PARTIES:	GAVIN CHRISTOPHER ROBSON COOK v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising APPELLATE JURISDICTION
FILE NO:	CA 4/98 (9619456)
DELIVERED:	18 November 1998
HEARING DATES:	5, 6 October 1998
JUDGMENT OF:	Mildren, Thomas and Bailey JJ

CATCHWORDS:

Appeal – leave to appeal conviction – identification – admissibility of surveillance video identification evidence.

Appeal – admissibility of opinion evidence as to identification within jurisdiction of trial judge – no universal principle excluding identification because of prior knowledge of accused's misconduct.

Appeal – co-accused – evidence of alleged co-accused's plea of guilty admissibly where certificate of conviction tendered – evidence of conviction on basis of acting alone and sentencing judge's conviction on that basis inadmissible where tendered at request of accused's counsel, no substantial miscarriage of justice.

Appeal – co-accused – principle to be applied in allowing relationship evidence between accused and co-accused is "is the evidence more consistent with guilt or was it simply intractably neutral".

Appeal – Test to apply for unsafe and unsatisfactory jury verdict.

Legislation

Criminal Code – s210(1); s410(b); s411(2)

Text

Cross on Evidence Vol 1

Cases

1) *R v Brett Randall Griffith* (1995) 79 A Crim R 125 distinguished and doubted

2) *R v Goodall* [1982] VR 33 followed

3) *R v Palmer* (1980) 1 A Crim R 458 followed

4) *R v Smith* (1983) 33 SASR 558 referred

5) *R v Theos* (1996) 89 A Crim R 486 referred

6) *R v Fowden and White* [1982] A Crim L R 588 distinguished and doubted

7) *Alexander v R* (1981) 145 CLR 395 referred

8) *R v Shephard (No 4)* (1989) 41 A Crim R 420 followed

9) *R v Turner* (1832) 1 Mood 34; 168 ER 1298 referred

10) *Moore* (1956) 40 Crim App R 50 referred

11) *R v Dawson* [1961] VR 773 followed

12) *R v Carter, ex parte Attorny General* [1990] 2 QD R 371; (1990) 47 A Crim R 55 followed

13) *R v Hutton* (1991) 56 A Crim R 211 followed

14) *Kempster* [1989] 1 WLR 1125 referred

15) *R v Triffit* [1992] 1 Tas SR 293 mentioned

16) *R v Gisbon* (1930) 47 WN (NSW) 119 referred

17) *Knight v Porter* [1945] VLR 208 mentioned

18) *Ex Parte Cranney*; *Re Lindfield* (1930) 47 WN (NSW) 57 mentioned

19) *March v Darley* [1914] 3 KB 1226 mentioned

20) *Williams v Hammersley* (1978) 20 ALR 223 referred

21) *Cleland v R* (1982) 151 CLR 1 followed

22) *Heuston* (1995) 81 A Crim R 387 referred

23) *Chamberlain* (1984) 153 CLR 521 referred

24) *R v Psano* [1997] 2 VR 343 applied

25) *M v R* (1994) 181 CLR 487 applied

26) *Jones v The Queen* (1997) 72 ALJR 78 referred

REPRESENTATION:

Counsel:

Appellant:	A. Donaldson with W. Potts
Respondent:	R. Wild QC with P. Elliott

Solicitors:

Appellant:	Withnall Maley & Co
Respondent:	Director of Public Prosecutions

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tho98097
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. CA 4/98 (9619456)

BETWEEN:

GAVIN CHRISTOPHER ROBSON COOK
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, THOMAS AND BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 18 November 1998)

THE COURT

This is an application for leave to appeal against conviction of the appellant following a trial before judge and jury. The trial concluded on 26 March 1998. The appellant was found guilty by majority verdict of the jury on a charge that:

On 2 August 1996 at Darwin in the Northern Territory of Australia he stole three diamond rings and one unset diamond with a wholesale value of

$30,400 the property of Goldsmith Pty Ltd trading as Sterns Jewellers, contrary to Section 210(1) of the Criminal Code.

By consent the application for leave to appeal pursuant to s410(b) of the Criminal Code and the appeal itself were heard together.

