PARTIES:	ALEX JOHN ALEXIOU
	AND
	THE QUEEN
TITLE OF COURT:	In the Court of Criminal Appeal of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory Jurisdiction
FILE NO:	No 5 of 1995
DELIVERED:	18 September 1995
HEARING DATES:	19, 20 JULY 1995
JUDGMENT OF:	MARTIN CJ, MILDREN & THOMAS JJ

CATCHWORDS:

Criminal Law – Appeal and New Trial, Pardon and Enquiry subsequent to Conviction – Appeal and New Trial – Appeal against conviction – Leave sought to appeal – Appellant convicted of assault, deprivation of liberty and entering dwelling house at night

Criminal Law – Evidence – Identification evidence – Whether to exclude on grounds of unfairness – Photoboard identification – Refusal to participate in identification parade – No obligation on police to advise appellant that photoboard identification could only be used if he refused to participate in identification parade – Whether police obliged to explain merits of identification parade as opposed to dangers of false identification from police photoboard

Criminal Law – Evidence – Identification evidence – Whether to exclude on grounds of unfairness – Police failure to properly record photographs shown to witnesses – Whether witnesses' subsequent identification affected by "displacement effect" – No significant unfairness to appellant in all the circumstances

Criminal Law – Evidence – Lies – Trial judge not in error in failing to give lies direction – Direction not sought by Defence at trial – No suggestion by Crown that proven lies could be used to infer guilt – Matters going to credibility only

Criminal Law – Jurisdiction, Practice and Procedure – Verdict – Whether verdict unsafe or unsatisfactory – Whether sufficient evidence for jury to be satisfied beyond reasonable doubt of guilt – Principles regarding identification evidence discussed

Legislation

Criminal Code 1983 (NT) ss 188(1), (2)(m), 196(1), 213(1), (4), (5), (6)

Cases

Alexander v The Queen (1980-81) 145 CLR 395, considered
Rowley (1986) 23 A Crim R 371 at 379, mentioned
R v Haidely (1984) VR 229, mentioned
Grimley v The Queen (unreported decision of CCA delivered 27 July 1995), approved
R v Keeley [1980] VR 571, considered
R v Fuda (unreported, Supreme Court of South Australia, delivered 31 August 1993), distinguished
R v Marashi and Ors (unreported, District Court of South Australia, delivered 30 May 1995), doubted
R v Dawson (unreported decision of Mildren J, delivered 8 November 1994), considered
R v Elliot (unreported decision of Duggan J, Supreme Court of South Australia, delivered 19 November 1993), distinguished
Edwards v The Queen (1993) 178 CLR 193, mentioned
Harris v The Queen (1990) 55 SASR 321, approved
Chamberlain v The Queen (No. 2) (1984) 153 CLR 521, mentioned
Morris v The Queen (1987) 163 CLR 454, mentioned
Chidiac v The Queen (1990-91) 171 CLR 432, considered
M v R (1994) 126 ALR 325 at 328, considered
Davies v The King (1937) 57 CLR 170 at 180, 328-9, considered
Pitkin v The Queen (1995) 130 ALR 35, considered

REPRESENTATION:

Counsel:

Appellant:	D. Edwardson
Respondent:	C. Cato

Solicitor:

Appellant:	Messrs De Silva Hebron
Respondent:	Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
IN THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

CA5 of 1995

BETWEEN:

ALEX JOHN ALEXIOU

Appellant

AND:

THE QUEEN

Respondent

CORAM: MARTIN CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 18 September 1995)

THE COURT:

INTRODUCTION

This is an application for leave to appeal against conviction following verdicts of guilty by a jury that the appellant (1) deprived Shane Lee Dunning of his personal liberty (s196(1) of the Criminal Code); (2) unlawfully entered a dwelling house at night with intent to commit a crime, (aggravated assault) whilst armed with a firearm (s213(1)(4)(5) and (6) of the Code); (3) unlawfully assaulted Leslie James Collins by threatening him with a pistol (s188(1) and (2)(m) of the Code). The Court heard the application for leave and the substantive appeal together, with the consent of Mr Cato, counsel for the respondent.

THE CROWN CASE

The facts, upon which the Crown case was based may be briefly stated. On the morning of Wednesday 28 August 1993, a number of people arrived at the home of Stella Rickard at 7 Phineaus Court, Gray, (a suburb of Palmerston). A day's outing with the children of Ms Rickard and of a Ms Kathy Griffiths had been arranged. The adult members of the party included Ms Rickard, Ms Griffiths, Ms MacLannan, and a man called Manuel. The party proceeded to the Humpty Doo area,

where they visited a swimming hole. A good deal of alcohol was consumed, but Ms MacLannan consumed much less than the others. Later in the afternoon the party went to the Noonamah Hotel and consumed more alcohol in the beer garden over a period of several hours. Some fast food was also consumed. Late in the day, the party left the hotel and drove to Palmerston. Rickard and Griffiths went to the Palmerston Tavern for a while. The party then went to Griffiths' place before returning to Rickard's home at approximately 11pm. A barbecue was organised and the children were fed and put to bed. The barbecue fire was converted into a bonfire on the ground around which the adults gathered. At this stage MacLannan was virtually sober, Rickard was "in reasonably good order" and Griffiths was obviously intoxicated. Whilst the group were talking and drinking around the bonfire, three strange men appeared in the backyard, the first of whom the Crown alleged at the trial was the appellant. We will refer to this person as "X". There was a light at the side of the house and illumination from the fire. X asked to speak to Rickard and seemed reluctant to speak in front of the others. He wanted Rickard to go to the home of one Susie Desousa. Initially she refused, but ultimately it was agreed that she would go in MacLannan's vehicle. MacLannan and Griffiths got into the vehicle with her. They were followed by the three men driving a small white car.

On the way, the vehicle stopped at the home of one Shirley Dollymore and Rickard went inside. When Rickard returned with Dollymore, X accused her of wasting time and tried to get into MacLannan's vehicle, but he was prevented by her from doing so. The two vehicles then proceeded to Desousa's unit at 8/31 Cornwallis Circuit, Gray. X told one of the other men to go to the rear of the building, and he and the other man, described as a Maori, escorted Rickard upstairs where they were admitted to Desousa's flat.

Inside the flat were Desousa and Shane Dunning. X asked Rickard and Dunning where was the cannabis which had gone missing from Daly River. Dunning maintained that Rickard knew nothing about the cannabis. At some stage during X's questioning of Rickard and Dunning, Dollymore and the third man, variously described as a Latin or a Greek, arrived. After slapping Dunning across the face, X said Rickard could leave. Rickard and MacLannan left the flat and as they drove away MacLannan wrote down the registration number of the white car in her diary.

