

THE EVIDENCE ACT 2006

AND THE ADMISSIBILITY OF THE IDENTIFICATION EVIDENCE

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Lana Paul, an Associate at Wynn Williams, discusses how the Evidence Act 2006 (the "Act") has brought about major changes as to what evidence is able to be presented in Court and how that evidence is to be presented.

IDENTIFICATION EVIDENCE

For a criminal defence Counsel, one of the major changes has been the admissibility of visual identification evidence.

A leading cause of wrongful convictions is eye witness evidence which is usually given by honest, yet mistaken, witnesses.

For example: a person ("**Mr V**") is approached by a stranger, punched in the face, and his wallet is stolen. The whole incident may have lasted for less than 30 seconds.

Mr A is found by the Police 2 blocks away and is charged with robbing Mr V. Mr A denies robbing Mr V.

Six months to two years after the night that he was robbed, Mr V, who has not previously identified the person who robbed him, appears in Court and points to Mr A in the Court and says "Yes, that is the person who robbed me". This is known as "dock identification".

Defence Counsel has always been able to cross examine Mr V about the identification process. For example, as to the circumstances in which the identification was made questions could be asked as to Mr V's age, the strength of Mr V's eye sight, Mr V's sobriety, whether Mr V knew Mr A prior to the offence, whether there was any opportunity for memory distortion, what lighting (if any) was there, how far Mr V was from Mr A, whether there were any obstructions to Mr V's view, the length of the encounter, whether Mr V had previously given a good description of Mr A and whether there were any unique characteristics of Mr A identified and whether that description matches Mr A.

If, at the end of all the questioning, Mr V is still adamant that Mr A was indeed the person who took his wallet and punched him, even with warnings by the Judge to the jury and to him or herself as to the unreliability of eye witness evidence, it is still difficult for a Judge and/or a jury to not accept the identification evidence by Mr V, if he has been a credible witness.

The Act now provides very strict guidelines for identification evidence gathered after 1 August 2007.

This has led the Court of Appeal in the 2009 case of R v Young, to condemn dock identification as the primary source of identification (where there was no previous identification process) and it is expected that dock identification, as a primary source of identification, will no longer be allowed.

WHY IS ADMISSIBILITY IMPORTANT?

If evidence is "**admissible**" it can be put before a Judge and/or a jury. If evidence is "**inadmissible**" a Judge and/or a jury cannot consider it.

Whether identification evidence is admissible could be the making or breaking of a case, particularly where there is no other supporting evidence. Using the example above, if Mr A was not found with Mr V's wallet in his possession or any of the items from the wallet, and no DNA evidence was retrieved, the only evidence against him is Mr V's identification of him.

In cases where there is no other evidence, if identification evidence is inadmissible, then it is likely Mr A will be found not guilty or, if dealing with a minor, the charge will be found to be not proved.

WHAT IS THE CORRECT FORMAL PROCEDURE?

A formal procedure for obtaining visual identification evidence is set out in Section 45(3) of the Act. This procedure essentially requires that the identification take place as soon as practicable after the alleged offence is reported to an officer of an enforcement agency, that the person to be identified is compared to no fewer than 7 other persons who are similar in appearance to the person to be identified, that no indication is given to the person making the identification as to whom among the persons in the procedure is the person to be identified and the person making the identification is to be informed that the person to be identified may or may not be among the persons in the line up or, more commonly, a photographic montage.

The Police are required to provide a written record of the procedure actually followed that is sworn to be true and completed by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing.

PRACTICAL IMPLICATIONS

In a recent matter, a young person, along with 2 others, was charged with aggravated robbery.

A man was confronted by a group of 4 to 6 young people on a dark night walking home from the local dairy and 3 of the group took various items, including a cellular phone and clothing from the victim, and violence was used against the victim.

The Police were called and within approximately 20 to 30 minutes of the incident, a car with 2 officers stopped a group of young people a few blocks away from the scene. The Police met with the victim who was in a car at least 20 metres down the road from which he pointed at 3 of the group, of which the young person was one of the people singled out, alleging that they were responsible for robbing him earlier.

None of the stolen property was found on any of the accused and there was no other evidence offered against them.

Counsel for the 3 accused had to consider the implications of section 45 of the Act.

S45 - ADMISSIBILITY OF VISUAL IDENTIFICATION EVIDENCE

Step (1) Was the formal procedure followed s45(1) - No

Step (2) Was there a **good reason** for not following a formal procedure s45(1).

Good Reason includes where an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence was reported and in the course of that officer's initial investigation s45(4)(e) - **Yes**

Step (3) Then the evidence is **admissible** in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.

Step (4) If the evidence is unreliable then the evidence is inadmissible.

At the hearing all Counsel indicated that identification evidence was in issue, all Counsel agreed that the evidence would fall within s45 (4)(e) and, accordingly, it was up to the defence to show that the identification was factually unreliable.

In order to do that it was necessary for the prosecution to call and defence Counsel to cross examine the victim and both Police officers.

Counsel established that the victim did not know any of the accused, it was very dark, the incident occurred over a very short time period, the identification took place from a car approximately 20 metres away, the lights of the car the victim was in when identifying the accused were on, but were too far away for the light to reach the boys now accused and give a clear look at the boys. There were no facial descriptions, only vague descriptions were given by the victim, which did not accurately reflect the actual appearance of the boys.

At the conclusion of the Police evidence all Counsel submitted that the identification evidence was unreliable and therefore inadmissible.

This was accepted by the Judge and, as the Police had no further evidence, the charges against the accused were dismissed.

SUMMARY

It has been 3 years now since the provisions in respect of identification evidence under the Act came into force. The prosecution can no longer rely on dock identification. The focus is now on identification well before any hearing and strict procedures need to be followed by the prosecution. It is up to Counsel to ensure that the correct procedures are followed so that only admissible evidence is put before a Judge and/or jury and protect clients against unsafe convictions.