The brief background to this matter is as follows:

At approximately 3.30pm to 4.00pm on 2 August 1996, it was discovered that some jewellery at Sterns Jewellers, Shop 4 Galleria Shopping Centre, Smith Street Mall was missing (evidence of S. Wong t/p 77-8). This was the jewellery as set out in the indictment. Inquiries made of the staff did not reveal why the jewellery was missing. There was a video camera installed in the shop. It was Darwin Cup weekend and the store was very busy with tourists and other customers who came into the shop to browse and to take advantage of the sale which the store was conducting. The video in the camera ran for some eight hours and when it was later perused, revealed a woman who climbed underneath the counter and went into an area which was not open to the public. Also in the shop at that time was a man, whom the Crown alleged, distracted the shop staff to enable the woman to climb under the counter. Approximately 1½ hours later the video shows the woman again climbing under the counter and the same man whom the Crown alleged distracted the staff. It was the Crown case that these two persons left the store although not together after the first incident and then re-entered the store separately, shortly prior to the second incident.

Police were not able to identify these two persons on the video and as a result they published part of the relevant footage of the video on television and asked whether anybody was able to recognise the people who were involved. Mr Steven James Kelk, who was at that time a police officer with the Australian Federal Police, saw the footage of the video on a Darwin television station, Channel 8, on 6 August 1996. Mr Kelk recognised the man depicted in the video as the accused and informed his supervisor, Federal Agent Taylor.

Following viewing of the video on the voir dire, his Honour the trial judge was of the opinion that it was not possible for the jury to make any identification of the man because of the substandard nature of the video itself, and other features which obscured the view of the man the Crown was alleging was the accused. The Crown conceded that the jury ought not make any identification of the man, whom the Crown alleged was the accused, simply by viewing the tape.

The first ground of appeal is:

Ground 1:

"The Learned Trial Judge erred in admitting the opinion evidence of the witness Mr. Kelk."

Mr Donaldson, counsel for the accused, relied on the decision *R v Brett Randall Griffith* (1995) 79 A Crim R 125 as authority for his submission that the evidence of Mr Kelk was inadmissible. The case of *R v Griffith* (supra) involved a robbery of a TAB agency. Use of certain security camera photographs was hampered by the presence of a stocking over the head of the person photographed, distorting his facial features. The court held (p128) that no attempt was made to adduce evidence that either policeman was qualified as an expert in the distortion of features by placing a stocking or material over the head of another. It was the officers' knowledge of the past appearance of the appellant which was relied on to qualify them to give evidence. Their Honours held that that did not give the officers any advantage over the jury. The evidence of the police officers was held to have been inadmissible.

The Court said, at p128:

> "In our respectful opinion the better view appears to be that ordinarily opinion evidence that a person present in court (but observed by the witness at earlier times) looks very much like a person depicted in a photograph before the court will not be admitted, where there is no circumstance giving the witness in question a substantial advantage over the court."

We consider that *R v Griffith* (supra) is distinguishable in that in the case before this Court, Mr Kelk was in a better position than the jury to identify the person shown in the video tape.

We agree with the conclusion of Kearney J in the course of his ruling that the evidence of Mr Kelk was admissible as Mr Kelk did have an advantage over the jury because his previous knowledge of Mr Cook "had enabled him spontaneously to identify Mr Cook out of court on 6th August, as the man he saw on the television news item that evening and (later) from the 23 minute film segment." (AB 366)

Mr Kelk, during the voir dire examination, said that the picture of the offender he saw on Channel 8 did not provide a direct front-on shot, but that there was a good profile and a good, almost complete, body shot (AB135). The following exchange then occurred:

> "And what did you see on that profile that was of some special – what feature?---I saw features in their entirety from a profile perspective. Is that what you mean?
>
> Yes?---Put – putting them all together, I saw Mr Cook.
>
> Well, what? What did you see?---I saw – well, do you want me to start at the top and work all the way down to the bottom?
>
> Yes, if you could?---I saw a nose shape, lip shape, face shape, shoulders, body size, buttocks.
>
> Mm mm?---I put them all together and found Mr Cook."

We note the evidence given by Mr Kelk during examination in chief (AB 192):

> "When you saw that video tape did you recognise anybody?---Yes, I did.
>
> Who was it that you recognised?---I recognised Gavin Cook.
>
> Who was he, in the video?---He was the man wearing the baseball cap and glasses.
>
> What was your observation or identification being based upon?---It was based upon his relative size and body shape and visible face, facial features, that I determined.
>
> As a result of what you saw, what did you do?---I contacted my then supervisor, Federal Agent Taylor, and advised him of what I'd seen."

