R v Al Jenabi [2004] NTSC 44

PARTIES:	THE QUEEN
	v
	ALI HASSAN ABDOLAMIR AL JENABI
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20308400, 20308403
DELIVERED:	7 September 2004
HEARING DATES:	7-11, 22-25, 28-30 June 2004 and 1-2, 5-7, 9, 12-16, 19, 21-22, 30 July 2004
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – evidence – discretion to exclude – reliability – unfairness discretion – public policy – probative value weighed against prejudicial effect

EVIDENCE – whether admissible – whether proper identification made on photo board – whether highly prejudicial to accused – whether legislation complied with

Crimes Act 1914 (Cth) s 3, s 3ZO, s 3ZO(1), s 3ZO(2), s 3ZO(2)(f), s 3ZM(6)(1); *Evidence Act (NT)* s 26L; *Migration Act 1958 (Cth)* s 232A

Eyewitness Identification: Why So Many Mistakes?, Lorretta Re (1984) 58 ALJ 509 at 513

Alexander v The Queen (1980-1981) 145 CLR 395 at 414; *Bunnings v Cross* (1998) 141 CLR 54; *Festa v The Queen* (2001) 208 CLR 593 at 602; *Murphy v The Queen* (1994) 52 SASR 124 at 124-125; *R v Carr* (2000) 117 A Crim R 272 at 288; *R v KS* (2003) 139 A Crim R 553 at 560; *The Queen v Swaffield* (1998) 192 CLR 159; referred to

REPRESENTATION:

Counsel:

Plaintiff:	D Lovell QC, P Usher
Defendant:	J Tippett QC, G Smith

Solicitors:

Plaintiff:	Commonwealth Director of Public Prosecutions
Defendant:	NT Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	mil04340
Number of pages:	38

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

R v Al Jenabi [2004] NTSC 44
No. 20308400, 20308403

BETWEEN:

THE QUEEN
Plaintiff

AND:

ALI HASSAN ABDOLAMIR AL JENABI
Defendant

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 7 September 2004)

[1] This is an application pursuant to s 26L of the Evidence Act.

[2] The accused is charged with four counts of "people trafficking" contrary to s 232A of the Migration Act 1958 (Cth) (as well as with a number of alternative charges). The four main counts allege that he was responsible for the organisation of four boats of illegal immigrants which arrived in the Australian Territory of Ashmore and Cartier Islands in 2000 and 2001. The issues in the case are whether the person who is in the dock is Ali Al Jenabi and whether he is the person responsible for the organisation of the bringing into Australia of a group of five people or more, reckless as to whether or not those people had a lawful right to come to Australia.

[3] The evidence which the Crown intends to lead is of the following kind:

(1) evidence from an informer, a Mr Sultani, who allegedly worked for the accused for a period of 12 months and who is well familiar with him and with his operations;

(2) the evidence of a number of passengers on the vessels who claim to be able to identify the accused as Ali Al Jenabi, the "people smuggler" who arranged for their passage to Australia;

(3) evidence from an application made to Australian immigration officials in 1999 by a Mrs Sa'idi for a protection visa for herself and her family which included an application covering the accused, as well as containing a photographic likeness of him;

(4) evidence that the accused was arrested in Bangkok and entered Thailand on a false Moroccan passport which contained a photograph of him which came from the same source as the photograph contained in the application made to Australian immigration officials;

(5) evidence that, since his being held in remand at Berrimah Prison, the accused has been visited by a Mrs Sa'idi, a passenger on one of the vessels and who, it is alleged, is the accused's mother; and

(6) evidence that the sim card from a mobile telephone in the accused's possession contained a quick dial number described as "mother" which was traced to Mrs Sa'idi.

[4] The present application relates to the evidence of those witnesses who were passengers upon the four vessels concerned. Each of those witnesses were asked by members of the Australian Federal Police (AFP) to look at a photo board made up of 9 black and white photographs to see if they were able to identify the person who organised their trip to Australia. Most of those witnesses will also be asked to make an "in court" identification. Those witnesses, almost without exception, picked out a photograph of the person the Crown alleges is the accused, with varying degrees of certainty as to whether or not this was a photograph of the alleged people smuggler. The photograph used in the photo board is the same photograph used in the visa application. Counsel for the accused, Mr Tippett QC, concedes that the evidence is admissible but submits that I should exclude this evidence in the exercise of my discretion.

[5] Mr Tippett's submissions fall into three broad categories:

(1) A number of witnesses were shown a group of photographs by an intelligence analyst employed by the Department of Immigration, a Ms Jamal Houssami. Subsequently those same witnesses were shown a photo board when later interviewed by members of the AFP, from which these witnesses chose a photograph which they said, with varying degrees of certainty, was that of the accused. The broad thrust of the submission is that the circumstances under which those photographs were shown to those witnesses are such as to prevent the accused from having a fair trial. Further, or alternatively, it was put

that the evidence should be rejected because its probative value was outweighed by its prejudicial effect.

(2) The circumstances under which the photo board was employed by the AFP were such as to prevent the accused from having a fair trial. Further, or alternatively, it was put that the probative value of the evidence was outweighed by its prejudicial effect and the evidence should be rejected because of public policy considerations. This submission was made in respect of all witnesses, whether or not they had previously been shown any photos by Ms Houssami or for that matter by anyone else.

(3) A further small group of witnesses were allegedly shown the photo board in the presence of another person who was also familiar with the physical appearance of Ali Al Jenabi. It is suggested that these witnesses were "kibitzed" or assisted in the identifications made, and that the purported identifications were of no probative value and should be excluded.

Witnesses Shown Photographs by Jamal Houssami or By Others

[6] It is established that in relation to some witnesses proposed to be called by the Crown, who were passengers aboard either the "Bacala" or the "Outtrim", the intelligence agent Jamal Houssami showed a group of approximately 48 photos to those passengers a number of whom claimed to

have identified the photograph of Ali Al Jenabi amongst the photographs shown.

