

**NOTE: THIS JUDGMENT HAS BEEN REISSUED TO CORRECT AN  
ERROR IN [35].**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA194/2010  
[2010] NZCA 264**

BETWEEN JUSTIN LEIGH HARNEY  
Appellant  
AND THE QUEEN  
Respondent

Hearing: 17 May 2010  
Court: William Young P, Chisholm and Keane JJ  
Counsel: A J Bailey for Appellant  
C L Mander for Respondent  
Judgment: 1 July 2010 at 11.00 am  
Reissued: 9 July 2010  
Effective date of judgment: 1 July 2010

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**JUDGMENT OF THE COURT**

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**A Leave to appeal is granted.**

**B The appeal is dismissed.**

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**REASONS**

Chisholm and Keane JJ  
William Young P

[1]  
[40]

## **CHISHOLM AND KEANE JJ**

(Given by Chisholm J)

[1] Having been found guilty in the District Court at Christchurch of reckless driving and failing to stop on the strength of visual identification evidence,<sup>1</sup> the appellant unsuccessfully appealed against his conviction to the High Court.<sup>2</sup> Then he sought leave from the Supreme Court to appeal directly to that Court against the judgment of the High Court.

[2] When dismissing the application for leave to appeal the Supreme Court accepted that issues of general and public importance concerning the interpretation of s 45 of the Evidence Act 2006 could arise. However, before considering those issues the Supreme Court wanted to have the benefit of the views of this Court.<sup>3</sup> Following that decision the appellant unsuccessfully sought leave of the High Court to appeal to this Court. He now seeks special leave from this Court pursuant to s 144(3) of the Summary Proceedings Act 1957.

### **Background**

[3] While driving a patrol car near Waimate at about 4.04pm on 3 May 2009 Constable Vallender observed a distinctive vehicle travelling in the opposite direction. According to the officer the driver was a “thin faced white male aged about 35 to 40 years”. The officer performed a U turn behind the vehicle and activated his red and blue lights and a siren. But the vehicle sped away and began overtaking other vehicles at an excessive speed. Eventually the officer abandoned the chase.

[4] About 20 minutes after originally sighting the vehicle the officer saw the same vehicle drive past him at an intersection in Glenavy. The other vehicle was about 15 metres away. At that stage the officer “saw the driver clearly and

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<sup>1</sup> *Police v Harney* DC Christchurch CRI-2009-009-8289, 31 August 2009.

<sup>2</sup> *Harney v Police* HC Christchurch CRI-2009-409-141, 13 October 2009.

<sup>3</sup> *Harney v Police* [2009] NZSC 126.

recognised him as Justin Leigh HARNEY whom I have dealt with before”, and also considered him to have been the driver involved in the previous incident. Once again the officer activated his red and blue lights and a siren, but the vehicle sped away at excessive speeds with the officer ultimately having to abandon the pursuit.

[5] On 2 June 2009 the appellant was charged with failing to stop on both occasions, and also with reckless driving on both occasions (four charges).

[6] Admissibility of the officer’s evidence concerning his visual identification of the appellant was a pivotal issue at the summary trial before Judge Erber. That issue is governed by s 45 of the Evidence Act 2006:

**45 Admissibility of visual identification evidence**

(1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.

(2) If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.

...

(4) The circumstances referred to in the following paragraphs are **good reasons** for not following a formal procedure:

- (a) a refusal of the person to be identified to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or a video record that shows a true likeness of that person);
- (b) the singular appearance of the person to be identified (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared);
- (c) a substantial change in the appearance of the person to be identified after the alleged offence occurred and before it was practical to hold a formal procedure:

- (d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant:
- (e) if 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:
- (f) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a chance meeting between the person who made the identification and the person alleged to have committed the offence.

Given that there had been no “formal procedure”,<sup>4</sup> the issue was whether the officer’s identification evidence was admissible either because there was “good reason” for not following a formal procedure (s 45(1)) or the circumstances in which the identification was made produced a reliable identification (s 45(2)).

