

*The Queen v Murdoch* [2005] NTSC 79

PARTIES: THE QUEEN

v

MURDOCH, Bradley John (No 5)

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: 20215807

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HEARING DATES: 7-8 March, 21-22 & 26 April 2005,  
18 October – 13 December 2005

JUDGMENT OF: MARTIN (BR) CJ

**CATCHWORDS:**

CRIMINAL LAW

Murder – admissibility of evidence of possession of weapons and habit of carrying weapons – evidence admitted.

**REPRESENTATION:**

*Counsel:*

Plaintiff: R Wild QC, A Elliott, A Barnett &  
J Down  
Defendant: I Barker QC, G Algie, M Twiggs &  
I Read

*Solicitors:*

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

Judgment category classification:	A
Judgment ID Number:	Mar0524
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*The Queen v Murdoch* [2005] NTSC 79  
No. 20215807

BETWEEN:

**THE QUEEN**  
Plaintiff

AND:

**MURDOCH, Bradley John**  
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 15 December 2005)

**Introduction**

- [1] The accused is charged that on 14 July 2001 near Barrow Creek he murdered Peter Marco Falconio. He is also charged that on the same occasion he deprived Joanne Rachael Lees of her personal liberty and that he unlawfully assaulted Ms Lees in circumstances of aggravation.
- [2] The Crown sought to lead evidence concerning the possession by the accused of a number of weapons and of his habit of carrying a loaded weapon in his motor vehicle during trips between South Australia and Western Australia. I now set out my reasons for rulings given in connection with this evidence.

## **Facts**

- [3] Early in the evening of Thursday 14 July 2001 Ms Lees and Mr Falconio were travelling north in a Kombie van on the Stuart Highway approximately 10 kilometres north of Barrow Creek. Mr Falconio was driving. A vehicle pulled alongside and the driver gestured to Mr Falconio to pull over. It is the Crown case that the driver of the other vehicle was the accused.
- [4] After Mr Falconio stopped the vehicle on the side of the highway, he walked to the rear of the Kombi van where he met the driver of the other vehicle. Ms Lees could hear the men talking about sparks coming from the exhaust. Mr Falconio returned to the driver's side door and asked Ms Lees to rev the engine. That was the last time that Ms Lees or anyone else saw Mr Falconio alive.
- [5] While Ms Lees was revving the engine, she heard a loud bang. It is the Crown case that the driver of the other vehicle shot Mr Falconio.
- [6] Ms Lees ceased revving the engine and turned to look out the window. She observed a male person standing at the driver's side window with a gun pointed at her.
- [7] The details of subsequent events are set out in my reasons for judgment in *R v Murdoch (No 1)* [2005] NTSC 75. In substance it is the Crown case that the accused forced Ms Lees into his vehicle from where she escaped into the scrub. While Ms Lees was hiding in the scrub the accused shifted the Kombi van and left it in the scrub on the western side of the Stuart

Highway. It is the Crown case that after leaving the Kombi van in the scrub the accused travelled to Alice Springs and from there to Broome.

- [8] The opportunities of Ms Lees to see the weapon were limited to her initial observation through the window of the Kombi van and subsequently when the offender pointed the gun to her head. Asked in evidence to describe the gun, Ms Lees said (**p 83**):

“It’s a silver revolver. I’d never seen a gun before. To me it looked like a western type gun. It had – it had engraving on it which was in a rectangular box, that was down the barrel of the gun.”

- [9] Ms Lees said she did not see the butt of the gun which was under the offender’s hand. Nor did she see the trigger.

- [10] Ms Lees gave instructions to an artist for the sketching of the weapon. The artist drew the butt and trigger without instructions. A copy of the final sketch is annexed to these reasons.

- [11] During cross-examination Ms Lees said she could not give a description of the engraving. She said she just described it as “scrolling engraved along the barrel of the gun”. She agreed that her first description was accurate:

The gun had a scroll-like pattern, the scroll pattern had no words or symbols on the side engraved in the box like border.”

- [12] As to whether the pattern on the sketch by the artist was a fair representation of what she saw, or whether she could not say one way or the other, Ms Lees responded:

“A. I can’t say. It’s not a good representation but it was hard to describe and I couldn’t remember vividly what the engraving was, only there was some engraving.

Q. Do you know one way or the other whether what we see in that drawing is similar to what you saw on the night?

A. Similar.”

[13] Ms Lees was asked about the length of the barrel. She demonstrated the length by reference to the length of her hand from the area of the wrist to the tips of her fingers. Measured against a ruler Ms Lees demonstration was approximately 6 to 7 inches.

[14] Mr William Gibbs has known the accused for a number of years. In a statement dated 7 November 2002, Mr Gibbs described guns he was aware were in the possession of the accused as at 14 July 2001 in the following terms:

- “• A silver six shot .22 revolver with a barrel of approx four inches long with a wooden grip.
- ...
- A Chinese copy of a 45 pistol which was silver.
- ...
- One 308 rifle with a scope and a five shot magazine.”