[7] The first submission made by Mr Tippett QC is that the provisions of s 3ZO of the Crimes Act 1914 (Cth) were not complied with by Ms Houssami in a number of respects and that this somehow tainted a subsequent photo board examination of the same witness made by an officer of the AFP.

[8] Subsection (1) of s 3ZO provides as follows:

> (1) If a suspect is in custody in respect of an offence or is otherwise available to take part in an identification parade, a constable investigating the offence must not show photographs, or composite pictures or pictures of a similar kind, to a witness for the purpose of establishing, or obtaining evidence of, the identity of the suspect unless:
>
> (a) the suspect has refused to take part in an identification parade; or
>
> (aa) the suspect's appearance has changed significantly since the offence was committed; or
>
> (b) the holding of an identification parade would be:
>
> (i) unfair to the suspect;
>
> (ii) unreasonable in the circumstances.

[9] Mr Tippett's submission concentrated upon the definition of "constable" in s 3 of the Act which is defined to mean "a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory". There was no evidence that this Ms Houssami was a member or a special member of the AFP, but it was put that on the facts I should find that she was acting as an agent for the AFP. I am unable to

accept this submission. There is no evidence that Ms Houssami was authorised by any member of the AFP to investigate the commission of an offence. Ms Houssami's role was purely that of intelligence gathering at a time before the People Smuggling Strike Team (PSST) had established an operation for the purpose of prosecuting Ali Al Jenabi.

[10] Furthermore, assuming that the accused was a suspect, it is plain that he was not "in custody in respect of an offence" at that time. The word "offence" is defined in s 3C of the Act to mean either an offence against a law of the Commonwealth (other than the Defence Force Discipline Act 1982) or an offence against a law of a Territory other than the Australian Capital Territory.

[11] At the relevant time there is no evidence that the accused was in custody in respect of an offence. If the accused is, as the prosecution suggests, Ali Al Jenabi, the evidence would strongly suggest that he was in Indonesia at liberty. The evidence is that the accused was arrested by Thai police for entering into Thailand on a false passport in April 2002. Even at that stage he was not "in custody in respect of an offence" as defined.

[12] It is also clear that at the relevant times the defendant was not available to take part in an identification parade as he was overseas in a country with which Australia had no extradition treaty, namely Indonesia.

[13] There was therefore no requirement that Ms Houssami comply with s 3ZO of the Crimes Act even if she were an agent of the AFP.

[14] Nevertheless, there is the possibility of what is known as the "displacement effect" or transference of the image of the photograph shown by Ms Houssami so that when such a witness was later interviewed by members of the AFP what the witness remembers is the photograph rather than the features of the person that the individual is asked to identify: see *Eyewitness Identification: Why So Many Mistakes?*, Lorretta Re (1984) 58 ALJ 509 at 513; *Alexander v The Queen* (1980-1981) 145 CLR 395 at 414; *Festa v The Queen* (2001) 208 CLR 593 at 602.

[15] However, it is also well established that there is little danger of the displacement effect where photographs are shown to witnesses who previously knew the accused: see *Alexander v The Queen* (supra) at 414.

[16] Counsel for the Crown, Mr Lovell QC, submitted that the witnesses in this case were all or nearly all recognition witnesses. Counsel for the accused conceded that in some instances the evidence of witnesses in the course of the identification process could properly be described as recognition evidence. There is no satisfactory definition of what is or is not recognition evidence. In *R v Carr* (2000) 117 A Crim R 272 at 288, Blow J drew a distinction between the recognition of individuals previously known to witnesses as distinct from the subsequent identification of individuals by witnesses who first saw them at or near crime scenes.

[17] In the present case it is difficult to say what is or what is not the crime scene. On one view it might be the place where the passengers boarded one

of the boats which took them to Australia. On another view it might be that the crime scene could be said to comprise those parts of Indonesia and Malaysia where, on the evidence, the accused allegedly carried out his people smuggling business. Perhaps what is of more significance in this case is the number of times that the witnesses had an opportunity to speak to or see the accused during the course of the people smuggling operation in which they were involved, the length of time they had to observe the accused on each such occasion, and the conditions under which they observed the accused. It is therefore a question of fact and degree in each case. If the witnesses had an opportunity on a number of occasions to meet and see the suspect for more than a few minutes there is no doubt in my opinion that the witness should properly be characterised as a recognition witness. On the other hand if there was only one opportunity to meet the accused and that opportunity was only for a short time, I do not think I should characterise the witness as a recognition witness. There will be graduations in between these extremes with some witnesses falling on one or the other side of the line.

[18] Of the witnesses who were shown photographs by Ms Houssami, I consider that all but one of those witnesses is a recognition witness. The witnesses who I find to be recognition witnesses are Mahdi Al Shamas, Ebitsam Al Safi, Baher Shamasa and Huthaifa Al Obaidy. The witness who I consider ought not to be characterised as a recognition witness is Nizar Al Haddad.

[19] So far as the recognition witnesses are concerned, I consider that there is no risk of their subsequent identification being affected by the displacement effect. I would therefore not reject their evidence on that ground alone.

[20] So far as the witness Nizar Al Haddad is concerned, I record the fact that Mr Al Haddad arrived in Australia on the "Outtrim" on 4 May 2001, but was not asked to make an identification by the AFP until 18 February 2003. Mr Al Haddad's opportunity to see the accused was very limited, he met him personally only once at a hotel in Surabaya at about midnight when he claims that Ali Al Jenabi came to the hotel in order to collect money from passengers including himself. He claims to have had a conversation with Ali Al Jenabi. The conversation as recorded in his statement (Exhibit P7) is quite brief and he handed to him US$3500. His only subsequent sighting of Ali Al Jenabi was again at night when he claims to have been collected from the hotel along with a number of other passengers by a bus to be taken to a beach where he was to board a boat which took him Australia. He says that he saw Ali Al Jenabi at the time when he was told to board the bus, at the time when he was told to get off the bus and whilst he was organising the passengers onto small boats on which they were to be taken out to a larger vessel off shore. These sightings occurred in mid to late April 2001.