[7] Constable Vallender was the only witness for the prosecution. In his evidence in chief he said that when he saw the vehicle for the second time at the Glenavy intersection it was travelling at possibly 10 to 15 kph and that his view of the driver was a “side view, especially initially head on, and then side on view as he rolled around the corner in front of me”. He said that the driver was “sitting low in the car, just the top of his shoulders and head [were visible]”. He also said that he had dealt with the appellant on two occasions before and that he was “very sure” that it was the defendant.

[8] Under cross-examination the police officer acknowledged that he only had a limited time to observe the driver and that the vehicle under observation never stopped. He also explained that he had dealt with Mr Harney on two occasions previously, the first occasion having been possibly seven years ago “when there was an incident in Waimate”, and the second possibly a couple of years later “in a hotel”. The police officer rejected Mr Bailey’s proposition that he could have “perhaps unconsciously identified Mr Harney incorrectly”.

[9] The appellant did not give evidence.

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<sup>4</sup> See Evidence Act 2006, s 45(3).

## **District Court decision**

[10] After traversing the evidence Judge Erber turned his attention to Mr Bailey's submission that the identification evidence was inadmissible:

[8] I here set out s 45 (2).<sup>5</sup> A formal procedure under that subsection does not have to be followed if there was a good reason for not following a formal procedure and the prosecution say there was a good reason. That was there was no point in a formal procedure in relation to the second occasion because Mr Harney was known to Constable Valinder. As to that identification I note that the identification was based on contact between two persons at the earliest five years before and at the latest seven years before the events. I have to bear that in mind. I also have to bear in mind the stricture of relating to identification evidence in the Summary Proceedings Act. But I have no doubt whatever that Constable Valinder properly identified Mr Harney on the second occasion. Consequently the prosecution has proved beyond reasonable doubt that the circumstances in which the identification [was] made has produced a reliable identification.

The Judge found the charges of failing to stop and reckless driving relating to the second occasion proved beyond reasonable doubt. The appellant was convicted and sentenced to one month's imprisonment.

[11] On the other hand, the Judge was not satisfied that there had been a reliable identification of the driver on the first occasion. The two charges relating to that occasion were dismissed.

[12] For the sake of completeness it should be added that following his conviction the appellant was charged with the theft of the vehicle being pursued by Constable Vallender, which had been stolen. There are also a number of flow-on charges. Those charges have been laid indictably and the appellant is to be tried on them later this year. It is likely that the same identification issues that arose before Judge Erber will also arise at that trial.

## **Appeal to High Court**

[13] When the appeal came before Harrison J, Mr Bailey argued that Judge Erber had erred by failing to give reasons for his conclusion that the constable's identification evidence was reliable and also by failing to identify the "circumstances

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<sup>5</sup> It is common ground that the Judge actually meant s 45(1).

in which the identification was made” that led to that conclusion. He also claimed that if the Judge had undertaken a proper analysis of those “circumstances” he could not have reached the conclusion that the prosecution had proved beyond reasonable doubt that the circumstances in which the identification was made had produced a reliable identification.

[14] Harrison J decided:

[15] ... s 45(2) did not apply. Constable Vallender recognised Mr Harney from his previous dealings. He was satisfied that the person he saw driving was the man he had seen on two earlier occasions. While that contact went back some years, I am satisfied that there would have been little if any point in the police conducting what is now called a formal procedure, or more colloquially an identification parade. The result would likely have been a foregone conclusion: see *R v Edmonds & Keil* [2009] NZCA 303.

[16] In particular I accept that the list of factors said to constitute good reasons for not conducting a formal procedure is not exhaustive: see *Edmonds* at [62]-[73]. Common law grounds still apply. The procedure will serve no purpose where a parade will establish the uncontroversial fact that the officer is able to identify a person he has previously identified. While, of course, it is always a matter of fact and degree, and the closer or more intense the nature of the relationship the more likely will be the outcome of a formal procedure, in this case the degree of association was not within the slight category such as might still require an identification parade.

[17] Moreover, and I place particular weight on this fact, Mr Bailey carefully cross-examined Constable Vallender. In accordance with his obligations, Mr Bailey concluded by suggesting to the officer that he was mistaken. He suggested that the officer was acting on a hunch and did not have a sufficient opportunity to identify Mr Harney, leading unconsciously to an incorrect identification. Constable Vallender conceded he could not identify the driver during the first pursuit. However, the officer repeated his evidence-in-chief that when he got within a sufficient range at Glenavy on the second occasion and saw the driver turn his vehicle in front of the officer’s vehicle, he was able to identify him.