In cross-examination (AB 194) Mr Kelk agreed that this person did not have any features of particular significance. Mr Kelk gave evidence (AB 190-1) that he had previously observed Mr Cook on two occasions in 1993, the first whilst he had him under surveillance at the departure lounge of Sydney Kingsford Smith Airport for about 20 minutes and the second occasion at the Criterion Hotel in Sydney for approximately five hours, but otherwise his evidence was not directly challenged before the jury. Mr Kelk gave further evidence (AB 191), that on 26 February 1996 he had on two occasions observed Mr Cook within the precincts of the shopping centre at Casuarina Shopping Square.

We prefer the approach taken in other authorities to which we were referred. In *R v Goodall* [1982] VR 33 at 44 Murray J said:

> "…. I have no difficulty in thinking that a person who knows or is familiar with an accused person and has some special knowledge of his appearance at a particular time may give evidence in court that the person shown in a security photograph taken during the course of a robbery and properly proved, is a photograph of the accused person. The weight of that evidence will obviously depend upon the clarity of the photograph and the detail which it reveals, but I see no basis on which it can be properly argued that such evidence is not admissible."

In the case of *R v Goodall* (supra) the special knowledge referred to was the varying degrees of familiarity of three witnesses with the accused.

In *R v Palmer* (1980) 1 A Crim R 458 the Court of Criminal Appeal was dealing with the identification of an accused from a bank security photograph. At 462 Street CJ said:

> "….., I entertain no doubt as to the admissibility of this evidence. Two persons such as the Furlongs who saw the photograph at the bank were, in my view, fully competent to give evidence at the trial identifying the man in that photograph as the man who used to live opposite to them. …."

and at 463:

> "…. The matter being contested was essentially whether it was proper for a witness to say that a person shown in a photograph was a particular person known to them. I can see no basis for doubting the admissibility of evidence along these lines."

In *R v Smith* (1983) 33 SASR 558, evidence of an identification made from a security camera, of a heavily disguised perpetrator of armed robbery, was held to be admissible.

Both *Palmer* and *Goodall* were cited in *R v Theos* (1996) 89 A Crim R 486 at 497 (Vic CCA). In that case, the Court held that evidence of identification made by two witnesses who knew the accused well and who identified the accused from security photographs depicting two robbers wearing balaclavas was held to be admissible, although the identification depended on non-physiognomical features. The basis of the admission of the evidence was the undisputed familiarity of the witnesses with the person they purported to identify.

We have come to the conclusion that the evidence of Mr Kelk was admissible and that there was no error on the part of the trial judge.

This ground of appeal is dismissed.

Ground 2:

> ***"That the learned trial Judge erred in failing to exercise his discretion to exclude the evidence of Mr. Kelk that he had previously surveilled the Applicant in his capacity as a Federal Police Agent in that the prejudicial effect of that evidence outweighed its probative value."***

His Honour, the trial judge, concluded as follows (AB 371):

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

His Honour distinguished this case from the decision of *R v Fowden and White* [1982] Crim L. R. 588 and at AB 371 his Honour, the trial judge, stated:

> "…. I note that in *R v Fowden & White* (supra), a shoplifting case, the Court of Appeal (Eng.) held that the evidence of witnesses (who knew both accused) that they were the persons seen on a video security film, should not have been admitted, because the circumstances were such that the defence could not test the accuracy of that identification, without thereby being prejudiced and embarrassed. However, in that case, the circumstances were that the identifying witnesses' knowledge of the accused stemmed from a similar shoplifting case a week later; I consider that the devastating prejudicial effect of eliciting that that was the basis of their identification evidence clearly outweighed its probative value. The present case is very different."

Counsel for the Crown at trial, Mr Elliott, emphasised in his opening address to the jury (AB 76) that there should be no inference of guilt drawn by the jury either because it was a police officer who identified the accused or because the accused was under police surveillance.

Mr Kelk gave evidence as follows (AB 190):

> "Now, is it fair to say that surveillance can cover a wide range of people?---It'd be fair to say that many people come and go throughout a surveillance operation, yes.
>
> And some will be on the periphery and things like that?---Some will be peripheral, some will be targets, some will become targets, some will cease to become targets."

