

## **EVANS v THE QUEEN (S219/2007)**

Court Appealed from: New South Wales Court of Criminal Appeal

Date of Judgment: 7 September 2006

Date of Grant of Special Leave: 24 April 2007

This appeal raises a number of issues about the conduct of a trial involving admissibility of evidence, the circumstances in which "demonstration evidence" should be permitted, whether the trial Judge was obliged to or had given adequate reasons for rulings and whether the Court of Criminal Appeal correctly applied the proviso where a misdirection had been made on alibi evidence.

The appellant was convicted on charges of armed robbery and assault arising out of a robbery at Strathfield Municipal Chambers in February 2002. The offender was wearing overalls and a balaclava and spoke during the robberies. The balaclava was left behind and subsequently found to contain DNA which matched the appellant. A subsequent search of the appellant's home located similar overalls and balaclavas.

During the trial before Backhouse ADCJ, the balaclava and overalls seized at the home were shown to various witnesses after they had been asked to describe their recollections. Subsequently, over objection the appellant was asked to put on the balaclava, the overalls, sunglasses similar to those described as being worn and, at a later time to repeat the words "give me the serious cash" in the presence of the jury. The appellant gave evidence and denied that he was the robber.

The Court of Criminal Appeal (James, Hidden and Hoeben JJ) dismissed the appeal holding that sufficient relevance had been established to justify showing the items of clothing to witnesses and that the "demonstration of the clothing and words required of the appellant, with the exception of the sunglasses, were not subject to the requirements of section 53 of the *Evidence Act* 1995 (NSW) nor unfairly prejudicial to the appellant. The Court further held that the summing up as a whole contained adequate cautions on evidence of resemblance and did not require the specific directions for identification evidence, and that insofar as the trial judge failed to give written reasons where she had undertaken to do so, comments made during submissions were sufficient. Insofar as errors had been made in respect of the sunglasses and the ruling that there was not power to extend time for alibi evidence it was an appropriate case to apply the proviso.

The grounds of appeal include:

- The Court of Criminal Appeal should have held that the trial miscarried as a result of the admission of evidence of eyewitnesses concerning items of clothing that had been randomly seized from the applicant's home twenty two months after the offence.
- The Court of Criminal Appeal should have held that:
  - Section 53 *Evidence Act* 1995 (NSW) applies to "in court" demonstrations; and/or
  - The prosecutor should not have been permitted to require the applicant to put on a balaclava and overalls, walk up and down in front of the jury and say words which were attributed to the robber by one eyewitness.
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- The Court of Criminal Appeal should have held that there was a miscarriage of justice occasioned by failure to direct the jury on the dangers of the procedure outlined above.