PARTIES:	REGINA
	v
	GAVIN CHRISTOPHER ROBSON COOK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9619456
DELIVERED:	21 August 1998
HEARING DATES:	23 March; 12 May 1998
JUDGMENT OF:	Kearney J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE

Criminal Law – spontaneous identification of accused by formal Federal Police Agent after TV screening of security film – film image distorted – witness had engaged in earlier surveillance of accused - whether evidence of identification admissible – whether prejudicial effect outweighed probative value.

R v Swaffield (1997-98) 151 ALR 98, applied.
Griffith (1995) 79 A Crim R 125, distinguished.
R v Palmer (1981) NSWLR 209, followed.
Smith (1983) 10 Crim R 358, followed.
R v Goodall [1982] VR 33, followed.
Kajala v Noble [1982] Crim L Rev 433, followed.
Alexander v The Queen (1980-81) 34 ALR 289, applied.
R v Hanson (unreported, Court of Appeal (Qld), 29 August 1995), not followed.
R v Grimer [1982] Crim L Rev 674, referred to.
R v Fowden and White [1982] Crim L Rev 588, distinguished.

REPRESENTATION:

Counsel:

Crown:	P.X. Elliott
Defendant:	S.R. Donaldson

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	Withnall, Maley & Co.

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 9619456

REGINA

v.

GAVIN CHRISTOPHER ROBSON COOK

CORAM: KEARNEY J

REASONS FOR RULING

(Delivered 21 August 1998)

Background

From 23 to 26 March 1998 Gavin Cook stood his trial before me. On 26 March the jury found him guilty of having taken part in stealing jewellery valued at about $30,000 from a jewellery store in Darwin, on 2 August 1996. This offence of stealing carries a maximum punishment of 7 years imprisonment under s210(1) of the *Criminal Code*. On 27 March I sentenced Mr Cook to imprisonment for 12 months, and fixed a non-parole period of 6 months. I also ordered that he make restitution of the stolen items. On the same day, 27 March, an appeal against conviction was lodged. Several grounds of appeal related to the admission into evidence at the trial of the testimony of one Stephen Kelk; the background to that aspect is as follows.

On 23 March, the first day of the trial, in the absence of the jury, Mr Donaldson of counsel for Mr Cook objected to the admissibility of evidence which the Crown proposed to adduce from Mr Kelk. He further submitted that, if this evidence was admissible, it should nevertheless be excluded from the evidence before the jury, as a matter of discretion, because its prejudicial effect outweighed its probative value. He also submitted that *the whole* of some 8 hours of video film taken by a security camera in the jewellery store on 2 August 1996, should be viewed by the jury. After viewing a 23-minute segment of this film and considering counsels' submissions and the authorities cited, I ruled that Mr Kelk's evidence, in the terms it was foreshadowed to be given, was admissible and should not be excluded in the exercise of the prejudicial/probative discretion (*R v Swaffield* (1997-98) 151 ALR 98 at 119-120); and that the whole of the 8-hour film need not be viewed by the jury. I said that reasons would be provided for that ruling, if necessary.

On 12 May 1998, some 7 weeks after the ruling and the conclusion of the trial, counsel for Mr Cook asked me to state the reasons for the ruling of 23 March. I raised the obvious concerns about a Judge providing reasons for a decision *after* the institution of an appeal which challenged that decision, particularly where, as here, a fairly lengthy period had passed since the submissions were ruled on, and the appeal instituted. Since counsel nevertheless pressed the request, and the Crown prosecutor did not oppose it, I said I would accede to it. The reasons in question, follow.

What the security film was said to show

Various persons in the store on 2 August 1996 appeared on a 23-minute segment of that day's security film. This segment consisted of 2 short sequences, separated in real time by about 1½ hours. The persons filmed in the store include one Vivian Silvester, who earlier on 23 March 1998 had pleaded guilty to the theft of the jewellery on 2 August 1996. On two separate occasions, about 1½ hours apart in real time, a person is seen on the film segment, each time walking around the store, then crawling under one of the shop counters to enter an area, not open to the customers, where the stolen jewellery was then on display; and later emerging, undetected by store staff, and walking off. Ms Silvester admitted on her plea that she was that person. The film segment shows that other persons were present in the store on both occasions that Ms Silvester was there; they include a man wearing a cap and large sunglasses.