Mr Donaldson submitted that he was unable to adequately cross-examine Mr Kelk in front of the jury as to his previous observations of Mr

Cook at Sydney's airport or at the Criterion Hotel without causing serious prejudice to the applicant. First, Mr Kelk's knowledge of who Mr Cook was, was based on photographs shown to him by other Federal agents. This was likely to have come out, creating in the minds of the jury what he called "the rogue's gallery effect". We are unable to fathom why it would have been necessary for counsel to inquire how he knew or came to know that the person Mr Kelk was observing, was Mr Cook. There was no doubt that the person in the dock was Mr Cook and that Mr Kelk was saying that the person he identified was the same person as the person in the dock.

Next it was put that Mr Kelk's identification on the television depended upon the association between Mr Cook and a woman. According to Mr Kelk, when he saw Mr Cook at Casuarina he formed the belief that Mr Cook was operating as a shoplifter in conjunction with a female who was operating as his "cockatoo". It was suggested to Mr Kelk in cross-examination during the voir dire, that what he did when he saw the Channel 8 program, was draw the inference that the person shown on the program was Mr Cook from the fact that the program suggested that a man and a woman had been acting in concert at Sterns Jewellers. Mr Kelk's evidence that the offender was Mr Cook, was that he had not made that association until after he had formed the opinion, based on what he saw of the male suspect's profile as shown on the program (AB 136-7). It is obvious that any cross-examination of Mr Kelk along those lines before the jury was not likely to have cast any doubt on Mr Kelk's evidence and would be prejudicial to Mr Cook's defence. However, this background was not being led by the Crown. It was no part of the Crown's

case that at any of the times Mr Cook had been observed by Mr Kelk, or that Mr Kelk's identification of Mr Cook from the television program, had anything to do with any unlawful activity by Mr Cook. Indeed, Mr Kelk's opinion that Mr Cook had been engaged in shoplifting activities at Casuarina with another woman was inadmissible evidence if led by the Crown. This was clearly different from the circumstances apparently prevailing in *R v Fowden and White*, upon which Mr Donaldson so heavily relied.

While we agree his Honour the trial judge was correct to distinguish the present case from *R v Fowden and White* (supra), we would express doubt about the general approach enunciated by the Court of Appeal (Criminal Division). The available report of the case is in abbreviated form. However, we do not favour adoption of a universal principle that would exclude identification evidence of a witness who recognises an accused because of his previous misconduct. In our view, it is necessary to emphasise that whether the prejudicial effect of such testimony outweighs its probative effect can only be decided in the circumstances of a particular case.

It is nevertheless true that if Mr Donaldson had wished to put to Mr Kelk in cross-examination before the jury that the identification was based, not on what he said made him recognise Mr Cook, but on the fact that there were two persons, one male and one female, acting together, it would have been necessary to show that Mr Kelk had formed the opinion that Mr Cook had acted in concert with a woman on another occasion whilst shoplifting. However, Mr Kelk's opinion was just that, and, had the accused's counsel

raised it before the jury, the trial judge could have given a suitable direction to the jury as to the limited use which could be made of that opinion and directed them not to use that opinion evidence for any other purpose. In any event, it was for defence counsel to decide whether he wished to open this matter up. A similar problem arose in *R v Smith* (1983) 33 SASR 558. The Full Court there held that this was not a ground for refusing to admit the evidence in the exercise of discretion. We agree.

In all the circumstances we do not consider that the prejudicial effect of this evidence outweighed its probative value.

We do not consider that his Honour erred in his discretion by failing to exclude the evidence of Mr Kelk on the ground of prejudice to the accused.

This ground of appeal is dismissed.

Ground 3:

> ***"That the Learned Trial Judge erred in failing to discharge the jury upon the application of the Applicant after evidence of a dock identification was led by the Crown Prosecutor taking the defence by complete surprise and despite an indication by the Learned Crown Prosecutor that no such evidence would be sought to be elicited."***

At the conclusion of her examination in chief, the Crown witness Maria Teresa De Castro Matros, who was working at Sterns Jewellers on 2 August 1996, was asked by counsel for the Crown (AB 171):

> "… You didn't know who the person was?---No.
>
> You couldn't identify that person, save for giving a description of what the person was wearing on the day, is that right?---I can identify him.

You can identify him?---Yes, I can.

And how can you identify him?---I just – I remember his face, that's all.

Is that person in court?---Yes.

Can you indicate where that person is?---There.

HIS HONOUR: Identifies the accused man, yes."