Meanwhile, Dunning, who had maintained that he did not know what X was talking about, was forcibly escorted to the flat of one Les Collins, whose name had been mentioned as the supplier of a small amount of cannabis Dunning had in his possession. Collins' flat was about 150 metres away and Dunning was subjected to some manhandling by X and one of the other men. Dunning was told

by X to call out to Collins and ask if he had any dope. Collins came out of his flat and went to the gate. He said he had no dope and turned to return to his flat. Two of the men, including X, jumped the fence, and a scuffle ensued between them and Collins. The Maori, who had been left to mind Dunning, told him to jump the fence. He did so, followed by the Maori. The three men then dragged Collins into his flat. Dunning was told to turn out the front light and sit on a couch next to the front door. The Maori and X had Collins on the floor of the loungeroom. They put a pillow over his head. The Maori placed his knees on Collins' shoulders. Collins was questioned about the whereabouts of the dope. X pulled out a pistol from his jeans which he first checked. Then placing its barrel into Collins' mouth, repeated the question about the dope. Voices were heard outside. The three men ran out of the flat, jumped the fence, and left the scene in the white car.

The matter was reported to the police, and a Detective Manuell and Sergeant Lade were assigned to investigate these offences. The critical question was the identification of the three men. At the eventual trial of the appellant, the Crown case was that the appellant was X. The police evidence as to identification of the appellant as X came from the evidence of Dunning, Desousa, and Rickard, each of whom were shown a photoboard of 11 photographs from which they each made a positive identification of the appellant as X. Collins, Griffiths and MacLannan were shown the photoboard but were unable to identify the appellant as any of the men involved. The Crown also called as a witness one Robert Hayes, a near neighbour of Collins' who saw the three men jump over Collins' fence. He was shown the photoboard but was unable to positively identify any of the three men. Finally the Crown called one Marsha Grixti, another neighbour of Hayes', who saw the activity at Collins' fence, identified one of the men from one of the photos on the photoboard, but was unable to identify any of the others. This person was not the appellant. Ms Grixti also gave evidence that she knew the appellant as a person "to say hello to" prior to 18 August 1993. The Crown also relied upon evidence from a number of eye witnesses that the car used by the 3 men was a white Sigma sedan, the evidence of MacLannan as to the registration number of the white sedan, evidence that a white Sigma sedan with that registration number was owned by the appellant's parents, statements made by the appellant to the police concerning the whereabouts of the Sigma sedan on the evening in question, (it was said to have remained at the home of the appellant's parents where he also lived) and as to the fact that only the appellant and his parents possessed keys to that vehicle. At the trial the appellant gave evidence that on the evening in question he had spent the entire time from 7pm on the evening of 18 August until the next day when the police arrived with a search warrant, at his home. He also called his parents, and one Natasha Yateman, who claimed to be with him from 10.30pm until they both went to bed together at 2.30 to 3.00am.

The Grounds of Appeal

At the trial, the learned trial judge was asked by counsel for the appellant to reject, in the exercise of his discretion, the evidence of Dunning and of Desousa as to their identification of the appellant as X. No similar application was made in relation to Rickard. A voir dire hearing was conducted, at the conclusion of which the learned trial judge declined to exercise his discretion to exclude that evidence.

The application for the voir dire hearing was not opposed by the Crown and no doubt was raised by his Honour as to its appropriateness. That matter was not argued in this Court. The power of a trial judge to exclude identification evidence in the exercise of judicial discretion based upon the principle that the probative value of the evidence is outweighed by its prejudicial effect, cannot be doubted: Alexander v The Queen (1980-81) 145 CLR 395. However it is not always necessary for a trial judge to embark upon a voir dire hearing at which oral evidence is given in the absence of the jury in order to determine this issue. As Beach J observed in Rowley (1986) 23 A.Crim R 371 at 379:

> "In many cases the trial Judge is in a position to make a ruling upon the application based upon the material contained in the depositions and/or any further material such as statements of additional witnesses, placed before him by the Crown."

At p380, Beach J drew attention to the time consuming and costly nature of voir dires, and asserted that there was no obligation upon a trial judge to conduct a voir dire unless the Judge is satisfied that a real question of voluntariness, unfairness or impropriety has arisen. We would add to this, that the trial judge should also be persuaded that it is necessary for oral evidence to be called in order to properly reach conclusions of fact relevant to the exercise of his discretion.

We mention these matters lest it be thought that the procedure adopted in this case, by way of voir dire examination, is a precedent which would necessarily be followed.

At the hearing of this appeal, there were 3 grounds argued:

1. the learned trial judge erred in failing to exercise his discretion to exclude the identification evidence of Dunning and Desousa;
2. the learned trial judge erred in failing to direct the jury with regard to lies alleged to have been made by the appellant in a record of interview and in the witness box;
3. the convictions were unsafe and unsatisfactory.

Ground 1 – Failure to exclude the identification evidence

At the voir dire hearing, the Crown called Detectives Manuell and Lade, and the witnesses Dunning and Desousa. The appellant did not give or call any evidence. At the conclusion of the voir dire hearing, the learned trial judge delivered oral reasons for his decision which, omitting formal parts, were as follows:

> "The witnesses with which this application is concerned are Shane Dunning and Susanne Desousa. Each witness claims to have seen the offenders at the time of the commission of the crime. Each has identified the accused as one of the offenders by picking out his photograph from a folder containing 11 photographs.
>
> In the early hours of Thursday, 19 August, Dunning and Desousa were taken first to Palmerston Police Station and later to Berrimah Police Station. At each place they were shown books of photographs. Altogether the witnesses were shown between 8 and 12 books, each book containing about 100 photographs. At this stage the accused was not a suspect.
>
> The witnesses were asked to thumb through the books. They were invited to point to any photograph whose subject had any resemblance to any of the three offenders. Precisely what happened during this procedure is far from clear. The court heard evidence from the two witnesses and Senior Detective Manuell and Sergeant Lade, who supervised the examination of the photographs.
>
> The hearing of evidence extended intermittently over two days. On the first day Senior Detective Manuell told the court that the books of photographs were not available, having

been lost or destroyed during some police reorganisation. However, on the second day the court was informed that Mr Manuell had made a search and discovered most of the missing books. He was recalled and produced the books, together with two indexes of the photographs.

The evidence of Dunning and Desousa satisfies me that Dunning selected two photographs which were said to resemble two of the offenders. There is a note in evidence which indicates that Dunning selected photograph number 453 as similar to the man with the gun and another photo as similar to another offender of Greek appearance. Desousa's evidence satisfies me that she selected three photographs as being similar to one or other of the offenders.

Neither of the witnesses claim to have made a positive identification of any offender. The selection of the various photographs does not appear to have aroused any interest in Messes Manuell or Lade because no action of any sort was taken consequent upon the witnesses' examination of the photographs.