The Crown case

The Crown case is as follows: it was only on those 2 occasions that day, that Ms Silvester was present in the store; Mr Cook was one of the other persons in the store, on both of those occasions; while in the store he deliberately distracted the attention of staff, thus enabling Ms Silvester to effect the theft of the jewellery.

At the time of the theft, the Police could not identify the persons seen on the security film. They arranged for a short part of this segment of the

security film, some 30 seconds in all, showing Ms Silvester and the others present on the two occasions she was in the store, to be screened by a Darwin television station 4 days after the theft, as part of its ordinary evening news programme on 6 August. Viewers were asked if they could recognise any of the people who appear on the film. Mr Kelk, a resident of Darwin, formerly an Agent with the Australian Federal Police, happened to see this evening news item at his home. He contacted Territory Police stating that he recognized Mr Cook as one of the persons then present in the store. It was Mr Kelk's evidence identifying Mr Cook as a person in the store at the relevant times, which Mr Donaldson sought to have excluded from the evidence to be placed before the jury.

The 23-minute film segment consists of silent black-and-white footage. The security camera is located in an elevated position in the store. It uses a 'fish-eye' lens, to take in a bigger area, and is directed downwards at an angle of about 60 degrees. The curved lens causes some distortion of the film image; the downwards angle means that faces are not seen straight on, or in straight profile. The man seen on the film, alleged by Mr Kelk to be Mr Cook, wears a cap and large sunglasses, throughout; these obscure his facial features to a considerable degree, and the opportunities on the film for a relatively open view of his face are very limited. They are such that I consider that any conviction based on the jury's own viewing of the film and its conclusion therefrom, by comparing the man in the film with the man in the dock before them (Mr Cook), that Mr Cook and the man in the film are one and the same person, would be unsafe. However, this was not to be an issue in the trial: the

Crown expressly conceded that the jury could not safely make such an identification, by comparing what they saw on the security film with Mr Cook as he sat in front of them.

The basis of Mr Kelk's recognition evidence

Indeed, that was why the Crown sought to introduce Mr Kelk's identification evidence, and to ascertain from him how it was that he claimed to be able to recognize Mr Cook from the film. Mr Elliott the Crown Prosecutor informed me that Mr Kelk's evidence would be as follows. He had spontaneously identified Mr Cook, as a matter of recognition, when he saw the short film segment on the television news item on 6 August 1996. He recognized Mr Cook at that time because as a Federal Agent he had carried out surveillance on him on two previous occasions. The first occasion was in June 1993, at a distance of 5 metres and for 20 minutes at Sydney Airport; the second was in August 1993 at a distance of 4 metres and over 5 to 6 hours in the Criterion Hotel in Sydney Mr Elliott conceded that the introduction of evidence that a police officer had surveilled Mr Cook, itself raised the possibility of Mr Cook suffering prejudice in his trial; he submitted that that was unavoidable, and any such prejudice could be cured by an appropriate direction to the jury. On a third occasion, in February1996, although Mr Kelk was not at that time carrying out surveillance on Mr Cook, he believed that he had seen Mr Cook for a couple of minutes at a distance of 3 metres, at the Casuarina Shopping Centre in Darwin. So, in all, Mr Kelk's recognition of Mr Cook as the man with cap and sunglasses seen in that segment screened on

the evening TV news programme, was based on these 3 earlier encounters he had had with Mr Cook.

The submissions

Mr Donaldson submitted first that Mr Kelk's identification evidence was in the nature of opinion evidence, and inadmissible as such; alternatively, it was inadmissible because Mr Kelk lacked the particular expertise which would enable him to give such opinion evidence. Second, if admissible, his evidence should nevertheless be excluded as a matter of discretion, because its prejudicial effect would outweigh its probative value; this stemmed from the fact that it would be necessary for the Crown to show *why* Mr Kelk could make the identification on 6 August – that is, to elicit the basis for his identification – and this meant adducing from Mr Kelk that his previous surveillance of Mr Cook was as a Federal Agent. Evidence to that effect would have a prejudicial effect on Mr Cook in his trial, one which no direction to the jury could cure.