It would appear from the way in which he framed the question that the prosecutor was also taken by surprise with the answer given by the witness. We agree with the submission by Mr Wild QC, counsel for the respondent, that the prosecutor had to ask the witness who the person was that she identified, or the jury would be left with the overwhelming inference that it was not the accused.

When the accused is identified for the first time by the witness as happened in this case, the evidence is not only of little probative value; the trial judge has a discretion to exclude it altogether (*Alexander v R* (1981) 145 CLR 395 at 436-7).

Immediately after the witness concluded her evidence in chief as set out above, the jury retired and Mr Donaldson made an application to the judge that the jury be discharged. The judge declined to order the discharge of the jury. Immediately upon the jury returning to the court and before the resumption of any further evidence, his Honour directed the jury in very strong terms that the identification evidence given by Ms De Castro Matros was "absolutely worthless" (AB 186-7). His Honour explained to the jury in great detail why

this was so and warned the jury that they should place no weight on that aspect of Ms De Castro Matros' evidence.

Mr Elliott, the prosecutor at trial, in the course of his final address warned the jury about the danger of relying on the dock identification by Ms De Castro Matros (AB 254).

In his summing up to the jury (AB 385) his Honour, the trial judge, again stressed to the jury that they should disregard the evidence of Ms De Castro Matros relating to her identification of the accused.

In *R v Shepherd* (No. 4) (1989) 41 A Crim R 420 at 433 the NSW Court of Criminal Appeal said with respect to the trial judge's discretion whether or not to discharge the jury:

> "Consistent with *Ball* and *Maric* this Court would be slow to interfere with the course the learned trial judge took and would act only in a clear case where there has been a miscarriage of justice.
>
> The trial judge was of course far better placed than this Court is to determine the atmosphere at the trial. ...."

Given the very strong direction to the jury by the trial judge, both immediately after the evidence of Ms De Castro Matros and in his Honour's summing up, we do not consider there was a miscarriage of justice in that the discretion of the sentencing judge miscarried.

We would dismiss this ground of appeal.

Ground 4:

"That the Learned Trial Judge erred in admitting evidence that another person named Miss Silvester had pleaded guilty to the offence with which the Applicant was charged and who the Crown alleged that the Applicant aided."

Before the prosecutor opened to the jury, he indicated that he proposed to lead evidence that Ms Silvester had pleaded guilty to the charge of stealing the jewellery. This was initially objected to by Mr Donaldson (AB42). The prosecutor subsequently indicated that he was content to prove only that it was Ms Silvester seen on the videotapes as the person crawling under the counter (AB44). Mr Donaldson put it that this evidence would not go far enough (AB45), and that evidence led that she had pleaded guilty to a charge of stealing was inadmissible against the appellant, as her co-accussed (AB64). The prosecutor then changed his position by indicating that he proposed to lead evidence that Ms Silvester had admitted her guilt to the police (AB66-7). The trial judge ruled that that evidence was admissible (AB66). Counsel for the Crown did not open the proposed evidence to the jury. At that stage Ms Silvester had not pleaded guilty, but it was anticipated that she would do so before the learned trial judge the next day. Subsequently, the prosecutor requested the learned trial judge to prohibit publication of Ms Silvester's plea in case it came to be known to the jury (AB104). It seems that the prosecutor may have abandoned that idea at this stage.

Subsequently his Honour raised with counsel that he could not see why the Crown could not prove Ms Silvester's conviction to prove the existence of the crime for which Mr Cook stood charged as an aider and abetter (AB117),

noting that this was different from the view he had taken previously. No further submissions were made at that stage.

Later during the trial, the prosecutor raised with the learned trial judge whether the Crown could lead evidence through Detective Moseley that Ms Silvester had pleaded guilty and as to the basis of her plea (AB159-160). Mr Donaldson changed his position. He submitted, not that the evidence was inadmissible, but that fairness required that the Crown should prove that she had pleaded guilty and had been convicted on the basis that she had acted alone (AB160). His Honour was not asked to rule on this immediately.

The matter was again raised before Detective Moseley gave evidence. It is plain that although Mr Donaldson considered the evidence was inadmissible hearsay, he wanted the jury to know that Ms Silvester had been convicted on the basis that she had acted alone (AB196). The Crown did not object to that, but did not want the evidence to go any further. His Honour indicated that the Crown could prove her conviction by tendering a certificate of conviction, but Mr Donaldson submitted that this would be unfair and misleading, and that fairness required that the jury be told the basis of her plea (AB207). His Honour indicated, after hearing submissions, that the jury should in fairness, know that she was convicted on the basis that she had acted alone (AB209) and that his Honour had formed the opinion, when sentencing Ms Silvester, that on the basis of the materials placed before him at that time, he was not persuaded beyond reasonable doubt that she acted in concert with anyone else. Subsequently his Honour indicated that this should be led in evidence by the

prosecutor, a course which Mr Donaldson supported (AB211). Eventually that material was led by the Crown without further objection by Mr Donaldson (AB218-9).