[18] While Judge Erber did not articulate or emphasise this feature, I infer from his decision that he placed, as the trier of fact, particular weight on his assessment of Constable Vallender’s viva voce evidence and the officer’s confirmation of his evidence-in-chief of clearly recognising Mr Harvey: see *R v Edmonds* at [116]-[120]. In addition, I repeat, the Judge acting as the trier of fact took account of the statutory warning when relying on identification evidence.

The appeal was dismissed.

[15] Leave to appeal to this Court was sought on the basis that the following questions required determination:

- (a) Was the High Court Judge correct to find that there was a “good reason” for not following a formal identification procedure pursuant to s 45(1) Evidence Act 2006?
- (b) If not, was the High Court Judge correct to find that the circumstances in which the identification was made produced a reliable identification beyond reasonable doubt pursuant to s 45(2) Evidence Act 2006?

It was claimed that both questions are of public importance because the law relating to the application of s 45 is unclear and the decisions of this Court in *R v Edmonds*<sup>6</sup> and *R v Peato*<sup>7</sup> concerning that issue are in conflict.

[16] Harrison J rejected the proposition that there was any conflict between *Edmonds* and *Peato* that could have any relevance to this appeal. He also noted that recently, in *R v Thomson-Wiari*,<sup>8</sup> this Court had confirmed that part of the *Edmonds* approach which is relevant to this appeal. He considered that even if the first question was a question of law, the second question was one of fact rather than law.

### **Application to this Court for special leave**

[17] Under s 144(3) of the Summary Proceedings Act this Court may grant special leave if in its opinion the question of law involved in the appeal is one which, by reason of its general or public importance, or for any other reason, ought to be submitted to this Court for decision.

[18] Given that both questions raise issues concerning the admissibility of evidence, we accept that they raise issues of law.<sup>9</sup> We now address the two questions separately.

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<sup>6</sup> *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762.

<sup>7</sup> *R v Peato* [2009] NZCA 333, [2010] 1 NZLR 788.

<sup>8</sup> *R v Thomson-Wiari* [2009] NZCA 562.

<sup>9</sup> See *R v Gwaze* [2010] NZSC 52 at [49]–[51].

## First question

[19] Mr Bailey said that this question focuses on the level of familiarity or acquaintance required between a witness and an alleged offender before there will be “good reason” to not hold a formal identification procedure. He noted that whereas *Edmonds* suggests that anything more than “slight acquaintance” is sufficient,<sup>10</sup> the Law Commission suggested a substantially higher level of familiarity (“so well known”).<sup>11</sup> It is his submission that a high degree of familiarity should be required before an enforcement agency can be excused from carrying out a formal procedure.

[20] According to Mr Bailey the judgment of this Court in *Peato* questioned the *Edmonds* approach with respect to the treatment of identification evidence. He submitted that the *Peato* approach should be preferred. Even on the authority of *Edmonds*, submitted Mr Bailey, Harrison J was wrong to hold that there was a good reason not to hold a formal procedure because Constable Vallender only had a “slight” familiarity with the appellant.

[21] Like Harrison J we do not accept that there is any conflict between *Edmonds* and *Peato* in a respect that is material to the issues raised by this appeal.

[22] *Edmonds* arose from a pre-trial ruling concerning identification evidence. The primary eye witness to an alleged attack by the appellants had previously been associated with the appellants and recognised them as the offenders. For that reason there was no formal identification procedure. One of the issues before this Court was whether the fact that the witness recognised the alleged perpetrators provided “good reason” in terms of s 45(1) not to conduct a formal identification procedure.

[23] Having decided that the fact that a witness recognises an alleged offender could constitute a good reason not to conduct a formal identification procedure<sup>12</sup> the Court went on to explain:

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<sup>10</sup> See at [73] and [135].

<sup>11</sup> Law Commission *Evidence Code and Commentary* (NZLC R55, 1999) at 129.

<sup>12</sup> At [65].