- [15] In the same statement Mr Gibbs said that the accused kept the Chinese copy of the .45 pistol under his seat in his vehicle and would keep the .22 stainless steel revolver in the driver's side pouch.
- [16] Mr Gibbs also spoke of the accused owning a .357 Magnum revolver and two black Glock 9 ml weapons. He said the Glock weapons were purchased after the disappearance of Mr Falconio and he, Mr Gibbs, was in possession of the Magnum at the time of the relevant events.
- [17] Mr Gibbs did not give evidence at the preliminary examination. Although the Crown intends to call Mr Gibbs, it cannot guarantee his attendance at the trial.
- [18] Mr James Hepi met the accused in 1998. In a statement dated 14 September 2002 Mr Hepi said the accused owned a .22 pistol and a 357 Magnum. He said he was unsure whether the .22 was a pistol or a revolver. The 357 was a black and grey revolver with a wooden stock. Mr Hepi stated that the accused had one of the weapons in the centre of a fold up camping table in the back of the vehicle and another inside the seal of the driver's side door.
- [19] In a statement dated 4 November 2002 Mr Hepi said the .357 had a grey metal barrel of ten to twelve inches in length. The stock was wooden with a "crisscross pattern" on it. According to the statement Mr Hepi could not remember if the weapon had any engraving on the barrel. The .22 was all black in colour.

[20] In his statement Mr Hepi said that the hand guns were “kept fairly close to Brad at all times.” He said that the last time he saw the accused with the weapons it was in South Australia after the events under consideration. The weapons were in the accused’s vehicle between the legs of the folding table.

[21] In evidence at the preliminary examination given in June 2004, Mr Hepi gave similar descriptions of the two weapons about which he spoke in his statement. He said the .22 weapon was a revolver which did not have a magazine. Rather, “it had a rolling revolver in it”. He was unable to recall any distinctive markings on the .22. He said he did not take much interest in the weapon. According to Mr Hepi the accused kept the weapons on his person or in his vehicle in the side panel of the driver’s side door tucked down beside the seat.

[22] Mr Brian Johnston met the accused in about 2000. In a statement dated 27 March 2003 Mr Johnston spoke of a trip with the accused in the accused’s vehicle during which the accused pulled the inside panel of the driver’s door back and pulled out a gun wrapped in a bit of rag with brown packing tape around it. The accused then put the weapon inside the centre well of the spare tyre. Subsequently they were met by another man to whom the accused gave the weapon saying he had a loaded gun that he did not want to take into Broome. The accused retrieved the weapon from the spare tyre and handed it to the other person. The accused said something to the wife of the other person about the weapon being a “girlie gun” and that she could use it.

[23] In evidence at the preliminary examination given in August 2004

Mr Johnston said he saw a Magnum 357 belonging to the accused and a smaller weapon which was apparently a 38. Both were revolvers. They were dark grey in colour and metal. The 38 was carried in the accused's vehicle, usually in a cavity in the long range fuel tank. Mr Johnston gave evidence of the occasion when the accused retrieved a weapon from the inside of the driver's side door as described in his statement to which I have referred.

[24] Ms Julie-Anne McPhail met the accused for a short time in June 2001. They happened to meet when travelling in separate vehicles from Western Australia to South Australia. In a statement dated 2 December 2003 Ms McPhail said that on an occasion when the accused had stopped in the bush at the side of the road she pulled up behind him. When she got out of her vehicle the accused was standing at the passenger side of his car holding a "small ladies revolver". The accused fired two rounds into the bush and offered to sell the revolver to Ms McPhail. She declined. Ms McPhail described the weapon "as a revolver, plain silver in colour, and about seven to ten centimetres in length".

[25] Ms McPhail gave evidence at the preliminary examination in August 2004. She said the weapon she saw on the occasion when they stopped at the side of the road was a small revolver with a silver barrel. It had a "spin around chamber".

[26] Ms Rachel Maxwell met the accused when introduced to him by Mr Hepi in January 2001. The accused and Mr Hepi came to her home at Springton in South Australia.

[27] In a statement dated 21 October 2002, Ms Maxwell stated that in about March 2001 she saw the accused and Mr Hepi sitting at a table with bits of a gun on the table. She said that she does not know guns very well as she does not like them and tends to avoid them.

[28] Ms Maxwell gave the following description of the weapon:

“The gun was silver and was not anything that looked to me to be high tech that you would see on television. The gun reminded me of a western or John Wayne type of gun. It was silver with a wooden bit on the handle. I did not notice whether it had engraving or etching. It had a round chamber where you put bullets in the side and the chamber looked like it would turn. The whole length of the gun would be that of an average sized tissue box containing 200 tissues.”

[29] Ms Maxwell stated that she was aware that the gun was later wrapped up and hidden. She stated that she never saw the silver gun again after that day.

[30] In evidence given at the preliminary examination in August 2004, Ms Maxwell spoke of seeing the weapon on the table. She described the weapon as having a wooden handle and a silver barrel and “silver whatever you call the bit that shoots the bullet out”. Asked if she had ever seen a weapon like it on television, Ms Maxwell responded:

“Yeah, it’s like an old gun that was, you know, like John Wayne would have used, sort of thing.”