There is authority for the proposition that the general rule is that proof of the conviction of an offence by some person other than the accused is inadmissible in evidence against the accused: *R v Turner* (1832) 1 Mood. 347; 168 E.R 1298; *Moore* (1956) 40 Crim App R 50. In Australia, there is also authority to the effect that there is an exception to the rule where the accused is charged as an accessory. In that case, the Crown can prove in the case against an accessory the conviction of the thief in order to show, as it must, that the goods were stolen by the thief: *R v Dawson* [1961] VR 773 at 774; *R v Carter*, *ex parte Attorney General* [1990] 2 Qd R 371; (1990) 47 A Crim R 55; *R v Hutton* (1991) 56 A Crim R 211.

There is a decision of the English Court of Criminal Appeal to the contrary: *Moore* (supra). The position in England is now governed by statute, which permits the Crown to prove the conviction, subject to an overriding discretion in the trial judge to reject it: see *Kempster* [1989] 1 WLR 1125. In *Dawson* (supra), the Crown had proven the conviction by calling evidence that the principal offender had pleaded guilty, and the Full Court held that this evidence was admissible. (*Dawson* was successfully appealed to the High Court, but on another point. The present point was not considered: see (1961) 106 CLR 1). In *R v Triffett* [1992] 1 Tas SR 293, Underwood J limited the

rule to cases where both offenders were prosecuted on the same indictment and the principle offender pleaded guilty.

The Australian authority is to the effect that the conviction by plea of guilty can be proven by someone who was present in Court at the time: see also *R v Gibson* (1930) 47 WN (NSW) 119, but there are some dissenting opinions by single judges to the effect that proof must be by way of a certificate of conviction: see *Knight v Porter* [1945] VLR 208; *Ex parte Cranney*; *Re Lindfield* (1930) 47 WN (NSW) 57; *R v Gibson* (1930) 47 WN (NSW) 119 per Simpson JA. See also *Byrne v Heydon*, *Cross on Evidence* Vol 1, para 41105. The position in England is that proof of a conviction requires production of a certificate: *March v Darley* [1914] 3 KB 1226, despite earlier authority to the contrary. We think we should follow the Australian authorities, given that they are Full Court decisions unless they are plainly wrong. No argument was addressed to us to show that this was the case. [As to the methods of proof, see also *Williams v Hammersley* (1978) 20 ALR 223 per Forster CJ].

However it is not necessary for us to decide this question. The course of the proceedings show that when Mr Donaldson became aware of the basis of Ms Silvester's plea, he was anxious to have that put before the jury, and this was done. Whatever else may be said about the admissibility of the evidence of Detective Moseley, we do not consider that the fact that Ms Silvester claimed to have acted alone, or that the sentencing judge reached that conclusion on the evidence before him, was admissible. If the evidence led

was inadmissible, it favoured the accused and came before the jury in that way eventually at the behest of the accused's counsel. In these circumstances there was no substantial miscarriage of justice, and we would not allow the appeal on this ground: *Criminal Code*, s411(2).

Accordingly, this ground of appeal must be dismissed.

Ground 5:

"That the Learned Trial Judge erred in redirecting the jury upon the application of the Learned Crown Prosecutor as to two matters already raised by the Learned Crown Prosecutor in his address to the jury and specifically referred to by the Learned Trial Judge during the course of his summing up and when reminding the jury of the Learned Crown Prosecutor's submissions, thereby giving undue weight to those submissions."

At the conclusion of his Honour's summing up counsel for the Crown sought a further direction from his Honour to the jury that the evidence concerning the relationship between Ms Silvester and the accused, the telephone calls, "the in and out of Darwin, the entry into the store, not only is that material upon which they can rely to establish guilt, but it is material they can rely upon to firm up the identification evidence." (AB 396). His Honour, in his summing up, had referred to this evidence but only in the context of the Crown submission, not as a direction from the judge.