Furthermore, no step was taken by either detective to make a note of the photographs selected or of the comment made by the witness in relation to a selected photograph, nor was any step taken to remove a selected photograph from the album or to identify it in any way. There is only the rough note to which I have earlier referred, the origin of which is obscure.

When Senior Detective Manuell produced the discovered albums on the second day of the hearing it appeared that photograph number 453 was still to be found in book 3. It is a photo of a young man with some general similarity to the accused but is definitely not a photograph of the accused.

An examination of the albums which were belatedly produced shows that no photograph of the accused is included, although Mr Manuell conceded that there may have been more albums shown to the witnesses than are now produced. He further conceded that there may have been some changes in the photographs included in the albums that have been produced.

Mr Manuell stated that the albums were not punctiliously maintained and that the use of the albums was not at all systematic. Nevertheless, I find that it is highly unlikely that there was a photograph of the accused in any of the albums used in the exercise on 19 August.

I am entirely satisfied that the photograph selected by the witnesses did not include a photograph of the accused. I base this finding on the positive evidence of Mr Manuell.

All that seems to have emerged from the exercise is, that the detectives obtained a very general description of one or more of the offenders.

It was not until approximately 11am on 19 August that the police received information from one Shirlene MacLannan, that she had noted down the registration number of a car concerned in the offences. A search of the registration records revealed that the car was owned by the parents of the accused. The police, having been given a description of the offenders, immediately suspected the accused. A photograph of the accused was obtained from the Police Information Bureau but was not shown to Dunning or Desousa.

A warrant to search the accused's premises was prepared and was issued late on 19 August. It was executed early on 20 August and in the course of the search the accused was arrested and charged.

Later that morning the detectives interviewed the accused. The interview was video-taped. The accused maintained his denials of involvement and refused to participate in an identification parade. Accordingly, the detectives made arrangements for an identification procedure by the use of photographs.

For this purpose, a photograph of the accused was taken. Senior Detective Manuell then compiled a folder of 11 photographs. The folder had room for 12 photographs but one space was left blank. The photographs, other than that of the accused, were selected by Mr Manuell

from the hundreds of photographs in the books which had been earlier examined by the witnesses.

He selected photos of men with a broad similarity to the accused in terms of age, size and colouring. The indications are that the photographs selected by Mr Manuell included some of the photographs which had been selected by the witnesses on 19 August.

On Saturday 21 August the folder was shown to the witnesses, Dunning and Desousa. Each made a positive identification of the accused. This procedure was recorded and a transcript was tendered. Although her evidence was by no means clear, Ms Desousa said that the photos she had selected on 19 August were among the photos in the folder presented to her on 21 August.

Mr Manuell was not able to contradict this evidence and I think it is probably correct. But Ms Desousa also said that the photo of the accused which she selected from the folder had been selected by her on 19 August. This cannot be true because the photo of the accused did not come into existence until 20 August.

Upon this application, Mr Tippett contended that the court should exclude the identification evidence of Desousa and Dunning in the exercise of the court's discretion. It was said that unfairness or prejudice to the accused would result from its admission. Mr Tippett based his submission upon three grounds.

First, it was said that the casual way in which the police conducted the proceedings on 19 August has produced a situation where the accused cannot effectively investigate that proceeding to discover whether there were irregularities which would discredit the evidence of the later identification.

It was said that the detectives should have carefully identified and preserved the photographs which had been selected by the witnesses and noted the remarks made by each witness in

respect of each photograph selected. If this had been done, so it was said, it may have emerged that a witness had made a selection or observation which was irreconcilable with the later identification or grossly weakened its weight. It was submitted that fairness to any later suspect required that the salient features of the proceedings on 19 August be carefully noted and recorded.

Mr Tippett's second point was that the briefing given to the witnesses on 21 August was inadequate. He contended that a proper briefing required that the witness be told that the suspect's photo was not necessarily among the photos presented. Reference was made to certain research which is said to demonstrate that if a witness knows that the suspect's photo is among those presented he or she is more likely to make an ill considered selection than would be the case otherwise.

Reference was made to a recent ruling by Mildren J in R v Dawson (unreported) on 8 November 1984. In that case his Honour referred to the research and the English Code of Police Practice and expressed the view that it is desirable that the briefing should be in the stated terms.

Thirdly, Mr Tippett submitted that an identification procedure should not be carried out after the investigative phase was completed and the suspect charged. As I indicated, during the course of argument, I do not think that either the second or third of Mr Tippett's points has substance.

As to the criticism of the briefing, I can accept that it may be desirable to use language which leaves open the possibility that a photo of the suspect is not among the photos presented for inspection. Logically, the same course should be followed in the course of an identification parade. However, I cannot feel that any significant unfairness stems from a failure to employ the suggested formula.

It seems to me extremely improbable that the average witness would accept the possibility that he was being invited to undertake a futile exercise in which the suspect was not present. I

do not consider that the suggested formula would be successful in introducing into the witness's mind the doubt which is said to be desirable. Furthermore, neither counsel was able to refer to any judicial discussion of this point, apart from Mildren J's ruling.

In relation to the submission that the identification procedure should not have been undertaken after the accused was charged, Mr Tippett based himself on a passage in the judgment of Stephen J in R v Alexander (1981) 145 CLR 395 at 417 to 420. In that passage his Honour expressed the view that, when photograph identification is used after the detection process is over, that fact will be a strong ground for excluding such evidence. His Honour's judgment was a dissenting one and was contrary to the opinions of the majority of the court on this point.

It is, in my view, well-established that an identification procedure may be conducted after the accused is charged. See R v Haidley (1984) VR 229, where the present objection was made and rejected by the Victorian Court of Criminal Appeal and where (at page 240) the judgment of Stephen J in R v Alexander is examined in the light of the majority judgment in that case.

I now return to Mr Tippett's first point which has in my view some substance. It must be accepted that Messrs Manuell and Lade did not keep such records as might have facilitated an investigation into the circumstances in which certain photos were selected by the witnesses. Mr Manuell now has only a very limited recollection of the occasion and Mr Lade has even less.

However, it must be remembered that this examination of albums took place in the early hours of the morning in the immediate aftermath of the commission of the crime. The police had no idea of the identity of the offenders and the exercise was primarily intended to provide some clue as to the appearance of the offenders.

The detectives, no doubt, entertained the hope that one of the witnesses may identify one of the photographs as being that of an offender; but that, I think, was a slender hope. It can, I

think, be safely inferred that nothing in the nature of an identification was made, otherwise steps would have been taken long before the information regarding the car was obtained.

If full records had been kept, the chance that those records would have provided a foundation for an attack upon the later identification is, in my view, remote. As things stand, each of the four witnesses concerned in the procedure are available to be cross-examined and all the criticisms of the police can, and, no doubt, will, be made.