(a) *Whether evidence inadmissible*

Mr Donaldson relied on *Griffith* (1995) 79 A Crim R 125, a case where 2 police officers had opined in court (over objection) that the accused (appellant) was the person shown in a security camera photograph wearing a stocking mask which distorted his facial features. (In the present case the cap and sunglasses worn by the man in the store obscured for most of the time a clear view of his face). The officers in *Griffith* (supra) were not qualified as experts on the effects of stockings in distorting facial features, but relied on

their knowledge of the past appearance of the appellant, though one of them had not seen him for 9 years. Allowing the appeal against conviction, the Court of Appeal (Q'land) treated the 2 police officers as non-expert witnesses, and based its approach at 127 on a principle –

> "sometimes … applied in considering the admission of opinion evidence, namely that non-expert witnesses are not ordinarily allowed to give opinions when their inferences are such that 'the jury can be put into a position of equal vantage for drawing them': *Wigmore on Evidence,* vol.7, p32.
>
> A non-expert witness who is called to tell the jury whether in his opinion one object which is present in court resembles another which is present in court is, as it seems to me, covered by this rule. Here, one object was the photograph and the other the appellant."

The Court concluded at 128 that:

> "That knowledge [by the police officers, of the appellant's past appearance] did not give the officers any advantage over the jury. … *ordinarily opinion evidence that a person present in court (but observed by the witness at earlier times) looks very much like a person depicted in a photograph before the court will not be admitted* where there is no circumstance giving the witness in question a substantial advantage over the court". (emphasis added)

In my opinion, the passage emphasized does not apply to the evidence of Mr Kelk. His evidence would be that his previous knowledge of Mr Cook had enabled him spontaneously to identify Mr Cook out of court on 6 August, as the man he saw on the television news item that evening, and (later) from the 23-minute film segment. In general, I think that a witness may give evidence of having recognized (as a result of previous encounters) an accused out of court, from photographs or film taken during the commission of a crime. I

note that this appears to have been the approach adopted in *R v Palmer* (1981) NSWLR 209 at 213 and 214 and in *Smith* (1983) 10 A Crim R 358 at 360 (both of which were cited in *Griffith* (supra)), in relation to several witnesses; and also in *R v Goodall* [1982] VR 33 at 37-39, in relation to the evidence of 2 police officers; and in *Kajala v Noble* [1982] Crim. L. Rev. 433, where however there was no objection to the evidence. I consider that Mr Kelk's evidence of identification was used in the detection process, and is admissible in evidence; see *Alexander v The Queen* (1980-81) 34 ALR 289 at 305-6 per Stephen J.

I note that their Honours in *Griffith* (supra) immediately qualified the breadth of the exclusionary approach they had enunciated (p7); they said that it does not apply if there is some circumstance "giving the witness in question a substantial advantage over the court". Assuming the exclusionary approach enunciated in *Griffith* (supra) is correct and applicable here, the critical question would be: does Mr Kelk's previous observations of Mr Cook give him "a substantial advantage over the court" on the identification issue. The Crown did not rely on Mr Kelk as a person with particular expertise in the art of surveillance generally; it put him forward as a person with particular expertise in identifying Mr Cook specifically. It was this expertise, in turn based simply upon his having observed Mr Cook in detail and at length in the course of his earlier surveillance work, upon which Mr Elliott relied as giving Mr Kelk the necessary "substantial advantage over the court".

The approach in *Griffith* (supra) was applied some 4 months later by the majority in *R v Hanson* (unreported, Court of Appeal (Q'land), 29 August 1995), where the Court of Appeal itself raised the point whether certain identification evidence was admissible. There the witness was a prison officer. He had purported to identify the accused (appellant) as having been one of the occupants of a particular room in the prison, during a prison riot.
Mr Donaldson noted that in contrast with Mr Kelk's previous limited observations of Mr Cook, the prison officer in *Hanson* had seen the person in question on the security film in circumstances in which he was able to recognize all 30 occupants of the room. So Mr Donaldson relied on *Hanson* (supra) as a case where there was a stronger basis for the identification evidence than in this case, but nevertheless, the majority in that case was not satisfied that the officer had any "substantial advantage over the members of the jury in identifying the appellant from the video film", and considered that his evidence should therefore have been excluded.

Their Honours noted that the officer's evidence seemed to suggest that he had "positively recognized the accused". The basis for that recognition is spelled out in the judgment of the other member of the Court, Shepherdson J, who noted the officer's evidence "that he knew everybody" in the relevant area, having been working there for about 8 weeks before the riot.
His Honour, dissenting on whether the officer's evidence should be excluded,

considered that his evidence was "relevant and admissible", citing, inter alia, *R v Grimer* [1982] Crim. L. Rev. 674, a case somewhat akin in its facts to the present, and *R v Fowden and White* [1982] Crim. L. Rev. 588. His Honour considered that *Griffith* (supra) did "not apply to the present appeal".