[72] Although we would accept the Crown submission that the fact that an accused recognises an alleged offender can provide good reason not to conduct a formal identification procedure, we do not consider that this should always be the case. This aligns with the position in England and Wales. We do not, for example, accept the Crown submission ... that even slight acquaintance should always suffice to provide good reason not to conduct a formal identification procedure. If a formal identification procedure would serve a useful purpose then such a procedure should be conducted.

[73] We thus consider that there would be good reason not to conduct a formal identification procedure where the witness recognises an accused, except where such a procedure would serve a useful purpose, such as would likely be the case where there is slight acquaintance only or in a case where the accused denies that he is the person whom the witness claims to know ...

Because this was a pre-trial ruling and it was likely that identification would remain an issue at trial, the Court also made some observations about the s 126 warning that would need to be given by the trial Judge when the matter went to trial.

[24] Rather than being a pre-trial matter, *Peato* involved an appeal against conviction. A central issue was whether the Judge's direction pursuant to s 126 was adequate. When addressing that issue the Court turned its attention to whether any warning at all was required, and this prompted the Court to consider *R v Turaki*<sup>13</sup> and *Edmonds* because both had discussed judicial warnings under s 126.

[25] Having briefly discussed *Turaki* (which expressed the same view about s 126 warnings as *Edmonds*) the Court continued:

[19] The second decision of this Court in relation to this issue is *R v Edmonds* [2009] NZCA 303 which was delivered the same day as *Turaki*, the Court comprising the same members in each case. The distinction between identification evidence and observation evidence was reiterated at [44] but the appeal was principally concerned with the issue of whether there was good reason not to conduct a formal identification procedure in terms of s 45(4) Evidence Act ...

[20] Unfortunately, we cannot accept in its entirety what this Court said in those two cases. We do not consider ourselves bound by them, as they are, in our view, inconsistent with what this Court said in *R v Uasi* [2009] NZCA 236. We prefer the approach in *Uasi*.

[21] The approach of this Court in *Turaki* and *Edmonds* focused very much on the definition of "visual identification evidence" in s 4. In our respectful view, that focus has led to an incorrect conclusion as to when the need for a s 126 warning is

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<sup>13</sup> *R v Turaki* [2009] NZCA 310.

required. The Court in *Turaki* seems to have itself recognised that its interpretation can yield an unsatisfactory result, as it accepted that, even in circumstances where, on its view, s 126 had no application, it might nonetheless be appropriate for the judge to direct the jury on some or all of the matters that a standard s 126 warning would include: at [93]. The Court appeared to contemplate a warning which did not necessarily need to conform to s 126 but which included elements commonly mentioned before the new Evidence Act came into force.

These are the paragraphs that Mr Bailey relies on to support his contention that there is a conflict between *Edmonds* and *Peato* that needs to be resolved.

[26] While there seems to be a conflict between those two cases with reference to s 126 warnings, there is no conflict in relation to the admissibility of identification evidence under s 45. That issue did not arise in *Peato*. Nor did it arise in *Uasi*<sup>14</sup> which the Bench in *Peato* preferred (*Uasi* involved a conviction appeal where the issue was whether a s 126 warning was required and, if so, whether the warning that had been given was adequate). Finally, if there was any doubt about the matter, it is expressly stated in *Peato* that the difference between the divisional Courts, which it regretted, concerned “when s 126 warnings are required”.<sup>15</sup>

[27] Having determined that there is no conflict between the authorities concerning any issue relevant to this appeal, we turn to Mr Bailey’s proposition that a high degree of familiarity should be required before an enforcement agency can be excused from carrying out a formal procedure. We do not accept that proposition. *Edmonds* explained the law and no other decisions of this Court have departed from that explanation. There will be “good reason” not to conduct a formal identification procedure where the witness recognises an accused, except where such procedure would serve a useful purpose, such as would likely be the case where there is a slight acquaintance only.

[28] Applying that law to the facts of this case, it was open to Harrison J to conclude that it was unlikely a formal procedure would have served any useful purpose in this case, and had there been a formal procedure the outcome would likely have been a foregone conclusion. Amongst other things this reflects that: the identification was being made by a police officer who was “very sure” of his

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<sup>14</sup> *R v Uasi* [2009] NZCA 236, [2010] 1 NZLR 733.