I have carefully considered whether there is any significant unfairness of the type suggested and I have concluded that there is not. By the time the jury retire to consider its verdict it will have heard a close investigation of the circumstances surrounding these identifications. It will have been repeatedly warned to be cautious about this class of evidence, both judicially and otherwise.

When considering whether the admission of this evidence will produce unfairness it is important to remember that this form of identification evidence was forced upon the police by the accused's refusal to participate in an identification parade.

It was suggested by Mr Tippett that the accused was, in substance, given a choice between a line-up or photographic identification and merely chose the most convenient. But, in my opinion, a reading of the transcript of the recorded interviews shows that the accused was resolved, from the outset, that he would not participate in a line-up. The answers he gave suggest that he was merely trying to place his refusal in the best possible light.

The importance, in the present context, of the denial to the police of the opportunity to conduct a line-up is emphasised in many cases; most recently by Mildren J in R v Dawson. The point is emphasised in striking terms in the judgment of Brooking J in R v Haidley at page 253. In this case there is no doubt that the evidence sought to be led by the Crown is admissible and potentially important evidence. The onus is on the accused to persuade the court to exclude the evidence on discretionary grounds. For the reasons I have endeavoured

> to express I am not so persuaded. Accordingly, the application to exclude the evidence was refused."

The principles upon which this Court will interfere with the exercise of a discretion by a trial judge in criminal proceedings are not in dispute. The appellant must show that the trial judge erred either in his application of the relevant law to the facts, or that he erred in arriving at his findings of fact either because there was no evidence to support them, or because the evidence was all one way. Alternatively the appellant must show that the trial judge's conclusions were so unreasonable or unjust that, although no particular error can be identified, it is proper to infer that some error must have been made in the trial judge's reasoning processes. It is not enough that the members of this Court would have reached a different conclusion on the facts; nor is it open to this Court to reach its own conclusions as to what inferences are to be drawn from the established facts or those facts accepted by the trial judge; error must be shown in the sense that an inference drawn by the learned trial judge was not reasonably open to him: see generally the decision of this Court in Grimley v The Queen delivered on 27 July 1995 where the relevant authorities are referred to at pps 20 to 22.

The first matter relied upon by the appellant is that the learned trial judge erred in finding as a fact that the appellant had refused to take part in an identification parade. The police asked the appellant on a number of occasions whether he would participate in a line-up, and the appellant made it clear that he had no intention of voluntarily so participating. The first request was made by the police on the morning of Friday 20 August 1993. That morning the police had attended at the appellant's home with a search warrant. At 7.11am the appellant was arrested and cautioned. After the search was over, the appellant was taken to police headquarters, Berrimah. At 9.11 Detective Manuell had a conversation with the appellant which was tape-recorded:

> "The time is eleven past nine Berrimah headquarters. 'What we are proposing to do is conduct a line up, do you understand that?---Yeah, yeah.' 'Are you prepared to take part in a line up?---No, I don't really want to, but I guess I have to.' 'No, you don't have to, it's up to you?---But if I don't have to, then I don't want to do it.' 'The reason that I'm asking you now is something that we will put to you in a formal interview. It's just to get the people organised, it's going to take some time, so rather than getting organised after the interview, that – like I say you don't have to participate?---And you guys will give them a photo and say: "That's the guy", you know what I mean, it's as easy as that. And they can say: "Yeah,

that's him" in the line up.' 'Well, that's unfairness (inaudible) I don't – I can assure you that that's not going to happen, that's why we are proposing a line up and we don't --?—If I don't have to do it I'm not going to do it. I will only do what I have to do.' 'Right?---You can show them a photo of mine and ask them if that's the guy, they can stand up in court and point at me, do what they like.' 'Any photographs of you that are going to be shown to the witnesses will be amongst other photographs and that will be a photo identification parade, do you understand that?---And they sit there and ch ch ch?' 'No, the way it's done, there will be your photos input in a board. I don't think we've got any examples around here?---One in amongst 12 or something like that?' 'Yeah, 12. It's just a board like that and there's no indicators and then they look at it. I can assure you that everything done in this investigation has been done above board and been fair?---Hm, yeah.' 'All right?---Yeah, no worries.' 'So that's one of the reasons I'm asking you now on the field tape if you're prepared to participate just to save time, but you've given me the answer "no" so that's fair enough so ---?---If they – if they identify me at any stage they' – sorry – 'they can identify me at any stage. All I'm interested in is getting out of here pronto to get back to my kid, you know what I mean? This is someone else's dream, nothing to do with me, all right? So let's get it over and done with. I'm not prepared to wait here for you guys to pick an X amount of people and bring them in and do a line-up, do you know what I mean?' 'The thing is that we can delay your bail and have it done later on, do you understand that? You understand that, do you?---I know you can but I'm just not prepared to do something if I don't have to do something, then I'm not going to do it. In my own mind – because I haven't done anything wrong.' 'Thank you. So you're quite happy for a photo identification parade to be done?--- Yeah, mate, yeah, that's right. Yeah, you've got – you've probably already done that. I don't know what – I don't know, you see, so - - -' 'All right, the time is now 9.13.'"

The matter of an identification parade was next raised during the formal record of interview which commenced at 9.17am on Friday 21 August 1993:

"MANUELL: What we propose to do is conduct a line-up.

ALEXIOU: Hmm hmm.

MANUELL: Are you prepared to take part in a line-up?

ALEXIOU: I don't like being inconvenienced for someone else, for what someone else is doing. I feel I'm innocent and I'm not prepared to take part in a line-up, that person can point me out in Court in front of the Judge and that will be it.

MANUELL: We're not interested, ...

ALEXIOU: Yeah I know, I know ...

MANUELL: in prosecuting the people that are innocent and one of the purposes of an identification parade is to establish whether or not that person was in fact there or wasn't there.

ALEXIOU: That's fair enough well I wasn't there as a matter of fact and you also indicated that you could do a photo line-up which is just as effective and I'd rather that. You guys do whatever you want as far as, you do a photo line-up, do whatever you want. (Inaudible)

MANUELL: Well then, do you understand how it works?

ALEXIOU: What the photo line-up?

MANUELL: No. A physical line-up.

ALEXIOU: Hmm.

MANUELL: First of all that will all be video taped. I think its at least eight other males isn't it Detective EDWARDS?

EDWARDS: That's right.

MANUELL: For a line-up? Eight other people. There's a minimum of nine other people used in it that have an appearance similar to yours.

ALEXIOU: Yeah well..

MANUELL: And the witnesses are asked to view the line-up few of visitors asked to view the line-up and to see if they can identify the person they saw on the night, and the idea of having people similar to you is out of fairness so that we can establish there's no doubt in their mind who the person was at the time.