[31] In response to a subsequent question as to whether it was a “wild west one”, Ms Maxwell replied “wild western thing, something like that, yeah.”

[32] According to Ms Maxwell the weapon had a wooden brown handle and the rest was silver and shiny although not “ultimately shiny”. Asked if there were any patterns on it, Ms Maxwell replied “Not that I remember, no.”

[33] Leaving aside Mr Gibbs, from a combination of the evidence of Mr Hepi and Mr Johnston, it would be open to the jury to conclude that as a matter of ordinary practice the accused kept a hand gun in the vehicle in which he travelled. Considered in conjunction with the evidence of Ms McPhail and Ms Maxwell discussed later in these reasons, such evidence possesses probative value as to the capacity of the accused in July 2001 to carry out a killing by shooting. The evidence is admissible as a piece of circumstantial evidence and I decline to exclude it in the exercise of my discretion. Similarly, if Mr Gibbs gives evidence, his evidence to that effect will be admitted.

[34] Ms Lees described the weapon as a silver revolver which looked to her like a western type gun. Ms McPhail observed the accused in possession of a plain silver revolver of a length consistent with the length described by Ms Lees. In March 2001 Ms Maxwell observed the accused and Mr Hepi at a table with bits of a gun that she described as silver and which reminded her of a western or John Wayne type of gun.

[35] It would be open to the jury to conclude that the descriptions of the silver weapon provided by Ms McPhail and Ms Maxwell are, in a very general way, consistent with the description by Ms Lees of the weapon used by the offender. Considered in isolation from the remainder of the evidence, such evidence is incapable of proving that the accused possessed the weapon described by Ms Lees. However, as a piece of circumstantial evidence, the evidence is capable of probative value and, for that reason, is admissible.

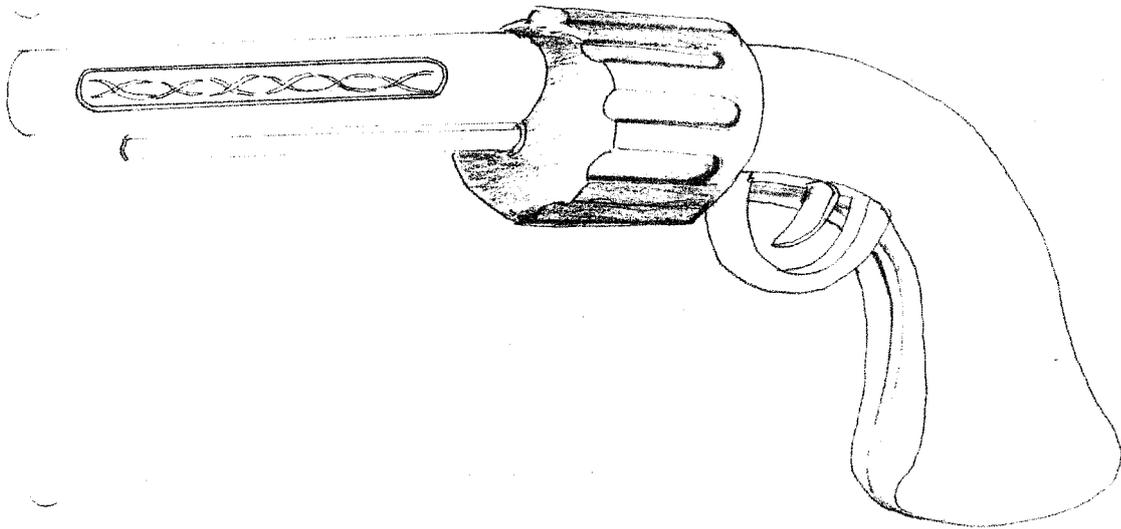
[36] As to the exercise of the discretion to exclude relevant evidence, in my opinion the potential prejudicial effect of the evidence does not outweigh its probative value. In all the circumstances, particularly in view of the evidence that the accused was engaged in the illegal activity of trading in cannabis, in my view it is highly unlikely that a jury hearing of the evidence of the accused's possession of such a weapon would engage in the impermissible line of reasoning. The jury would hardly be surprised to hear that a person who engaged in transporting cannabis many thousands of kilometres across the country was in the habit of carrying a weapon during the trips. In my view, given appropriate directions, the risk of impermissible use by the jury is minimal.

[37] The evidence of Ms McPhail and Ms Maxwell concerning the accused's possession of a silver gun is admissible. I decline to exclude it in the exercise of my discretion. If Mr Gibbs gives evidence, his evidence concerning the silver shot .22 revolver will also be admitted.

[38] The reasons I have expressed for the admission of the evidence were based upon the material before me prior to the commencement of the trial with the jury. Mr Gibbs did not give evidence before the jury. Having heard the evidence of the other witnesses to whom I have referred I remained of the view that the evidence was admissible and should not be excluded in the exercise of my discretion.

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