<sup>15</sup> At [45].

identification; although the previous contact had been some years previously, there had been contact on *two* occasions; and the circumstances surrounding the identification at the intersection were reasonably conducive to an accurate identification by the officer.

[29] We might also add that arguably the circumstances of this case could come within the “good reason” specified in s 45(4)(e):

- (e) if 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:

While we do not have a detailed knowledge of events following identification, we were informed from the Bar that Constable Vallender reported the matter, including his identification of the appellant, to another officer who handled the matter from that point. But we need not explore this possibility any further because it was plainly open to Harrison J to reach the decision that he did in relation to the application of s 45(1).

## **Second question**

[30] Essentially the issue raised by this question is whether a Judge’s impression of, or confidence in, the identification witness can be taken into account as part of the s 45(2) inquiry. Mr Bailey argued that when a Judge is considering whether “the prosecution has proved beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification” the Judge is simply exercising a preliminary screening role to determine admissibility and is confined to the “circumstances in which the identification was made”. Thus it would be inappropriate for the Judge to take into account credibility issues because they will ultimately fall to be decided by the jury.

[31] What is meant by a “reliable identification” in s 45(2) was traversed in *Edmonds*:

- [108] ... the reliability assessment under s 45(2) is a threshold inquiry, which is undertaken solely for the purpose of rendering evidence admissible. The judge’s

assessment under s 45(2) does not affect the jury's role and is not to be referred to at trial. In this case the jury will still be required to evaluate both the reliability and credibility of [the identification witness's] evidence at trial.

Of course at a summary trial this is somewhat artificial because unless there is a pre-trial hearing before a different Judge, the same Judge will determine both the admissibility of the identification evidence and the ultimate reliability and credibility of such evidence. We will come back to that matter.

[32] *Edmonds* also explained what is meant by “the circumstances in which the identification was made”, as used in s 45(2). It considered that although that phrase should be given its ordinary meaning, it should not be construed too narrowly and:

[112] ... it would cover both factors internal to the witness (such as eyesight, state of sobriety, prior knowledge of the alleged offenders and opportunities for memory distortion) and external factors (such as the state of the lighting, distance and any obstructions to the view). It should also, in our view, extend to cover the means of collecting the identification evidence, including any possible distortions to the evidence that may have occurred during that process.

But the Court considered that the phrase should not be stretched to allow a general consideration of all the other evidence because that would effectively mean that the Crown would have to run two full trials, one to prove that evidence is admissible under s 45(2) and another to prove the charges against the defendant.

[33] An argument that the High Court Judge determining the admissibility of the evidence had erred by relying on the manner in which the identification witness had presented his evidence was rejected. The Court said:

[117] While it has in the past been thought that witness confidence in identification is a poor predictor of accuracy it is now thought that this is not correct, provided confidence is assessed at the time of the first identification.

As we understand Mr Bailey's argument, he is claiming that there is a conflict between those remarks and the observations of this Court in *Thomson-Wiari*. We do not accept that proposition.

[34] In *Thomson-Wiari* the Court said:

[20] We disagree with the Judge that “the circumstances in which the identification was made” include the degree of confidence expressed by the receptionist in a later account of the identification as distinct from the actual identification. We must therefore make our own appraisal of the evidence.

That case concerned voice identification. When the receptionist made her initial statement to the police officer she mentioned the name “Dan” (the appellant’s Christian name) but did not suggest that the appellant was the offender. It was only at a later interview that this suggestion was made. For that reason the Court was careful to draw a distinction between the actual identification and a later account of the identification. There is no inconsistency with *Edmonds*, which relates to visual identification.

[35] It follows that there is clear guidance in *Edmonds* about the process to be adopted when determining the admissibility of identification evidence under s 45(2). The Judge is entitled to take into account his or her assessment of the identification witness. The scope of matters that the Judge is entitled to take into account has also been clearly defined. Thus any perceived difficulties in applying s 45(2) do not exist. Again we have not been persuaded that Harrison J erred.