[21] This witness was positive in his identification of the accused. At the committal he also made an in-court identification and in his evidence told the magistrate that he was completely certain that the photograph he had

selected was that of Ali Al Jenabi. In fact he went as far as to say that even if there was a mask on his face he would recognise him.

[22] In these circumstances I think there is a considerable risk of Mr Al Haddad's memory being affected by the displacement effect. In addition, I think it would be difficult for the accused to have a fair trial in respect of this identification because there were no records kept by Ms Houssami of the identification process conducted by her, and therefore it is not possible to know exactly what took place on that occasion. Also there are weaknesses in the photographic identification carried out subsequently by the AFP which I think in this case aggravate the problems with the identification which I have already identified. These weaknesses will be discussed at a later time. In the net result I consider that this witness's photo identification evidence should be excluded.

[23] I should record that it has not been suggested that the AFP breached the Crimes Act by failing to conduct an identification parade. However, I note that the photo identification made by Nizar Al Haddad occurred on 18 February 2003 at a time when the accused was being held in Thailand by Thai prison authorities following a hearing conducted on 4 November 2002, when Australia sought extradition of the accused. Indeed, Federal Agent Killmier took custody of the accused on 21 February 2003. A request was made for the accused to participate in an identification parade on 24 February 2003. This was a request that was ultimately rejected by the accused, but it seems to me that technically there may well have been a

breach of the Crimes Act in arranging for a photo identification at a time when the accused was being held by Thai authorities in custody in respect of an offence against the Crimes Act, awaiting extradition to Australia. However, it is not necessary to go into that matter any further.

[24] Counsel for the accused has suggested that a number of other witnesses were shown photographs either by Ms Houssami or by some other person who was a member of the PSST at a time which preceded the photo identification carried out subsequently by the AFP.

[25] The first of these is a witness James Basaka. Mr Basaka arrived in Australia on the "Outtrim" on 4 May 2001. He was interviewed by the AFP for the purposes of giving a photo identification on 27 February 2003. I consider Mr Basaka to be a recognition witness. Nevertheless he has given conflicting accounts as to whether he was ever shown photographs before being shown the police photo board. According to his statement (Exhibit P30) and his evidence at the committal (at transcript 192) this did not occur, but his evidence during the voir dire was to the contrary. There is a significant gap between the time of his arrival and the time that he was shown the photo board and that coupled with the fact that he is a recognition witness reduces the risk of the displacement effect. However because of faults identified by counsel for the accused with the photo identification process to which I will come, I have to also consider whether I ought to exercise my discretion to exclude this witness's photo identification evidence on the ground of fairness. It is not in contention that even in the

case of recognition witnesses the Court has a discretion to exclude evidence in photo identification cases on the usual grounds. Counsel for the Crown, Mr Lovell QC, conceded that there were was some unfairness in the photo identification process, but submitted that it was relatively minor, it was largely cured by the fact that these witnesses gave evidence both at the committal and during the voir dire and that any residual prejudice that might remain could be cured by the giving of appropriate directions.

[26] I think that this particular witness had a very poor recall of the process of identification into which he was asked to enter. The process was not video taped nor was it audio taped and no adequate notes were taken by the police. I do not consider that the weaknesses in the photo identification process have to any extent been balanced out by evidence which the witness himself can give as to what took place. He simply remembers little of it and in those circumstances it is very difficult indeed for counsel for the accused to question the process. This gives rise to a real concern as to whether the accused can have a fair trial on the issues raised by this witness's evidence. I consider therefore that the combination of the possibility of the displacement effect together with the lack of fairness is such that any directions which I might give to the jury are unlikely to satisfactorily resolve the problems with this witness's evidence and that therefore it should be excluded.

[27] I turn now to the evidence of Mohammed Shohani. This witness was unsure whether or not he had been shown any photographs of anyone who may have

been suspected of people smuggling prior to the time of his photo identification interview on 12 July 2002. This witness arrived in Australia on the "Bacala" on 20 August 2001. According to the statement taken on 12 July 2002, he had not been shown any photographs previously so the matter is possibly in a somewhat uncertain state. Mr Shohani had a reasonably good recall of the photo identification process and therefore I would not exclude his evidence on the fairness ground for the reasons which I have previously discussed, but according to the evidence which he gave at the voir dire, he was not interviewed by the AFP alone, but in the presence of his brother, who was shown photographs at the same time.

[28] Mr Shohani said that the police initially came to speak to his brother concerning another vessel carrying refugees that had sunk and as a result a number of persons had drowned. He claims that the police showed a photo board to his brother who pointed out a person to the police as a people smuggler. At that stage Mr Shohani was sitting next to his brother and saw who it was his brother had selected. He was then asked by the police if he could identify anyone and he selected a photo of the accused and said, "Yes, this is the person". The following evidence was given:

> Did your brother point to the same photograph that you pointed to?--- He pointed to the photo of Abu Husay at first, and then he said, 'Is this Ali Jenabi?', pointing at the photo and I looked myself also, and I said, 'Yes, I met that person, Ali Jenabi in Indonesia.'
>
> So, when you - Mr Shohani, when the police showed you the photographs, that is, when the police showed you and your brother the photographs, you and your brother looked at them together and

discussed the photographs between the two of you, is that right?---
I pointed out - I knew it was a photo. I said, ‘This is the one’.

I'm asking, though, did you and your brother discuss the photographs as you were looking at them?---Because my brother wasn't feeling better, when he was very distressed about the loss of his wife and girl, because they drowned in their ship, and - so he wasn't really - he was very tired, so I said, ‘Yes, this is the person’.

So, did your brother and - Mr Shohani, may I ask you again, please, did your brother and you discuss the photographs as you looked at them?---We didn't talk a lot about it or discuss it in great details, but I said - the police asked me, ‘Is this Ali Jenabi?’, I look, I said, ‘Yes, he is’.

I see, and when you - you told me that you also - when you pointed out the photograph you talked to your brother about it, is that true?---
I remember that maybe he went to make a coffee or tea for us, and - when the police asked me about the photo.