ALEXIOU: Well I don't feel that I should be, have anything to do with a line up as far as I'm concerned I'm innocent. So I don't think I have to prove my innocence, you know what I mean.

MANUELL: Its up to you.

ALEXIOU: Yep, we'll go along without the line-up.

MANUELL: I think that clears that point up."

It was submitted first that notwithstanding the appellant's apparent refusal, he was not told that a photoboard could only be used if he refused to participate in a line-up; secondly that he had not been disabused in his belief that a photoboard could be just as effective; thirdly, in consequence the appellant had not been advised as to his rights so as to make a proper choice. None of these arguments had been put in this way to the learned trial judge and we do not think we should now entertain them. However we are satisfied that there is no substance to any of these submissions. As to the first submission, there is no rule of law that a photoboard could only be used if the appellant refused to participate in a line-up, although that matter is no doubt of significance to the exercise of discretion. In R v Keeley [1980] VR 571, the decision of the trial judge to admit photoboard identification evidence in circumstances where the police had not arranged an identification parade and had not explained why that had not been done, was upheld by the Full Court. On appeal to the High Court (Alexander v The Queen (1979-80) 145 CLR 395) the majority held that the trial judge had not improperly exercised his discretion, notwithstanding the strong censure by Mason J of the police in failing to arrange an identification parade when it could have done so: see p.433. It was submitted that the use of a photoboard in the absence of refusal to participate in an identification parade would be a breach of the Commissioner of Police's standing orders, but the standing orders do not specifically address this point, except by implication, and appear to be in the nature of guidelines rather than rigid rules, the breach of which gives rise to potential disciplinary action. Even if the standing orders had been more specific, we do not accept that this placed any obligation on the police to advise the appellant that a photoboard could be used only if he refused to participate in an identification parade. In our opinion the police made it tolerably clear that they wished to conduct an identification parade, but that if he refused, a photoboard identification would be attempted. In those circumstances we do not think there is any substance to this point.

As to the argument that the police should have disabused the appellant about the effectiveness of the photoboard, there is no evidence that the police suggested to the appellant that a photoboard would be "just as effective" as a line-up. This appears to have been something the appellant said when explaining, during the record of interview, why he did not wish to participate in an identification parade. We do not think it was incumbent upon the police to take the matter any further than they had

already done. Indeed, had they persisted further, there was a danger that any consent the appellant may ultimately have given could have been subject to challenge on the ground of undue persistence and pressure by the police. There is no obligation on the police, arising out of fairness, to explain to a suspect or a person arrested, the merits of an identification parade as opposed to the dangers of a false identification from a photoboard, any more than the police are required to advise a suspect of the dangers of giving a statement to the police. We were referred to no authority for such a proposition, and we reject it.

The next submission was that the police failed to inform the appellant that they wanted to arrange a line-up and for him to take part in it. Reliance was placed upon certain observations by Mullighan J in The Queen v Fuda (unreported, Supreme Court of South Australia, 31 August 1993). However, we consider that the submission lacks substance. The circumstances in Fuda were that the police told Fuda he had a right to participate in a line-up, and that he was being offered that opportunity. Mullighan J therefore concluded that Fuda was never requested to participate in a line-up, and consequently never refused. The facts in this case are clearly different.

Accordingly we do not consider that it has been demonstrated that the trial judge's finding that the appellant refused to participate in an identification parade was in error.

Next it was submitted that his Honour's discretion miscarried because the police had not told the appellant what the consequences would be if he declined to participate in a line up, and reliance was placed upon certain observations of Judge Bishop, sitting in the District Court of South Australia, in an unreported judgment of R v Marashi and Others (delivered 30 May 1995). We do not accept that, if a suspect has refused to participate in an identification parade, it is incumbent upon the police to explore the consequences of that choice with him. In any event, in this case, the appellant was told that the police would, in those circumstances, use a photographic display.

Next it was submitted that the trial judge's discretion miscarried because there was no basis for his finding that no significant unfairness would arise if the evidence were to be admitted. In this context, it is necessary to briefly restate the legal principles upon which the discretion to exclude photo-identification evidence rests. These principles have been authoritatively stated by the High Court in Alexander v The Queen. It is clear that such evidence is admissible, but that the trial judge has a

discretion to exclude such evidence on the basis that its prejudicial effect outweighs its probative value. Unfairness, in this context, relates to the right to an appellant to a fair trial, although it may also relate to evidence unfairly or improperly obtained. In the context of this case, the submission was as we understand it, that the relevant unfairness if the evidence were to be admitted related to the right of the appellant to a fair trial.

The appellant sought to put this argument on two broad grounds. The first related to the failure of the police to properly record the photographs shown to Dunning and Desousa prior to the photoboard identification. Thus it was submitted that the appellant was not in a position to properly test whether or not either of those witnesses had been shown a photograph of the appellant in the books of photographs and submit to the jury that those witnesses' subsequent identification of the appellant were affected by the "displacement effect"; or that their identifications were unreliable for the reason that they had failed to identify him in the photo albums.

We consider that Mr Cato, who appeared for the respondent, was correct in his submission that on the trial judge's findings this is not a classic case where "dissociation" or the "displacement effect" could ever have been in issue. During the voir dire hearing, neither Desousa nor Dunning purported to identify the appellant from any of the photos in the photo albums. The photographs chosen from the photo albums were stated to be photographs of persons similar to X, as the learned trial judge found. We also note in passing that this argument was not raised before the learned trial judge.

The second argument is predicated upon an attack upon a finding made by the learned trial judge that it was highly unlikely that the appellant's photo was in any of the photo albums. If this finding is not able to be challenged, there is little of substance to the submission. If on the other hand the photo albums did contain a photograph of the appellant, and the witness had not identified that photograph, this could have been used to cast doubt upon the reliability of the identification of the appellant from the photoboard. This finding depended in part upon a finding his Honour made that the photographs selected by Dunning and Desousa from the photobooks did not include a photograph of the appellant. This finding was based on the evidence of Det. Manuell. The appellant attacked this finding on the basis that there was no evidence to support it. We consider there was evidence to support this finding. Manuell had given evidence that the photos selected by these witnesses were photos of persons who those witnesses said looked similar to the offenders. One photograph, number 453, selected by Dunning as being similar to X, was later produced, and that photo the learned trial judge found was