[36] Before leaving this question we return to the application of s 45(2) in the context of a summary trial. While in the context of indictable offences the divide between the screening role of the Judge and the role of the jury as the ultimate decision-maker is obvious, it is more difficult to apply in the case of a summary trial where identification is the primary issue and the same Judge is performing both roles.

[37] If a Judge presiding over a summary trial is satisfied in his capacity as the ultimate decision-maker, and taking into account the totality of the evidence, that the prosecution has proved the reliability of the identification beyond reasonable doubt, it must logically follow that the more limited inquiry as to admissibility has also been satisfied. But the reverse will not necessarily be the case (unless in the particular case the totality of the evidence relevant to identification also equates with “the circumstances in which the identification was made” in terms of s 45(2)).

[38] Given those matters we consider that it would be advisable for Judges involved in summary hearings where identification is the critical issue to explain the approach that they have adopted in the particular case. In particular an appellate Court will need to be satisfied that the Judge has either taken two discrete steps (representing the screening and adjudicative roles) or the finding of guilt on the strength of identification evidence is based on the totality of the evidence relevant to that issue.

### **Outcome**

[39] The two questions identified are issues of law of general or public importance sufficient for leave to be granted. In relation to the first, however, the supposed difficulties relevant to this case are more apparent than real. For those reasons we confirm the approach in *Edmonds* and accordingly dismiss the appeal on this ground. As the conviction was based on the strength of the identification evidence, (ie material relevant under s 45(2)), the admissibility enquiry was satisfied. The second ground is also dismissed.

### **WILLIAM YOUNG P**

[40] Section 45 of the Evidence Act provides certain hurdles which must be surmounted before a prosecutor can rely on visual identification evidence:

- (a) officers of an enforcement agency must have followed a “formal procedure” as defined, or there must have been a “good reason” for not following such a “formal procedure”; otherwise
- (b) the prosecution must prove beyond reasonable doubt that “the circumstances in which the identification was made have produced a reliable identification”.

[41] The voir dire procedure is as available in summary trials as in cases tried on indictment.<sup>16</sup> But my experience is that at least in cases in which the defendant does not intend to give evidence, defence counsel in summary trials often take substantial admissibility points<sup>17</sup> either when submitting that there is no case to answer or at the end of the case. This is what happened here.

[42] Where (as here) the disputed evidence is the only evidence given at trial, there cannot be much distinction between the decision under s 45(2) as to its reliability (which is subject to a beyond reasonable doubt test) and the substantive determination of the charge. Further, as will become apparent, I consider that the confidence of the identifying witness may be relevant to the reliability analysis and was in this case. In this context, it is understandable that counsel for Mr Harney (who would have known that Mr Harney was not going to give evidence) did not challenge the admissibility of the identification before or during the relevant evidence. Had he done so, a ruling in favour of admissibility on the reliability ground would have made conviction inevitable. As it turns out – and as Chisholm J has pointed out – the conclusion that the charge was proved (based as it was, solely on material which was relevant under s 45(2)) necessarily means that the evidence was admissible.

[43] Understandable though counsel's tactics were, I think it not desirable for admissibility challenges to be deferred until closing submissions. In part this is because I am uncomfortable about the conflation of admissibility and substantive decisions. As well, where the admissibility challenge has not been fairly signalled, evidence which is relevant to the challenge but inadmissible on the substantive issue might well not be called.

[44] I can explain this last point by reference to what happened in this case and with particular reference to the question whether there was good reason for not following a formal procedure.

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<sup>16</sup> See *Police v Kidwell* [1989] 3 NZLR 594 (HC); *Police v Grootjans* [1989] 3 NZLR 587 (HC); and *Police v Macklin* [1989] 3 NZLR 600 (HC).

<sup>17</sup> By substantial admissibility point, I mean the sort of point which, if resolved in favour of the defendant, will lead to the charge being dismissed and which is likely to involve an evaluative assessment of the evidence in question.