You told me that your brother was sitting next to you when you picked out your photo, is that true?---We were sitting in the sitting lounge and - with the police and he was looking at the photos of my brother, and he - he said, ‘It’s Abu Husay’, and he was looking at other people and I don't know at what stage he went to make coffee or tea exactly, but we were sitting together.

And you told me - and I just want to confirm this, but you told me you were sitting together when you picked out a photograph, isn't that true?---Yes, we were all together at home. My mother also was present.

[29] Subsequently he was asked these questions:

When you looked at the photographs you were sitting on the floor were you --- I don’t remember exactly what was my position, but I was I think sitting on the floor or maybe squatting and looking on the table at the photos.

> And was your brother sitting on the floor or squatting next to you, when you were looking at the photographs? --- He was in the same position as mine and was looking at the photos.
>
> And when he was looking at the photos and you were looking at the photos, were you next to one another --- Yes we were.

[30] Neither of the police officers who interviewed Mr Shohani was called to give evidence at the voir dire. However according to a statement dated 12 December 2003 of one of the Federal police involved, Mr George Switolski, he allegedly showed Mr Shohani a sheet of 12 colour photos. That is plainly wrong as the witness statement (Exhibit P14) shows that he was shown nine black and white photos. Mr Switolski has sworn a second statement dated 14 July 2004 correcting certain mistakes in his first statement. According to Mr Switolski's second statement he was present with Special Member Belinda Lawson. There is nothing in his statement of 12 December 2003 made nearly 18 months after the interview to indicate who else was present at the time when Mr Shohani was interviewed. There is nothing in the statement of Mr Shohani to indicate who was present apart from Mr Switolski, and the statement of Belinda Lawson does not refer to an interview with Mr Shohani at all.

[31] It is difficult to see how in those circumstances it would not be unfair to the accused to admit the identification evidence, particularly as the identification appears to have been a joint effort between he and his brother and according to the evidence Mr Shohani saw the person whom he has

identified as Ali Al Jenabi on only one occasion. In these circumstances the identification evidence of Mr Shohani will be excluded.

[32] The next witness in this category is Talaat Al Bayati. Whilst giving evidence on the voir dire he was unable to remember one way or the other if he had been shown any photographs by either Immigration officials or by police whilst he was in detention at the Woomera Detention Centre. When shown the 48 photographs which Jamal Houssami had used during the course of her interviews, he said he was unable to remember whether he was shown those photographs or not, although he did not think so. Mr Al Bayati arrived in Australia on the "Bacala" on 20 August 2001. According to the evidence of Ms Houssami it was not until November 2001 that she received information to the effect that she was not to show photographs to persons whom she was interviewing. This therefore leaves it as a possibility that Mr Al Bayati may have been shown photographs either by Ms Houssami or by somebody else, although the possibility is, I think, only very slight. I note that in his statement (Exhibit P42) Mr Al Bayati said that he had not previously been shown a photograph of Ali Al Jenabi. This witness claims to have seen Ali Al Jenabi on four occasions and, in my view, is a borderline recognition witness. Although he had no doubt that the photograph that he selected during the photo board process when he was interviewed on 18 April 2002 was that of Ali Al Jenabi, he was unable to identify the accused at the committal and he was therefore not able to give direct evidence of identification. His evidence is more in the nature of circumstantial evidence

in that although the photograph which he selected is allegedly a photograph of the accused, he is apparently not able to identify the accused at all. Mr Al Bayati had a good recall of the identification process undertaken by the police. At the time that he was interviewed on 18 April 2002, the accused had only just been arrested by the Thai police and was not in custody for a Commonwealth offence, so there was no breach of the provisions of the Crimes Act. In all the circumstances there is no reason why I should exercise my discretion to exclude the evidence of this witness.

[33] The next witness is Ari Faraj. He arrived on the "Fruitgrove" on 15 October 2000. The evidence is that Jamal Houssami was not involved in interviewing passengers from the "Fruitgrove" or the "Stonyville". According to Mr Faraj (Exhibit P36) he was not shown a photograph of Ali Al Jenabi before 27 February 2003, when he was interviewed by the AFP. At the committal, his evidence was that he had been shown a number of photographs in October 2000 by members of the AFP, but there was no photograph of Ali Al Jenabi amongst those photographs. He repeated this evidence before me during the voir dire. Even if he had been shown a photograph of Ali Al Jenabi in October 2000, this was some two and half years before the photo identification. Mr Faraj is clearly a recognition witness and has good recall of the photo identification process. At the time of the photo identification by Mr Faraj, the accused was already at Berrimah Prison, Darwin and his lawyer had been spoken to by Federal Agent Killmier, who had requested the accused to take part in an identification parade. This latter conversation

occurred on 24 February. No outright refusal had been made at that stage as the accused's then solicitor had requested particulars of the allegations against the accused before, so he said, he was in a position to advise the accused as to whether or not he should participate in an identification parade. I do not consider that the police should be expected to wait for very long whilst an accused person in custody makes up his mind as to whether or not he will participate in an identification parade, but some reasonable opportunity to get advice is obviously necessary. In the end result it little matters because when the accused's decision was finally provided to the Crown in June 2003, the request to participate was denied. Counsel for the accused did not seek to take issue about whether or not it was unreasonable in the circumstances to wait before using a photo board. Even if there had technically been a breach of s 3ZO of the Crimes Act, such a breach does not automatically result in the inadmissibility of the evidence. I do not consider that in the circumstances I should exercise my discretion to reject the evidence of Mr Faraj.

[34] The next witness in this category is Aziz Rashwani who also arrived on the "Fruitgrove" on 15 October 2000. There is nothing in his earlier statements, nor at the committal, to indicate that he was ever shown any photographs by the authorities at any time prior to the making of his statement, which was taken on 3 August 2003. During the voir dire he said that he was not 100 per cent sure, but that he thought that he was shown a sheet of photos at Port Hedland "of the smuggler". He said also that he was shown a sheet (he

thought) of eight or nine photos, none of which was a photo of Ali Al Jenabi. This witness is clearly a recognition witness with good recall of the photo identification process. There is clearly no breach of s 3ZO of the Crimes Act in his case. In the circumstances there is no reason to exclude his evidence in the exercise of my discretion.