not that of the appellant. Later in the day, when the police identified the registered owners of the white Sigma sedan, the police obtained a photograph (Ext B on the voir dire) of the appellant from the appellant's file held at the Bureau of Criminal Investigation. It would seem unlikely in the extreme that the police having obtained a photograph from this source would not have observed the similarity if either of the witnesses had pointed out a photograph of the appellant to the police out of one of the photobooks. Exhibit B was later used to show to MacLannan, who did not identify him from it, but was not shown to any of the other witnesses. The photograph of the appellant later used in the photoboard was taken by police after the appellant had been arrested. Although the trial judge does not appear to have expressly relied upon the evidence of Dunning and Desousa, Dunning said he did not see a photograph of the appellant in the photobooks. Further Dunning's evidence was that the photographs from the photobooks he identified as similar to that of X or the other men were not photographs of the appellant (Tr. pp46-47), and that he had not seen the photograph of the appellant (which he identified later during the photoboard examination) previously (Tr. p51). Desousa, late in her cross-examination, claimed that she had seen the photograph of the appellant she identified as being X from the photoboard as being the same photograph as one of the photographs she had selected previously from the photobooks as being similar to X. (Tr. p59-60) The learned trial judge concluded that she must have been mistaken as to this, as he accepted that the photograph in question did not exist at that time. That conclusion was reasonably open to him. Although Detective Manuell was not able to positively assert that there was no photograph of the appellant in the photobooks, we consider that it was open to the trial judge to conclude, on the balance of probabilities, that the appellant's photo was not in any of the photo albums. In any event, to return to the appellant's photograph in the photo books not only provided the appellant with a basis for attacking before the jury Desousa's identification of the appellant from the photoboard, it provided a basis for attacking Dunning's evidence as well.

The next submission was that, before viewing the photoboard, Dunning and Desousa were told by police that the police suspect's photograph was amongst the photographs on the photoboard. The identification process was audio-taped. The transcript of that tape reveals that so far as Desousa is concerned the police did not state one way or the other whether the suspect's photo was on the photoboard. Nevertheless, criticism was directed towards a failure by the police to say words to the effect that the person she saw may or may not be among them. In the case of Dunning, the police told him that it is alleged that one of the persons involved in the assault on Collins was depicted in the photographs. In R v Dawson (unreported, 8 November 1994) Mildren J took into account as a factor that the Code of Practice in England required, inter alia, the police to advise a witness that a photograph of the person he saw may or may not be among them, and whilst recognising that those guidelines had no legal effect in the Northern Territory, nevertheless Mildren J considered that they

represented a useful model against which the photo identification could be judged in that case. It is clear that this his Honour took into account but was unable to see how any significant unfairness stemmed from a failure to employ the suggested formula. The purpose of those guidelines when read as a whole is to ensure that the witness is not prompted in any way and must be left to make his selection without any help. As the learned trial judge observed, most witnesses asked to participate in photo-identification would assume that they were not being asked to undertake a futile exercise and would infer, correctly, that at least one of the photographs was that of a person suspected by the police. In the circumstances, for the appellant to show unfairness, there must be something more. This the appellant attempted to do by showing that the remaining 10 photographs used in the photoboard were selected from the photo albums which the witnesses had already seen, and included, probably the photographs previously selected by the witnesses from the photo albums. Particularly in the case of Dunning, it was submitted that, having already seen all the photographs previously, except the appellant's, the police had virtually told him which photo was that of the suspect. It does not appear that this submission had been developed this way before the learned trial judge. However we consider that this overlooks two things. First, Dunning was not asked to say whether or not he recognised any of the photographs on the photoboard as having come from the photobooks. At the highest his evidence was that he was unsure whether or not the photoboard contained any photographs he had selected before from the photobooks. Desousa claimed that all three of the photographs she had previously selected were on the photoboard, but was not asked if she recognised any of the others as photographs she had seen previously.

The evidence was that the witnesses were shown between 800 and 1200 photographs in the photo albums. The photoboard identification took place over two days later on Saturday 21 August. In these circumstances it is unlikely that either witness would have recalled previously seeing the photographs on the photoboard, except perhaps any they had previously selected and which were used on the photoboard. Counsel for the appellant referred to the judgment of Duggan J in The Queen v Elliott (Supreme Court of South Australia, unreported, 19 November 1993) to support his argument concerning the need for proper record keeping. That was a case of trial by judge alone. Duggan J was not concerned in that case with the question of his discretion to exclude evidence. Rather the question which Duggan J addressed was the weight to be given to identification evidence in circumstances where the police had failed to record the procedures adopted when the identification witnesses were shown photoboards. In that case the police claimed that certain witnesses were unable to select anyone from the photoboard which looked like the person who committed the robbery, whereas two of the witnesses gave evidence to the contrary, the point being that in both cases they failed to select the appellant's photo from the photoboard. Duggan J was rightly critical of the police for failing to record the procedure. Counsel for the appellant submitted that similar criticisms were

open to be made in relation to the failure to record the photobook examination or to video-tape the photoboard examinations. It cannot be said that the learned trial judge overlooked the first of these matters. His Honour expressly observed that there was some substance to the complaint made about the failure to record the photobook examination. As to the second matter, it was not suggested to the learned trial judge that any unfairness flowed from tape-recording rather than video-taping the photoboard identifications, and it must be said that the police tape-recorded the photoboard identification process in which all witnesses were involved, including those who were unable to identify the appellant.

The learned trial judge took into account the probability of a chance that full record-keeping of the photographs shown to Dunning and Desousa might have assisted the appellant to attack the later photoboard identification. He was aware that not all the photobooks had been located by the time of the trial, and the fact that the books were no longer in the same state as they were in August 1993. He took into account also that all the witnesses involved in the identification process were available for cross-examination where any weaknesses in this process could be exposed to the jury, the warnings he would be obliged to give the jury in his summing up, the circumstance that the purpose of showing the witnesses the photobooks was to get some idea as to the general appearance of each of the three persons involved, that some of the photographs used in the photoboard had been previously selected by the witnesses from the photobooks, that all of the photographs used in the photoboard, except that of the appellant, had come from the photobooks, the limited recollection of Manuell and Lade as to the photobooks, and the circumstance that the police were forced to use photoboard identification because the appellant had refused to participate in a line-up. He concluded that there was no significant unfairness to the appellant in refusing to admit the photoboard identification. We consider that in the circumstances it has not been shown that his Honour fell into error. Accordingly the first ground of appeal must be dismissed.

Ground 2 – Failure to give a lies direction

It is common ground that no direction along the lines suggested in Edwards v The Queen (1993) 178 CLR 193 was given by the learned trial judge. It is also conceded by counsel for the appellant that counsel for the appellant at the trial did not ask for one to be given. There is no suggestion in his Honour's summing up that the jury could, if they found he had lied to the police, or on his oath when giving evidence, use this as evidence of guilt. There is nothing to show that counsel for the Crown suggested to the jury that the jury could infer guilt because lies had been told.

The only proven lie was that the appellant admitted that he had lied to the police when he told them that he spent the night at his parents' flat alone, when in fact he later maintained at the trial he had been in the company of Ms Yateman at the relevant time.

