of an accused* or a witness or the sound of a voice heard in the court *does not have to be proved before a jury is entitled to take account of what they have seen or heard for themselves*." [19](Per Brennan CJ.)
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> …
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> "While the unsworn statement made by the appellant was not, strictly speaking, evidence, it was material available to the jury which they could make use of in the same way in which *they might use the appearance and manner of the accused in court where appearance and manner were relevant*…
>
> The rule [against self-incrimination] was not offended, any more than it would have been *if the jury had used the physical aspects of an accused where identification was in doubt*."[20] (Per Toohey and Gaudron JJ.)
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> …
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> "If the accused's manner of speaking is relevant to an issue, the Crown can ask the jury to use their recollection of the accused's voice to support the Crown's case on that issue, *just as the Crown can rely on the height or appearance of the accused to help prove its case*."[21] (Per McHugh and Gummow JJ.)
> (Emphasis added in each passage.)

[32] But defence counsel does not seem to have had great confidence in the jury's ability to make out the appellant's tattoos, because she appears to have gone beyond inviting them to consider what they could see of them to telling them that there was a cross tattoo under his eye and that the tattoos on his neck were not geckos. That approach resulted, at the close of defence counsel's address, in the trial judge rebuking her for giving evidence from the Bar table about the appellant's tattoos. The result was this passage in the summing-up:

> "She [counsel] said some things to you about the tattoos on the defendant. There's no evidence before the Court about what his tattoos are, all right? The prosecution didn't call evidence to say that police had taken a photograph of him or what tattoos he in fact has, the defence didn't call evidence about that. So, you must disregard any comments that the defence made about what tattoos he has or he hasn't got because that's what we call evidence from the Bar Table, there weren't any witnesses called in relation to that matter. So the evidence that you have before you is just what you yourselves can observe or there's the photograph and the other evidence before you."

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18 (1996) 185 CLR 375.
19 At 381.
20 At 399.
21 At 407.

[33] The learned trial judge's instruction to the jury as to the absence of evidence of the nature of the appellant's tattoos was correct, with this exception: the star tattoo could be seen on the photoboard image. Her Honour was right to tell the jury to disregard defence counsel's purported statement of fact to them about the character of the tattoos. Counsel would have been entitled, however, to ask the jury to look at the tattoos for themselves, and to seek a direction from the trial judge that they were entitled to act on what they saw. It does not seem that either course was taken.

[34] It cannot now be known what the jury made of the appellant's appearance in the dock. It seems unlikely, in light of the direction given, that they felt entitled to have regard to what they could actually see of his tattoos. The obvious course for the defence, in order to make the vital point about Mr Nai's error in describing the neck tattoos as geckos was to put evidence before the jury of what the appellant's tattoos actually were. That would not necessarily have involved the appellant himself going into evidence. It seems probable that had defence counsel asked the prosecutor to tender a photograph of her client showing the tattoos, she would have done so. It was also open to defence counsel to cross-examine the investigating police officer (who had personally dealt with the appellant) about the detail of his tattoos. There was no rational forensic reason for not doing either of those things.

[35] If the evidence was not to be led, it was necessary at the least to invite the jury in proper terms to have regard to the appellant's actual appearance and to ask the judge to direct accordingly. The end result of the attempt to rely instead on assertion from the bar table was to exclude from the jury's consideration the significant discrepancy between the tattoos and Mr Nai's description of them.

The omission of any submission or direction about the photoboard

[36] Counsel's explanation for not raising any issue about the adequacy of the photoboard was that she perceived it as desirable to have the photoboard before the jury because the point could be made that Mr Nai, having made no mention of the star tattoo prior to seeing the photoboard, subsequently drew a picture of the tattoos which included the star. She had not invited the trial judge to give any direction about the photoboard because there were other photos not inconsistent with that of the appellant, particularly that of the man who had a tattoo on one side of his neck and conceivably another tattoo on the other side.

[37] If counsel meant to suggest that the photoboard contained other images comparable to that of the appellant's or was in any way adequate, that proposition can immediately be rejected. It is difficult to understand why there was not simply an application for exclusion of the photoboard identification, having regard to the unfairness of the process. However, one can discern some glimmer of forensic advantage in having the photoboard before the jury, because it did allow a submission as to Mr Nai's suggestibility when he later adopted the star tattoo as an identifying feature of his attacker.

[38] What is not susceptible of rational explanation, however, is why counsel did not address on the photoboard's limitations or ask the trial judge to advert to them in setting out the weaknesses of Mr Nai's identification. Although one has considerable sympathy for her Honour's position, lacking the assistance of counsel, *Domican v The Queen*[22] makes it clear that a good deal is expected of the trial judge:

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22 (1992) 173 CLR 555.

> "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."[23]
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> (Citations omitted.)

[39] The respondent submitted that the inadequacy of the photoboard identification process was not "a matter of significance … undermining the reliability of the identification evidence". That was because the defence was centred on a suggestion that Mr Nai's identification of the appellant was the product of a displacement effect: having seen him in other contexts, he chose him as the suspect. Drawing attention to the flaws in the photoboard identification would not have advanced that argument.

[40] That may be so, but one of the factors which the jury is likely to have taken into account in accepting Mr Nai's evidence was the alacrity with which he identified the appellant's image on the photoboard as that of his attacker. The absence of other candidates meeting his description was a significant matter, liable to diminish the impact of his prompt response. Counsel's failure to raise it is forensically inexplicable, and it was a consideration which the trial judge should have made apparent to the jury.

Miscarriage of justice

[41] Mr Nai's identification of the appellant as the offender was critical. There were two obvious points to be made about that identification: that Mr Nai's consistent description of the appellant's neck tattoos was wrong, and that the photoboard process was next to worthless. Defence counsel did not lead evidence to establish the former and she did not identify a proper basis for the jury to draw its own conclusion. Nor did she identify the weakness in the photoboard identification, and the learned trial judge did not address that issue. Those failings deprived the appellant of a real chance of acquittal.

[42] The appeal must be allowed, the conviction quashed and a re-trial ordered.

[43] **GOTTERSON JA:** I agree with the orders proposed by Holmes JA and with the reasons given by her Honour.

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[23] At 562.