[35] The next witness is Azad Sherwani who arrived on the "Fruitgrove" and therefore was not interviewed by Ms Houssami. Mr Sherwani is another recognition witness who said that he was not sure whether or not he was shown any photographs of Ali Al Jenabi prior to the photo identification (notwithstanding that in his signed statement he claimed otherwise). This particular identification occurred on 13 June 2002 and was not shown to be in breach of the Crimes Act. Furthermore the identification in this particular case was recorded on audio tape. However, the witness claimed during the taking of his evidence on the voir dire that his wife was present with him at the time he made his identification. During his evidence he said on the one hand that his wife pointed out Ali to him on the photo board during the course of the photo board process, but later he said this occurred after he had made the photo identification himself. His evidence is confusing and contradictory (see Transcript at pages 599-601). There is nothing on the tape to suggest that there was any "kibitzing" by the wife during the photo identification process and her presence is not recorded on the tape at all. I note also that the interviewing officer, Ms Hoe, denied that any such thing occurred, although whether it did or did not is a jury matter. The

identification in this case occurred on the 13 May 2003. In the circumstances I consider that any possible prejudice to the accused can be met by an appropriate direction to the jury. I do not consider that I should exercise my discretion to exclude this evidence.

[36] The next witness who Mr Tippett suggested had been shown photographs by Jamal Houssami was Ali Bakhtiarrvandi. Mr Bakhtiarrvandi is a recognition witness who arrived on the "Stonyville" on 1 June 2000, and therefore was not shown any photographs by Jamal Houssami. There is no evidence that Mr Bakhtiarrvandi was shown photographs by anybody before he was interviewed on 13 June 2002. Mr Bakhtiarrvandi has good recall of the photo identification process. In the circumstances I consider there is no reason to exclude his evidence.

[37] The next witness in this category is Ahmed Malek Shahi, who arrived on the "Bacala" on 20 August 2001. Mr Shahi is not a recognition witness. According to his statement, he met the accused only on one occasion when he came to his room at a hotel in Surabaya and spoke to them about how they were going to come to Australia. This witness was unavailable to give evidence at the committal and in respect of his evidence I conducted a *Basha* enquiry. It was plain from his evidence before me that he had little opportunity to see the accused properly. On the occasion that he claims to have seen the accused in the hotel room the light in the room was not strong, there were others present in the room to whom the accused was allegedly talking and for much of the time the witness only saw the smuggler's

profile. The subsequent sightings on the beach a little later on were also at a time when it was dark and the witness himself said that he was unable to see the smuggler's face properly. Mr Shahi claims that he selected the photograph which most closely resembled that of the smuggler, but he did not purport to make a positive identification. This contrasts with his statement which gives no indication of that fact. So far Mr Shahi has not been asked to make an in-court identification. According to Mr Shahi he has never seen any other photos of possible people smugglers at any time prior to the taking of his statement on 10 October 2002. Mr Shahi, I considered, had good recall of the identification process. I do not consider him to be a recognition witness and I do not consider him to be a witness whose evidence of identity is other than circumstantial evidence (in the sense that he does not make a positive identification of the accused). In those circumstances I think that any possible prejudice or unfairness to the accused can be cured by an appropriate direction and I propose to admit Mr Shahi's evidence.

[38] The next witness in this category is Akeel Al Obaidy who also arrived on the "Bacala" on 20 August 2001. In his particular case there is no evidence that he has seen any photographs of suspected people smugglers prior to the time when he was formally interviewed for the purpose of being shown the photo board on 16 June 2002. At that time, there is no evidence that Ali Al Jenabi was in custody for an offence against the laws of Australia and there is no evidence to show that there was a breach of s 3ZO of the Crimes Act.

Mr Al Obaidy gives evidence of having seen the accused once in a hotel in Jakarta when he discussed the price of the trip; on another occasion when he paid him the full amount of the money that had been agreed a few days earlier; and on a further occasion when he said he could vaguely see his face when he boarded one of the small boats on a beach near Surabaya. I think he is a borderline recognition witness. His evidence at the voir dire was that he was certain that the photograph that he had selected was a photograph of Ali Al Jenabi. He was not asked to make an in-court identification at the committal. I think that I must treat him as a positive identification witness for these purposes. He has only a very poor recollection of the identification process that was carried out by the AFP. His identification was not taped and there are no notes kept by the police as to precisely what happened. This matter is very close to the borderline, but I think that having regard to the witness's lack of memory as to the identification process and the failure of the police to adequately keep notes as to what happened, I exercise my discretion to exclude this evidence. I consider that in this case it would be unfair to the accused to admit that evidence and accordingly it will not be admitted.

[39] The next group of five witnesses are witnesses whom it is alleged by Mr Tippett QC on behalf of the accused were shown photos by the AFP when someone else was present. The first of these witnesses is Mohammed Shohani whose evidence I have already discussed. It is not necessary to deal with him again.

[40] The next witness in this category is Ali Merundi. This witness is a borderline recognition witness who arrived on the "Bacala" on 20 August 2001. There is no evidence that he was shown photographs of anyone thought to have been a suspected people smuggler. His interview occurred on 17 February 2003 at a time when the accused was in custody in Bangkok prison awaiting deportation to Australia. As previously noted, I think there is an argument at least there may have been a technical breach of the Crimes Act in those circumstances in that it may well be said that under the terms of s 3ZO the accused was "in custody in respect of an offence". However, of more significance is the evidence of this witness that at the time when he was interviewed he was assured by his wife that the person he had selected was the right one and even then he was only 80-85 per cent sure of the identification he had made. He was also quite clear that the assurance that he received from his wife that he had made the correct selection occurred before he had put his signature across the photograph to indicate that he was satisfied with that selection. I think in those circumstances there has been no real identification by this witness, who clearly has had assistance from his wife. In those circumstances it would be unfair to the accused to admit this evidence even though the witness has a good recall of the identification process. Accordingly, I exercise my discretion to exclude this witness' photo identification evidence.