It was obvious that the appellant would have to explain this discrepancy in his story, and the appellant in fact offered an explanation for it, namely, that he did not wish his fiancée, who was returning with his child to Darwin the following day to effect a reconciliation, to discover that he had spent the night with another woman. It is clear from his Honour's summing up that the Crown's submission was that the telling of the lie to the police was used to attack the appellant's credibility as a witness. Further his Honour told the jury that no adverse inference could be drawn from the appellant's refusal to participate in a line-up, and that this evidence was relevant only to explain why the appellant was not given the benefit of that method of identification, generally regarded as the fairest method. Finally his Honour instructed the jury that the appellant, by giving evidence, did not have to persuade the jury of his innocence, that he would be entitled to be acquitted if his evidence raised a reasonable doubt in their minds, even if they thought his evidence was probably untrue, and to find him guilty, it would be necessary for the jury to be satisfied beyond reasonable doubt that he had given a wholly untruthful account of his activities that night. Counsel for the appellant criticised this last direction on the basis that the jury might have inferred from this that his Honour was implying that if they were satisfied his account was wholly untruthful, that would be sufficient to find a verdict of guilty. If such was the import of his Honour's direction, we consider that it would have been necessary to have given a lies direction: see Harris v The Queen (1990) 55 SASR 321. However we do not consider that that was the import of his Honour's direction. Taking the direction in context, all his Honour was saying was that, before the jury could convict, they would have to be satisfied beyond reasonable doubt, on the whole of the evidence, that he was X, and as part of reaching that level of satisfaction, it would be necessary for them to conclude that the appellant's account was wholly untruthful beyond reasonable doubt. That is quite a different thing from inviting the jury to infer guilt solely on the basis that the appellant's account is rejected as untruthful.

Counsel for the appellant criticised counsel for the Crown in putting to the appellant in cross-examination that he refused to participate in an identification parade because he knew he would be identified. It was submitted that this question ought not to have been put or allowed by the trial judge, even though no objection to it was made at the time. However that was not the subject of a ground of appeal. Rather it was raised because of the juxtaposition of that question to questions directed

towards showing that the appellant lied to the police about his whereabouts, and therefore a lies direction was somehow necessary. We are unable to see how this advanced the appellant's argument, given that it was never suggested at the trial that an inference of guilt could be drawn from lies: see Edwards, per Deane, Dawson and Gaudron JJ at 210-11:

> "Thus, in any case where a lie is relied upon to prove guilt, the lie should be precisely identified ..."
>
> (our emphasis)

Counsel for the appellant submitted that the failure to give a lies direction was all the more significant given that they (the jury) were told "the critical question is whether you are satisfied of the accuracy of Shirlene's (MacLannan's) evidence of the taking of the number plate. If you take that step it would seem that the drawing of the guilty inference follows inescapably although that remains entirely a matter for you". We are unable to see how this direction bears upon the question of whether or not a lies direction should have been given. This observation is quite unconnected with any lies told by the appellant. The evidence was that a white Sigma sedan was used by X and his accomplices. MacLannan wrote down the registration number and from this the police established that the appellant's parents were the registered owners. There was evidence that only the appellant and his parents had a key to the vehicle. It was not suggested that the parents were involved, nor that either they or the appellant lent the keys, or the car, to anyone on the night in question. According to the appellant, the car was at home that night. There was no evidence to suggest the vehicle may have been stolen and then replaced without the appellant's knowledge. Indeed the appellant maintained that if the car had been started before he went to bed at 3.00am he would have heard it, and he would have heard his dogs bark at an intruder. The appellant's parents also gave evidence that the car did not leave the premises that night before they went to bed at 1:00am. In our opinion it has not been shown that his Honour fell into error by failing to give a lies direction, and accordingly ground 2of the appeal must fail.

Ground 3 – Unsafe and Unsatisfactory

The principles upon which this Court acts when considering whether or not a verdict by a jury is unsafe and unsatisfactory are well-established. A verdict may be set aside notwithstanding that, as a matter of law, there was evidence upon which the appellant could have been convicted: Chamberlain

v The Queen [No. 2] (1984) 153 CLR 521; Morris v The Queen (1987) 163 CLR 454. It is for this Court to decide, having made its own independent assessment of the evidence, whether or not it was open, on the relevant evidence, for a reasonable jury to be satisfied beyond reasonable doubt of the appellant's guilt: Chidiac v The Queen (1990-91) 171 CLR 432.

Whilst this court is not permitted to set aside a verdict upon a speculative or intuitive basis, nevertheless, "a verdict may be unsafe or unsatisfactory for reasons which lie outside of the formulae requiring that it not be 'unreasonable' or incapable of being 'supported having regard to the evidence'. A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside": M v R (1994) 126 ALR 325 at 328 per Mason CJ, Deane, Dawson and Toohey JJ. This applies not only to cases where the court considers the appellant to be innocent but also whenever it would be "unjust or unsafe" to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or mislead": Davies v The King (1937) 57 CLR 170 at 180.

In answering the question this Court

> "must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witness ...
>
> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it is given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and set aside a verdict based upon that evidence:" M v R, at 328-9.

In identification cases,

> "... because experience teaches us that identification given by a witness who has a very limited opportunity to see the accused person is very often unreliable, an appellate court is occasionally confronted with the necessity of setting aside convictions based upon the apparent acceptance of that evidence by a jury, in circumstances where there has been no irregularity in identification procedures and the jury has been adequately warned by the trial judge ..." Chidiac v The Queen, at 445 per Mason CJ."

Where identification rests upon the use of photographs there are well-known dangers of consequential and unfair prejudice to the appellant which have been discussed in such cases as Alexander v The Queen, and more recently by the High Court in Pitkin v The Queen (1995) 130 ALR 35. As Deane, Toohey and McHugh JJ observed in the latter case, at 39, in such cases "ordinary considerations of fairness dictate that any such evidence be subjected to careful scrutiny before it is accepted as constituting evidence of positive identification". Nevertheless as their Honours also observed, at 38, "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." By that, we do not presume that their Honours were intending to cast any doubt upon the observations in Alexander as to the desirability of identification parades as the fairest means of identification, nor the desirability of proper record-keeping whichever form of identification process is used.

The submission made by the appellant in support of this ground of appeal is that the jury ought to have had a reasonable doubt having regard to the matters urged in support of grounds 1 and 2 of the appeal, having regard to the amount of alcohol consumed by the witnesses Dunning Desousa and Rickard, and the evidence of Grixti who knew the appellant but identified someone else as one of the offenders.