The Crown stressed that in this case Mr Kelk's previous observation of Mr Cook had not been in a normal everyday setting in which someone is merely casually cognisant of another's presence; it had involved his concentrating upon observing Mr Cook for the periods mentioned (p5). Mr Elliott said that the evidence that Mr Kelk would give would *not* merely be that he considered that the person in the film "looks very much like" Mr Cook, as mentioned in the *Griffith* formulation (p7); rather that, on seeing the short segment of film screened on the television news, he had then and there spontaneously identified the person as Mr Cook. This point was apparently made in light of Shepherdson J's observation in *Hanson* (supra) that the prison officer had "positively identified" the appellant, and was not saying merely that "it looks like" him.

With respect, I consider that the analysis of the law by Shepherdson J in *Hanson* (supra) is correct, and his Honour's conclusion that the evidence in question in that case was "relevant and admissible", also applies in this case. I consider that the evidence of Mr Kelk is admissible. In a case such as this I consider that evidence may be given by a non-expert person, not an eye-witness to the alleged incident, whose evidence is that having seen the security film he recognizes the person in it as the accused. His recognition evidence is

akin to that of an eye-witness at the incident who there saw someone he recognized because he had seen him before, and could say so to the jury. The weight of such evidence is another matter, and depends on the circumstances.

(b) *Whether evidence should be excluded on prejudicial/probative balance*

I turn to Mr Donaldson's second submission (p6), that perhaps the most significant objection to the reception of Mr Kelk's evidence was that its prejudicial effect on the accused outweighed its probative value; therefore it should be excluded, as a matter of discretion. In *Griffith* (supra), the majority said at 129 that even if the police officers' evidence had been admissible, it should have been excluded in the exercise of the trial Judge's discretion because:

> "[a]lthough the opinion of the police officers on the similarity point was of no real significance, it was capable of prejudicing the defence, because bringing out the foundation of the officers' opinion involved giving the jury more information bearing upon past contacts between the appellant and the police than they would otherwise have had".

Their Honours' view that the opinion of the police officers that the accused was the person in the photograph was "of no real significance", was presumably because they considered the officers had no "substantial advantage over the court".

Mr Donaldson submitted that similarly in this case it would be necessary for the Crown to reveal to the jury the basis of Mr Kelk's identification, even if that were limited, as the Crown had indicated, merely to the fact of some earlier surveillance of Mr Cook by Mr Kelk in his capacity as a Federal Agent.

This would result in unfair prejudice to the accused, not curable by directions to the jury. Further, he could not properly cross-examine Mr Kelk, without going into those areas of prejudice. I note that in *R v Fowden & White* (supra), a shoplifting case, the Court of Appeal (Eng.) held that the evidence of witnesses (who knew both accused) that they were the persons seen on a video security film, should not have been admitted, because the circumstances were such that the defence could not test the accuracy of that identification, without thereby being prejudiced and embarrassed. However, in that case, the circumstances were that the identifying witnesses' knowledge of the accused stemmed from a similar shoplifting case a week later; I consider that the devastating prejudicial effect of eliciting that that was the basis of their identification evidence clearly outweighed its probative value. The present case is very different.

Conclusions

I have already indicated (p10) that I consider that Mr Kelk's evidence is admissible. I consider that, limited in the way the Crown proposes, it could not be said that revelation to the jury of the basis of Mr Kelk's identification – his surveillance as a Federal Agent of the accused as indicated on p5 - would cause unfair prejudice to the accused, not curable by appropriate directions to the jury. Nor in my opinion would relevant cross-examination of Mr Kelk be impeded.

As to the other aspect of my ruling of 23 March – that the whole of the 8-hour security film need not be screened before the jury - Mr Elliott said that

he would lead evidence, if required, that the whole of the 8 hours of video had been viewed and that it was only on the two occasions now condensed into the 23-minute segment now proposed to be screened to the jury, that either Ms Silvester or the person alleged to be Mr Cook, was in the store. In that event, I did not see any unfairness to the accused in not screening to the jury the entire 8 hours of security video footage.

These are the reasons for the ruling of 23 March 1998 (p2).

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