[41] The next witness in this category according to Mr Tippett QC is Azad Sherwani. I have already dealt with Mr Sherwani and his evidence will be admitted.

[42] The next witness in this category is Enas Shibo who arrived in Australia on the "Fruitgrove" on 15 October 2000. Mr Shibo was not asked to participate in a photo board identification until 16 August 2003. Clearly at that stage there was no breach of s 3ZO of the Crimes Act. Furthermore the identification process in this particular instance was recorded on audio tape.

[43] Although there is nothing on the audio tape to indicate that anyone else is present, other than the police, Mr Shibo and the interpreter, he claims in his evidence that he was shown the photo board in the presence of his uncle who is Safaa Shibo. The evidence is that Safaa Shibo was interviewed on 26 February 2003. There is nothing in the statement of Safaa Shibo or in his evidence on the voir dire to suggest that Enas was present on 26 February 2003 when he was shown the photo board. Safaa Shibo was not cross-examined on this point during his evidence given on the voir dire, even though Enas Shibo had been asked about this subject and had given evidence about it at the committal. Enas Shibo, during his evidence on the voir dire, claimed that he was also interviewed on the same day as his uncle had been interviewed although after his uncle had been interviewed. This was consistent with evidence that he had given at the committal. In my view it is unlikely in the extreme that the police would have shown Enas Shibo

photographs on the same occasion as his uncle had been interviewed and not take a statement from him at that time.

[44] Safaa Shibo was interviewed by Federal Agent Whinfield in the presence of Federal Agent Sue Ho. Ho was called to give evidence and not cross examined about this subject. Even taking Enas Shibo's evidence at face value there is no evidence of "kibitzing"; at worst there is a possibility of the displacement effect if in fact he was shown photos on 26 February as well as on 16 August 2003. Enas Shibo is clearly a recognition witness and therefore the possibility of the displacement effect is fairly small. I think in these circumstances the evidence of Mr Shibo should be admitted into evidence. To the extent that any difficulties arise, these can be adequately dealt with by directions.

[45] Finally in this category we have the evidence of Safaa Shibo. In his case, he is also a recognition witness. There is no basis on which his evidence can be excluded. Mr Safaa Shibo has a good recollection of the events which occurred at the time of his own photo identification. There is no evidence that he was "kibitzed" by his nephew. I have taken into account that his photo identification occurred at a time only two days after a request had been made by Federal Agent Killmier for the accused to take part in an identification parade, but having regard to the fact that the accused ultimately rejected the opportunity to participate in an identification parade. I do not consider that there is any unfairness to the accused in admitting this evidence.

[46] I turn now to consider the question of whether or not I should, in the exercise of my discretion, reject any of the other witnesses on the basis that the accused would not be able to have a fair trial if their evidence were to be admitted.

[47] The principal complaint of Mr Tippett QC is that the police made no tape recording or video recording of the photo identification process in relation to these witnesses and failed to record, by notes or otherwise, certain information such as the time the process commenced, the time it concluded, what was said in words expressed in the first person, any observations that may have been as to gestures or comments allegedly made by the witness and the fact that no questions were asked about the degree of certainty with which the witness considered the selected photo was a true likeness of Ali Al Jenabi.

[48] In respect of these witnesses, it is not suggested that there was any breach of s 3ZO of the Crimes Act. In particular, it is not suggested that there is any breach of s 3ZO(2) of the Act, which provides as follows:

> (2) If a constable investigating an offence shows photographs or pictures to a witness for the purpose of establishing, or obtaining evidence of, the identity of a suspect, whether or not the suspect is in custody, the following rules apply:
>
> (a) the constable must show to the witness photographs or pictures of at least nine different persons;
>
> (b) each photograph or picture of a person who is not the suspect must be of a person who:

(i) resembles the suspect in age and general appearance;

and

(ii) does not have features visible in the photograph or picture that are markedly different from those of the suspect as described by the witness before viewing the photographs or pictures;

(ba) the photographs or pictures shown to the witnesses must not suggest that they are photographs or pictures of persons in police custody;

(c) the constable must not, in doing so, act unfairly towards the suspect or suggest to the witness that a particular photograph or picture is the photograph or picture of the suspect or of a person who is being sought by the police in respect of an offence;

(d) if practicable, the photograph or picture of the suspect must have been taken or made after he or she was arrested or was considered as a suspect;

(e) the witness must be told that a photograph or picture of the suspect may not be amongst those being seen by the witness;

(f) the constable must keep, or cause to be kept, a record identifying each photograph or picture that is shown to the witness;

(g) the constable must notify the suspect or his or her legal representative in writing that a copy of the record is available for the suspect;

(h) the constable must retain the photographs or pictures shown, and must allow the suspect or his or her legal representative, upon application, an opportunity to inspect the photographs or pictures.

[49] As Mr Lovell QC forcefully submitted, there is no provision in s 3ZO requiring the photo identification process to be either audio taped or video taped. This is in contrast to s 3ZM(6)(l) which requires identification parades to be recorded by video recording if it is practical to do so and if not recorded by video recording the parade is required to be photographed in colour: see s 3ZM(6)(m).

[50] Mr Lovell QC submitted that the reason why identification parades must be recorded by video recording or photograph is to ensure that there is a record kept of the visual appearance of all of those persons who took part in the identification parade. This is consistent with s 3ZO(2)(f) which requires the constable in the case of identification by means of photographs to keep or cause to be kept a record identifying each photograph or picture that is shown to the witness. In other words the concern is to ensure that the jury are able to be shown visual images of all of those persons who took part in the identification parade or all of the photographs that were shown if a photo board were used. There is considerable force in this submission.

[51] There is no definition of video recording contained in the Crimes Act. Usually, when a video camera is used, there is at the same time an audio recording made automatically by the machine. This means that a video recording would not only enable the jury to see what actually occurred at the time of an identification parade, but also to hear what was said to or by the witness at the time of making the identification.