In order to conclude that the appellant was guilty, the jury must have concluded, beyond reasonable doubt, that the appellant's evidence, and the evidence of his alibi witnesses, did not represent the true facts concerning the appellant's whereabouts and the whereabouts of the appellant's parents' vehicle on the evening in question. Further, the jury must have concluded, beyond reasonable doubt, that at least one of the witnesses Dunning, Desousa or Rickard had positively identified the appellant as X. Alternatively the jury may have concluded, beyond reasonable doubt, that the witnesses MacLannan had accurately recorded the registration number of the vehicle used by the perpetrators.

The photo identification evidence of Dunning and Rickard does not lack credibility. Each of the three identification witnesses relied upon by the Crown had a good opportunity to observe X in favourable light. The tape-recordings of the photoboard identification show that each witness made a positive identification. There was no question that the witnesses were asked to pick out someone who looked like one of the offenders. That process had already been undertaken by the photobook examination, and it is clear that the photoboard identification process was not perceived by the witnesses Dunning and Desousa in the same way. Each of these witnesses selected the appellant's photograph, photo E. The witness Rickard had not previously been shown the photobooks.

The witness Rickard's description of X given to the police was not in evidence. It was not suggested in cross-examination that her description given to the police or at the committal hearing varied from her evidence in chief, which was not shown to be inconsistent with the appellant's appearance. In cross-examination Rickard conceded that she thought at the time of the photoboard examination that photo C may have been one of the men involved, that there was some 'confusion' in her mind between photo C and photo E at the time, but she was able to resolve that 'confusion' in favour of photo E and had no doubts about it in her mind. She conceded that earlier during the day of the offence she had smoked cannabis and got drunk. She claimed she was not drunk by the time the 3 men arrived at the barbecue. This claim was supported by the witness MacLannan who also claimed to be sober at this time, although Dunning thought Rickard was drunk (AB293). Rickard's evidence was not lacking in detail indicative of a memory effected by alcohol, and Dunning may have confused Rickard with Griffiths.

The witness Dunning had seen the photobooks over two days previously. Photo E was not a photograph of the same person he had previously identified as 'looking like' one of the perpetrators. Dunning also had a good opportunity to see X's face in good light.

Dunning's description of X to the police and at the committal was not shown to be different from the description he gave in evidence, and was not inconsistent with the appellant. He said that he and Desousa had purchased a carton of beer just after lunch on the day in question which he and Desousa consumed that day. He said that when he went to bed at about 10 to 10:30p.m he was feeling the effects of the beer, and agreed he was 'a little bit dazed', but denied he was unsteady on his feet. He had slept until he was awoken in the early hours of the morning. He conceded that he was a "bit hung

over" by then, and a little dazed from having slept. He was not asked whether the beer he consumed was full strength or light beer, how many beers were in the carton, or how many of the beers in the carton he personally consumed. His memory of the events he described in his evidence was not lacking in detail indicative of being significantly affected by alcohol or lack of sleep. His identification evidence was not otherwise seriously attacked.

Desousa had also gone to bed at about 10:30pm on the night in question. She was awoken initially by a knock on the door between 11:15 to 11:30pm by 3 men. She did not open the door and went back to bed. About half an hour later, she heard Stella Rickard calling her name. Dunning opened the door and the three men came in. She claimed that the beer was not a carton, but a six pack, that she had bought it, that she and Dunning consumed 3 beers each, and that they could not afford to buy a full carton. Desousa claimed that Griffiths was the one who was holding a can of beer and appeared to be drunk (AB324). Her description of the clothes X had worn and given at the committal was shown to be different in one detail to her evidence at the trial, but otherwise her description was not attacked. It appears that Desousa was an unsatisfactory witness in other respects. She claimed to have written down the registration number of the vehicle in which the men arrived – 10999, which she memorized and wrote down later when she returned home. She claimed that this vehicle was a white Sigma. The number written down by MacLannan was 417-989, a white Sigma. The vehicle registered number 10999 was owned by a Mr Wolthers, an ex sergeant of police. Mr Wolthers gave evidence that this vehicle, a white two door SAAB 900 was elsewhere that evening. It was not suggested he was wrong. Desousa claimed that the photograph E was the same photograph as one she had previously selected from the photobooks. She claimed she identified the appellant initially to the police at the time she saw the photobooks. This evidence appears to be wrong. There were a number of other unsatisfactory aspects to her evidence which reflected upon her reliability as a witness. These matters went to the weight to be given to her identification evidence, and we do not think a reasonable jury, even making full allowance for the advantages enjoyed by them, ought to have been satisfied beyond reasonable doubt of the appellant's guilt based upon her evidence alone.

It is clear from the evidence of Grixti that she had seen all three men at different times, and that she identified one of these men as being a person whose photograph was on the photoboard. This person was not the appellant. It is also clear that the person she identified was not X, but the Latin or Greek man. As to the other two men she said (AB397) that she did not see their full faces, and "guessed the bloke was Maori from his colour and his build and the other guy I did not take much notice of." The "other guy" to whom she referred to was clearly X. It was therefore not unreasonable for the jury to have discounted her evidence, even though she had known the appellant previously. It was common

ground that Griffiths was drunk at the time and could not identify anybody. MacLannan could not identify anybody, but her opportunity to see the faces of those involved, in good light was not very good. None of the other witnesses were in a good position to make an identification.

We consider that, despite the lack of record keeping concerning the photobooks, and bearing in mind that 2-1/2 days had elapsed before Desousa and Dunning saw the photoboard, the improbability of those witnesses selecting photograph E because they had seen a photo of the appellant before in the photobooks, the number of the photographs they were shown altogether, the lack of any suggestion that the other photographs in the photoboard were remarkably different from photo E in material respects, and the fact that Rickard was not shown the photobooks, that there is little possibility that that lack of record keeping deprived the appellant of a real possibility of showing that these witnesses' identification of him were affected by a displacement effect or were otherwise tainted.

The evidence of MacLannan, as to the number of the vehicle which she took down did not lack credibility. In addition a number of other witnesses saw the car, which was described by them as a white Sigma sedan: (Hayes, AB306, 309; Rickard, AB221, (although she was less positive in cross-examination AB246); Desousa AB316, Grixti AB395, although she was not sure). There was other evidence to which we have previously referred which the jury were entitled to accept, and from which together with MacLannan's evidence, it was not unreasonable to draw the inference that the appellant was, beyond reasonable doubt, in charge of the car seen by the Crown witnesses in which the perpetrators travelled and from which an appellant's evidence and the evidence called in support of his alibi, it was reasonably open to the jury to reject that evidence, based on their assessment of the credibility of those witnesses.

The conclusion we have reached, having made our own independent assessment of the evidence, and having regard to the advantages which the jury had in seeing and hearing the witnesses, is that it was open to the jury to be satisfied beyond reasonable doubt as to the appellant's guilt.

Accordingly we do not consider this ground of appeal has been made out.

In the circumstances leave to appeal is granted but the appeal is dismissed.