Mr Donaldson, for the accused, objected to any further direction being given to the jury in the terms suggested by the Crown on the basis that it would give greater emphasis to the submission of the prosecutor (AB399).

His Honour accepted the Crown submission and brought the jury back to give them a further direction. His Honour directed the jury that there was other evidence which if accepted is capable of supporting Mr Kelk's identification of Mr Cook as being the man in the security video. His Honour then made reference to the evidence relating to the telephone calls from Mr Cook's mobile telephone in February and August 1996 and the evidence of the relationship between Ms Silvester and Mr Cook. His Honour stressed that these were matters for assessment by the jury and the extent they took them into account was a matter for them (AB 400).

Mr Donaldson, for the accused, submits to this Court that the effect of the redirection was to place undue weight on the submission of the learned Crown prosecutor which favoured the Crown case over that of the appellant's case.

The principle that a judge in summing up should put the issues fairly and maintain a balance between the prosecution case and the defence case, was expressed in *Cleland v R* (1982) 151 CLR 1 at 10:

> "… It is clear in principle that a trial judge, when directing a jury in a criminal trial, must hold an even balance between the cases of the prosecution and the accused and must fairly direct the consideration of the jury to the matters raised by the accused in his defence. In what manner, and in what detail, this should be done must of course depend on the circumstances of each case. …."

We agree with the submission by Mr Wild QC, counsel for the Crown, that the essential problem in this case which required a redirection from the

judge is that the jury could have been led by the charge to believe that its task was to establish as a threshold question: “Was it the appellant in the store” and that the only way it could answer that question was by reference to the evidence of the witness Kelk alone.

A jury can look at other evidence to decide the question of identity (*Heuston* (1995) 81 A Crim R 387 (NSW CCA) at 391; *Chamberlain* (1984) 153 CLR 521 at 535).

The test we apply is laid down in *R v Pisano* [1997] 2 VR 343: Is the evidence more consistent with guilt or was it simply intractably neutral? The evidence on which the Crown sought a redirection if accepted by the jury, was not intractably neutral but was consistent with the guilt of the appellant.

We do not agree with the submission by Mr Donaldson that in giving the redirection his Honour placed undue weight on the submission by the Crown prosecutor.

His Honour was redressing an omission in his summing up by giving the jury a direction on the law rather than just returning to the submission of the Crown prosecutor.

This ground of appeal is dismissed.

Ground 6

“That the jury’s verdict was unsafe and unsatisfactory.”

The test for an unsafe or unsatisfactory verdict has been established by the majority in *M v R* (1994) 181 CLR 487 at 493:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the 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 witnesses. On the contrary, the court must pay full regard to those considerations."

See also *Jones v The Queen* (1997) 72 ALJR 78 at 85 and the provisions of s411 of the Northern Territory *Criminal Code*.

Mr Donaldson, on behalf of the accused, submits that when the cumulative effects of the various unsatisfactory features of this trial are taken into account, the irresistible conclusion is that the appellant was not afforded the opportunity of having a fair trial on the merits.

Mr Donaldson refers to what he states are unsatisfactory aspects of the identification made by Mr Kelk. These include the fact that there was no particular feature of the appellant on which Mr Kelk relied, the average appearance of the appellant, the period of time that had passed since Mr Kelk had Mr Cook under surveillance, the disguise worn by the man on the video, the fish eye lens and the angle of the camera. There was no real cross-examination of Mr Kelk before the jury suggesting to the jury that Mr Kelk's

identification evidence should not be accepted. In those circumstances it is hardly surprising that the jury would have accepted his evidence. The fact that his identification was made from what he saw on the television program, and that it was he who had contacted the police who at that stage did not know who the person was, made his evidence more plausible, particularly when the evidence of the connection between Mr Cook and Ms Silvester through the telephone records is considered.

Mr Donaldson further submits that a reasonable jury not tainted by the dock identification of Ms De Castro Matros and not operating under the influence of the redirection made by the learned trial judge at the request of the learned prosecutor would have entertained a reasonable doubt about the guilt of the accused on the basis of all the evidence before the Court.

We have already stated under the previous heads of grounds of appeal the reasons for dismissing the appeals on all of these matters raised on behalf of the accused.

We do not consider that there is material before us which satisfies the test established in *M v R* (supra). In our opinion, upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

This ground of appeal is dismissed.

The order of the Court is that the application for leave to appeal be granted and the appeal dismissed.

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