[52] It is not easy to understand why an identification parade must be video taped, but a photo identification is not required to be video taped. Plainly the advantages of video taping the photo board process to ensure fairness to an accused are obvious. However, I must deal with the law as I find it.

[53] I accept the evidence given by Federal Agent Killmier and supported by the evidence of Federal Agent Creevey that consideration was given as to whether or not the photo board processes ought to be recorded in some way and that a decision was made not to record by either means as it was feared that the witnesses would not be cooperative if records were kept in that manner. That decision was based upon the previous experience of Mr Creevey when dealing with witnesses from a part of the world where they had learned to distrust their own police forces. Whilst I think that was a genuine reason, I am equally certain that it was a wrong reason. There is really no reason why the police ought not to have asked each witness whether the witness had any objection to the process being recorded either by video tape or audio tape, thereby leaving the choice to the witness. If the witness then refused, the reasons for the refusal could have been recorded in the form of a statement or in the form of notes taken by the police officers at the time. I think it is likely that the vast majority of witnesses would not have objected to the process being recorded and that the fears of the police were exaggerated.

[54] Criticism was also directed to the methodology in that the police used a "shell" statement in conducting these interviews. The shell statement was

drafted by Federal Agent Creevey. It was based on a form of "shell" statement previously in existence and used by other members of the PSST in relation to other investigations. The purpose of the draft was to ensure compliance with s 3ZO of the Crimes Act. The idea was that the shell statement was to be used as an aide memoire for the interviewing officer so as to ensure that nothing vital had been overlooked. There are a number of criticisms of this entire process made by Mr Tippett QC. These include the fact that in a number of cases the Crown has presented witnesses as if they had made positive identifications, when it transpires that a number of the witnesses concerned were not making positive identifications, but were merely asserting that the person whom they knew as Ali Al Jenabi resembled the person in the photograph. I accept the force of this criticism, but the plain fact of the matter is that, as Mr Lovell QC has pointed out, in the vast majority of cases the witnesses have a very good recall of what was said by them to the police and what took place during the photo identification process so that we now know whether they purported to make a positive identification or not.

[55] The next criticism made by Mr Tippett QC is that the process failed to capture the fact of identification including the acts, gestures and the words accompanying the identification all of which are part of the act of identification. Indeed, so it was put, the whole identification was undermined and reduced to the completion of a pro forma process. Mr Tippett QC referred me to *Murphy v The Queen* (1994) 62 SASR 121 at

124-125, where King CJ referred to the case of *R v Sutton* (1990) 159 LSJS 96 with apparent approval. In that case the identifying witness gave evidence that she identified the accused in a photograph, but gave no detail of what occurred at the identification. The detective who had shown the photograph to her was called to give evidence as to her words and actions at the time of the identification. The Court held that the evidence of the detective was admissible as to the matters to which he deposed because they were part of the act of identification and part of the material upon which the jury was required to assess the genuineness of the identification and of the confidence with which it was made. King CJ went on to hold that if matters surrounding the act of identification could be proved notwithstanding that the identifying witness does not depose to them in court, there appears to be no reason or logic why they could not be proved even though the identifier does not depose to the identification at all.

[56] In the present case the Crown has made its position very clear, that the Crown does not intend to call any of the police witnesses who were present at the time of the identification process. Therefore, no attempt will be made to bolster the identification or even to prove the identification if a witness is unable to give evidence of it himself or herself.

[57] Whilst I accept that the process used did fail to capture the acts, gestures and words accompanying the identification as part of the act of identification, the witnesses themselves are mostly able to give evidence of these matters. To the extent that witnesses are unable to recall the process of

identification, this is a matter which I can take into account in the exercise of my discretion.

[58] So far as the shell statement is concerned, I accept that it may well have had a tendency to exclude relevant evidence in that it did not require direct speech to be recorded, and it made no provision for a record to be made of the time taken for the identification process, the manner in which that process occurred or even to note the persons present. But I do not think that it true to say, as Mr Tippett QC suggested, that the defendant has been robbed of the ability to examine the assertions and to investigate the quality of the identification evidence, except perhaps where the witness concerned has little memory of what occurred during that process. On the other hand there is no doubt in this case which photographs were shown to each of the witnesses and the witnesses, in each case, selected the same photograph as being that of Ali Al Jenabi. There was a record kept of this as required by s 3ZO(2)(f). There was also noted in the statements, on a number of occasions, comments made about the degree of certainty with which the witness had expressed his or her identification, so it is not universally true to say that the statements did not always record observations of that kind.

[59] There are three main objections to photo board identifications. These are well known and discussed by the High Court in *Alexander v The Queen* (supra). There is the displacement effect, which I have previously discussed; there is the rogues' gallery effect; and there is the question of fairness in the

sense that there may be unfairness to the accused because he was not present and does not know what happened.

[60] So far as the rogues' gallery effect is concerned there is no question of that in this case. The photograph that was used is not a police photo. There is nothing to suggest that any of the photos used were police photos and it would be surprising in the least if anyone thought that the accused had a prior record of convictions in Australia. In the case of recognition witnesses, as I have said before, there is little risk of the displacement effect. That leaves the possibility of displacement to those cases where a witness is not a recognition witness and also the question of whether or not the process is one which has resulted in unfairness to the accused at his trial. Mr Tippett QC has also raised public policy considerations. I am satisfied that there are no public policy considerations relevant to this case: see paragraph [70] below.

[61] There is a further consideration and that is whether or not the witnesses made a positive identification or not. In a number of cases, the witness does not in fact identify the accused as Ali Al Jenabi. In these cases there can be no unfairness because there has been no identification made at all. There are a number of witnesses that fall into this category, namely Fatima Al Almeri; Ahmed Al-Amin; Ammar Al-Helou; Mohammad Al Hamidy; Ali Al-Jubory; Jafar Khoshbin; Nabeel Al-Nasiry; Jasim Al Herz; Mohmood Haeri; Sabah Baqiri; Nejah Jaderi; Abdullah Al Shimmari; Abdul Al Yuosif; Wessam Jadri; Jasim Al Meyahi; and Talaat Al Bayati.