[45] It will be recalled that Constable Vallender had previously dealt with the appellant. The nature and context of those previous dealings could be relevant to whether they warranted the police dispensing with a formal procedure. As well, if there were operational reasons why Constable Vallender (and other police officers) could be expected to keep an eye out for Mr Harney, that too could be relevant. I note that Mr Harney has a most impressive list of previous convictions – by my count over 90 – and much of this offending has been associated with motor cars. Given this and Constable Vallender’s job, it is likely that the nature and context of the constable’s prior dealings with Mr Harney involved discreditable conduct on the part of the latter. As well, in view of Mr Harney’s history of prolific offending, police officers who had dealt with him (as Constable Vallender had) could reasonably be expected to remember his face.

[46] My take on all of this is that if counsel for Mr Harney had clearly signalled a challenge to the admissibility of the identification, it is likely, to say the least, that Constable Vallender would have been able to give chapter and verse as to why a formal identification procedure would have been pointless. But in doing so, he would have referred to previous offending by Mr Harney which was probably inadmissible in relation to the substantive determination of the charges.<sup>18</sup>

[47] In cross-examination defence counsel did not explicitly challenge the failure to conduct a formal process. Indeed, his cross examination about the prior dealings involving the constable and Mr Harney was confined to their timing. In the absence of a signalled admissibility challenge, the police sergeant who was prosecuting could not fairly have been expected to lead detailed evidence about Mr Harney’s past interactions with Constable Vallender. In that context, challenging the admissibility of the identification in closing submissions was something of an ambush. If at that time the Judge was not satisfied as to the admissibility of the evidence, I think that it would have been open to him to have re-opened the case for the purpose of conducting a voir dire.

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<sup>18</sup> I say “probably” because perhaps there might have been a basis for admitting the evidence on the substantive issue as being material to the quality of the identification.

[48] If I had thought that the admissibility of the identification evidence had not been established I would have favoured directing a re-hearing in the District Court. As it turns out, however, I am satisfied that, on the evidence adduced, the identification was admissible.

[49] On the first issue raised by the appellant (as to “good reason”), I agree that there was good reason for dispensing with a formal procedure if the constable’s knowledge of Mr Harney was sufficient to render a formal process of no utility. In my opinion, the question whether the constable’s familiarity with Mr Harney met that standard, a condition precedent to the admission of the evidence, is a preliminary fact which needs only to be assessed on the balance of probabilities.<sup>19</sup> I agree with the reasons given by Chisholm J for concluding that the evidence was admissible on this basis.

[50] The complaint about the reliability finding is that the Judges in the courts below were influenced by the level of confidence expressed by the constable in his identification.

[51] The constable’s reference to being “very sure” of his identification was given in response to a question which was expressed in the present tense and therefore the passage from *R v Edmonds* relied on by Chisholm J in [34] of his judgment is not necessarily directly on point. But given that Constable Vallender’s identification was the only evidence adduced at trial against Mr Harney, it is reasonable to infer that the prosecution was based on his initial confidence in his identification. As well, the general drift of the constable’s evidence suggests that his confidence in his identification at trial reflected his sureness at the time. Be that as it may, however, I am in any event satisfied independently that the constable’s confidence was relevant to the reliability of the identification.

[52] The expression “circumstances in which the identification was made” is a reference to externalities. So I accept that the confidence level of the identification witness cannot, in itself, satisfy the s 45(2) reliability test. That said, identification is

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<sup>19</sup> *Police v Anderson* [1972] NZLR 233 (CA). See also the discussion of preliminary or underlying facts in *R v Bain* [2009] NZCA 1 at [225]–[227].

necessarily a subjective process and this consideration cannot sensibly be left out of a reliability assessment. If the identification witness is unsure of the identification, such unsureness plainly could not be ignored. So at least in a negative sense, Constable Vallender's confidence was relevant. Further, and far more importantly, his expression of confidence in his identification rested on two premises, his familiarity with Mr Harney (including his ability to recognise him if he saw him) and the circumstances in which he saw Mr Harney in Glenavy being conducive to making an accurate identification. The latter of these two premises particularly (but in my view also the former<sup>20</sup>) are comprehended by the expression "circumstances in which the identification was made". Although the expression of confidence was conclusory, it was in substance, and particularly in the context of his evidence as a whole, an assertion that he knew what the appellant looked like and that the circumstances in which he saw him in Glenavy enabled him to make an accurate identification.

[53] Accordingly I am of the view that the second issue also should be resolved against the appellant.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>20</sup> See *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [112].