R v Yirrawala [2004] NTSC 7

PARTIES:	THE QUEEN
	v
	YIRRAWALA, Nathan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20303109
DELIVERED:	26 February 2004
HEARING DATES:	16 February 2004
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW

Section 26L application – evidence – admissibility of evidence - photo-board identification – no identification parade conducted - identification of accused in court – where evidence should be excluded

EVIDENCE

Section 26L application – admissibility of evidence - photo-board identification – no identification parade conducted - identification of accused in court – where evidence should be excluded

Alexander v The Queen (1979-1980) 145 CLR 395, followed
Alexiou v The Queen (Court of Criminal Appeal (NT), unreported, 18/9/95), followed
Carusi (1997) 92 A Crim R 52, followed
Pitkin (1995) 80 A Crim R 302 at 305-306, applied

R v Britten (1988-89) 51 SASR 567 at 569, followed
R v Bloomfield [2003] NTSC 9, followed
R v Dawson (Supreme Court of the NT, unreported, 8/11/94) followed
R v Ireland [1999] NTSC 25, followed

REPRESENTATION:

Counsel:

Plaintiff:	Mr Adams
Defendant:	Mr Powell

Solicitors:

Plaintiff:	DPP
Defendant:	NAALAS

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Yirrawala [2004] NTSC 7
No. 20303109

BETWEEN:

THE QUEEN
Plaintiff

AND:

NATHAN YIRRAWALA
Defendent

CORAM: MILDREN J

REASONS FOR RULING

(Dated 26 February 2004)

[1] The accused was charged with the following offences:

Count 1: aggravated unlawful entry of a dwelling;
Count 2: stealing;
Count 3: having sexual intercourse without consent;
Count 4: alternatively to Count 3, committing an act of gross indecency without consent.

[2] The offences allegedly occurred at Flat 91, Kurringal Flats, Fannie Bay during the early hours of the morning of 27 January 2003. It is alleged that the accused entered the flat by poking a hole into an external flyscreen door with his fingers, thereby enabling him to retrieve a bunch of keys still in the lock on the inside. With these keys, he opened the fly screen door as well as the external front door to the flat. It is alleged that he entered the lounge

area where he found Ms MJ's purse and stole $28 in notes and coins. He left a Coca-Cola bottle containing petrol and a cut down beer can which possibly also contained some petrol on a table in the lounge room. He then went into the bedroom and saw Ms MJ and her de facto asleep on the bed. Both were naked. Ms MJ was lying on her side. It is alleged that he touched Ms MJ on the vagina. She awoke and screamed. The accused then left the bedroom and the flat. The police were called and obtained a description of the intruder from Ms MJ. It is alleged that the police carried out a search of the area. A person was seen running away from the flats and the police gave chase. The person got away. Later, the police had cause to attend at unit 169, Kurringal Flats, where they spoke to the accused. No arrest was made at that stage. Fingerprints were located on the Coca-Cola bottle and the beer can. On 4 February these were identified as belonging to the accused. DNA samples were taken in relation to some small particles of skin found on the flyscreen and on the cut down beer can. A partial match was made with the accused's DNA from the sample taken from the flyscreen and a complete match was made with the sample on the beer can.

[3] The accused was arrested by police on Monday 24 February. An attempt was made to conduct an electronically recorded record of interview at police headquarters, but this failed because the accused, who is an Aboriginal from Maningrida, was unable to understand the caution even with the assistance of an interpreter, and was in an agitated state. According to the officer in charge of the case, Detective Brayshaw, after the attempt to interview him

failed, he asked the accused to participate in a line-up, but "he was still agitated and that went no further". The accused was then charged and bail was refused. No further attempt was ever made to conduct a line-up.

[4] On 13 March 2003, Detective Brayshaw and Detective Sergeant Lade attended at flat 91, Kurringal Flats and showed Ms MJ a photo-board containing 12 photos of young Aboriginal men of similar appearance to the accused. Ms MJ selected the photo of the accused. Counsel for the accused, Mr Powell, submitted that although the evidence relating to the photo-board was admissible, I should reject that evidence in the exercise of my discretion as well as any evidence given by Ms MJ in the nature of a dock identification. Mr Powell also objected to any evidence relating to alleged flight by the accused after the police arrived at Kurringal Flats on 27 January 2003. Accordingly, I conducted a hearing pursuant to S 26L of the Evidence Act. At the end of that hearing, counsel for the Crown, Mr Adams, conceded that the proposed evidence of flight giving rise to an inference of guilt was inadmissible and he said that did not propose to lead it. That left the identification evidence. I ruled that I would exclude that evidence in the exercise of my discretion. I said that I would provide reasons at a later time. These are those reasons.

[5] It is well established that identification evidence from photo-boards is admissible, but the trial judge retains a discretion to exclude such evidence wherever the probative value of the evidence is outweighed by its prejudicial effect, or where it would be unfair to the accused to admit that

evidence, in the sense that the accused would not receive a fair trial: see *Alexander v The Queen* (1979-1980) 145 CLR 395; *R v Britten* (1988-89) 51 SASR 567 at 569 per King CJ; *R v Dawson* (Supreme Court of the NT, unreported, 8/11/94); *Alexiou v The Queen* (Court of Criminal Appeal (NT), unreported, 18/9/95); *Carusi* (1997) 92 A Crim R 52; *R v Bloomfield* [2003] NTSC 9; *R v Ireland* [1999] NTSC 25.

[6] The authorities recognise that there are critical questions which are relevant to the exercise of the discretion to reject photo-board identification evidence. These questions include whether or not the investigation had already passed the investigatory stage; if the police already knew who to arrest and charge; whether or not the accused was offered an identification parade and if so, whether or not he declined it; if no identification parade was offered, whether there was a legitimate reason for not offering it of the kind discussed by Hunt CJ at CL in *Carusi*, supra, at 64-65, as well as a number of other matters, some of which are relevant in this case.