[62] The evidence of each of these witnesses clearly has probative value, notwithstanding that no positive identification is made. Each witness is able to give something of a description of the accused and it is not insignificant that each witness has chosen the same photograph as being the one which most closely resembles the people smuggler. It is difficult to see how there is any unfairness when the witnesses themselves acknowledge that they are not at all certain that the photograph that they have chosen is that of the people smuggler, or that they are uncertain whether the accused is the people smuggler concerned.

[63] Similarly, in relation to recognition witnesses, particularly those recognition witnesses who have a good recall of the process of identification, it seems to me that there can again be little reason to exclude the evidence on the grounds of fairness and that any unfairness to the accused is outweighed by the probative value of the evidence. To the extent that there is some unfairness in the process that has largely been cured by the fact that these witnesses have given evidence during the voir dire and at the committal and have been subjected to cross-examination so that the accused is in a position to know exactly what it is they say about him and about the process itself. (I record also that there were a few other witnesses called at the voir dire who had not given evidence at the committal and in respect of those witnesses I permitted a full *Basha* enquiry to be conducted.) The witnesses that fall into this category are Mahdi Al Shamas; Ebitsam Al Safi; Baher Shamasa; Huthaifa Al Obaidy; Na'el Wardah; Ari Faraj; Saad Al Jabory;

Safaa Shibo; Aziz Rashwani; Morteza Kargar; Ali Bakhtiarrvandi; Amin Houvedar Sefed; Kais Al Selawi; Fouad Al Hasani; Daryoush Nejad; and Jutyar Babani.

[64] This leaves a small number of witnesses who claim to have seen the person Ali Al Jenabi on only one or two occasions and who have given a positive identification as to who this person was. Those witnesses are: Ahmad Shani; Abbas Allami; Akeel Al Obaidy (whose evidence I have already excluded); Muhammad Al-Shennawa; and Masoud Jizan.

[65] The next witness is Ahmed Shani who arrived on 20 August 2001 in the "Bacala". He was interviewed on 19 October 2002. In that case there is no doubt that there was no breach of the Crimes Act. Mr Shani did not give evidence at the committal and consequently I conducted a *Basha* enquiry in respect of his evidence. During the voir dire process he said that the photograph on the photo board was "pretty close" to the image he had in his mind of Ali Al Jenabi. It maybe questionable as to whether this is really a positive identification, but in any event he has a good recall of the circumstances under which the identification process took place and therefore I consider that there is no unfairness to the accused in admitting his evidence.

[66] The next witness is Abbas Allami who arrived on the "Bacala" on 20 August 2001 and was interviewed for the purposes of photo board identification on 13 June 2002. Mr Allami did not give evidence at the committal and

I conducted a *Basha* enquiry in respect of him. His evidence at the voir dire was less than a full identification. He said that the photograph which he had selected "looks like Ali Al Jenabi". I consider that he had good recall of the process and that there was no basis for rejecting his evidence.

[67] The next witness was Muhammad Al-Shennawa who arrived on the "Bacala" on 20 August 2001 and who was interviewed on 20 February 2003. Mr Al-Shennawa only had a partial recall of what took place during the interview process. Although he used the expression "I think it's him" in relation to the photographic identification, he made a positive in-court identification. I note that this witness saw the accused only once. I think in the circumstances the prejudice to the accused outweighs the probative force of that witness's evidence and that it cannot be cured by any direction which I might give to the jury. Accordingly his evidence will be excluded.

[68] Finally there is the evidence of Massoud Jizan who arrived on the "Outtrim" on 4 May 2001 and was interviewed by the AFP on 18 February 2003. Mr Jizan also only had a partial recall of the interviewing process. I consider that his circumstances are similar to those of Muhammad Al-Shennawa and that his evidence should be excluded for the same reason.

[69] Mr Tippett QC also made a general submission that I ought to reject all of the identification evidence for public policy reasons. Reference was made to the observations of Coldrey J in *R v KS* (2003) 139 A Crim R 553 at 560,

where his Honour referred to a passage from his own judgment in *R v Henry* where he said:

> The discretion to exclude evidence on the grounds of public policy may be enlivened where no unfairness to the accused is occasioned, but nonetheless, the method by which the confessional evidence has been elicited is unacceptable in the light of prevailing community standards. This broad discretion will involve a balancing exercise.

[70] Mr Tippett QC submitted that it is in the interests of public policy to ensure the efficient and reliable gathering of evidence, particularly evidence of a kind which is fraught with danger, such as identification evidence. He submitted that the interests of justice required that the authorities should take all reasonable steps to minimise the risk of a false identification, and that the community would expect every reasonable effort to be taken. In support of his submissions, he repeated criticisms he had earlier made of the identification process employed by the police in this case.

[71] In this case there is no proven illegality or impropriety by the police, so the exercise of a *Bunning v Cross* [(1978) 141 CLR 54] discretion does not arise. As was recognised in *The Queen v Swaffield* (1998) 192 CLR 159, public policy considerations can give rise to a separate discretion usually best considered after the fairness discretion has been considered, but the discretion may also overlap with the fairness discretion. In a broad sense, the matters of public policy to which Mr Tippett QC refers are also relevant to the fairness discretion and I have taken them into account. But whether considered as part of the fairness discretion or as a separate discretion,

I also have to balance the matters relied upon by Mr Tippett QC with the competing interests of fairness to the Crown. There is also a public interest in the prompt apprehension of offenders. In my opinion the balance is best struck by refusing to exclude the evidence on public policy grounds.

[72] In conclusion, the photo identification evidence of the following witnesses will be excluded in the exercise of my discretion for the reasons given above:

1. James Basaka;
2. Mohammed Shohani;
3. Akeel Al Obaidy;
4. Ali Merundi;
5. Mohmood Haeri;
6. Muhammad Al-Shennawa;
7. Massoud Jizan; and
8. Nizar Al Haddad

[73] The evidence of all the other witnesses will be admitted for the reasons given above.