[7] Clearly, at the time the photo-board was used, the investigatory stage had well and truly passed. The accused had been arrested and charged. He had been granted bail, but he was initially unable to meet the conditions of his bail and it is not known whether he had been released or not by the time the photo-board was shown to Ms MJ. The police made no further effort to locate him after his arrest for an identification parade. No identification parade was held. There were no difficulties in holding an identification parade of the kind referred to in *Carusi*. The evidence of Detective

Brayshaw was that he considered there was an ample supply of appropriate persons readily available on short notice for an identification parade if that course had been taken.

[8] According to Detective Brayshaw, as I have mentioned already, he did offer an identification parade, but the accused "was still agitated and that went no further". This offer was not recorded electronically. No note was made of the conversation. No record was kept of any kind indicating that such an offer had been made. Detective Brayshaw conceded that the conversation ought to have been recorded and that that was his usual practice. He could offer no explanation as to why it was not done in this case. He conceded that there was no mention of this in his statement. He also said that Detective Henrys was present at the time. The Crown did not call Detective Henrys. No explanation was given for not calling him. The alleged conversation was not opened by the prosecutor. Indeed, the prosecutor said in his opening that there was no evidence that an identification parade had been offered. In these circumstances, I am not prepared to find that Detective Brayshaw offered an identification parade to the accused, who rejected the offer. No evidence was led as to what words were used to convey the alleged offer, or what words the accused used to reject it, so even if something was said about it contrary to my finding, I am unable to find that whatever was said amounted to an offer which the accused understood and rejected.

[9] It is well established that the failure to offer an identification parade when one ought to have been offered usually results in the photo-board

identification being excluded: see for example *Alexander v The Queen,* supra, at 402-403 per Gibbs CJ; per Stephen J at 417; per Murphy J at 436-437; *Carusi*, supra at 64-65. However, there is no rigid rule, and what must be borne in mind are the reasons why identification evidence based on photographs is often considered to be unfair or to lack probative value. Some matters often mentioned are "the rogues' gallery effect" and "the displacement effect". As was said by Deane, Toohey & McHugh JJ in *Pitkin* (1995) 80 A. Crim R. 302 at 305-306:

> The use of photographs of suspects by law enforcement agencies for the purpose of identifying an offender is a necessary and justifiable step in the course of efficient criminal investigation. Nonetheless, it is attended by some danger of consequential and unfair prejudice to an accused. One such danger is that identification through a photograph is likely to be less reliable that direct personal identification since differences in appearance between the offender and a suspect may be less noticeable when a photograph of the suspect is used. In that regard, once there has been purported identification through a photograph, any subsequent direct identification may be less reliable by reason of the subconscious effect of the photograph upon the witness's recollection of the actual appearance of the offender. Another such danger is that a witness who is shown photographs by investigating police will ordinarily be desirous of assisting the police and will be likely to assume that the photographs shown to her by the police are photographs of likely offenders. In that context, and in an environment where the ultimate accused will necessarily be absent and unrepresented, there may be subconscious pressure upon the witness to pick out any photographs of a "suspect" who "looks like" the offender notwithstanding that the witness cannot, and does not purport to, positively identify the subject of the photograph as the offender. Yet another danger from the point of view of an accused is that a witness's evidence that she identified a photograph of the accused which was in possession of the police may suggest to the jury that the accused either has a criminal record involving the relevant kind of crime or is otherwise unfavourably known to the police as a person likely to commit that kind of crime. That danger of prejudice is likely to be increased in a

> case, such as the present, where the police have produced a number of different photographs of the accused taken at different times.

[10] In the present case, the evidence of Ms MJ was that she only saw the offender's face in profile silhouetted against a light from the laundry alcove opposite her bedroom door as the offender left the bedroom. She claimed to have seen the offender once before when some two weeks previously she had passed him on some steps. There was nothing out of ordinary in her seeing him that day and her observations of him then could have not lasted more than a second or two. It seems unlikely that she really did remember seeing him previously. I think this is a case where in reality what she saw in the bedroom was the profile of a stranger in poor light for no more than a second at the most. In those circumstances there is a significant danger that what she now recalls is not the face of the accused that she saw that night, but the photo of the accused which was shown to her on the photo-board. Ms MJ was told that the intruder's photograph may or may not be in the photo-board. She was also told that the intruder may have worn different clothing. But having listened to the audio tape, the way this was said may have implied to Ms MJ that the police believed that the perpetrator's photo was on the board. This, together with the evidence of Ms MJ's fleeting observations of the intruder, led me to conclude that the probative value of this evidence was very small and was clearly outweighed by its prejudicial effect.

[11] There is, of course, the DNA evidence and fingerprint evidence to which I have referred. This is strong circumstantial evidence that the accused committed the unlawful entry. However, this evidence does not eliminate the possibility that the person who sexually assaulted Ms MJ was someone other than the accused. It is possible, for example, that after the accused committed the burglary, he left the front doors of the flat open and that another person, seeing the doors open, entered the flat and assaulted Ms MJ. There are also other possibilities which are not necessary to go into. Indeed, on the night in question, the police originally detained another young Aboriginal person whose clothing better matched the description of the offender's clothing and who, as it happened, had $28 in notes and coins on his person. The police eliminated him from their enquiries because he had a goatee beard whereas the offender was supposedly clean shaven. A photograph of this person was not included in the photo-board. I think in the circumstances of this case, in fairness to the accused that person's photograph should have been included.