

*Murdoch v The Queen* [2007] NTCCA 1

PARTIES: MURDOCH, BRADLEY JOHN

v

THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF  
THE NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE  
SUPREME COURT EXERCISING  
TERRITORY JURISDICTION

FILE NO: CA 2/06 (20215807)

DELIVERED: 10 JANUARY 2007

HEARING DATES: 12, 13, 14, 15 DECEMBER 2006

JUDGMENT OF: ANGEL ACJ, RILEY J & OLSSON AJ

APPEAL FROM: NORTHERN TERRITORY SUPREME  
COURT, 20215807, 15 December 2005

**CATCHWORDS:**

Appeal – Proviso – Application of proviso – Whether miscarriage of justice

Evidence – Identification – Whether spontaneous – Victim identifying  
appellant suspect as her assailant from photograph of appellant on internet

Evidence – Identification – Photoboard – Whether Trial Judge erred in  
permitting evidence of photoboard identification in circumstances where  
previous out of court identification admissible

Evidence – Identification - Dock identification – Whether Trial Judge erred  
in permitting evidence of dock identification in circumstances where  
previous out of court identification admissible

Evidence – By victim of similarities between dog at crime scene and accused’s dog in photograph – Whether admissible in the circumstances

Evidence – Possession, ownership and use of guns by accused – Circumstantial evidence adverse to him – Whether relevant or should have been excluded by Trial Judge as matter of discretion

Evidence – Accused denied that he was person in truckstop video – Edwards direction by Trial Judge – Whether appropriate in circumstances

Evidence – Expert evidence - Admissibility – Opinion evidence — Facial Mapping and Body Mapping – Whether ‘specialised knowledge’

Evidence – Expert evidence – Qualifications of witness as expert – Whether Body Mapping proper subject matter for expert testimony

Evidence – Expert evidence – Opinion evidence – Truckstop video – Whether expert witness who did not know appellant could identify him as man in video – Evidence of identity wrongly admitted

Evidence – Opinion evidence – Non-expert opinion – Identity – Truckstop video – evidence of witnesses who knew appellant identifying him as man in video – Whether matter for jury – Evidence properly admitted – Jury to decide weight

Evidence – Identification – Truckstop video – Evidence of witnesses who knew appellant identifying him as man in video – Whether matter for jury – Evidence properly admitted – Jury to decide weight

Sentencing – Murder – Indeterminate sentence with non-parole period – Whether non-parole period manifestly excessive

### **Statutes Referred to:**

Criminal Code (NT) s 411, 429(2)

Evidence Act 1995 (NSW) s 79

Sentencing Act s 53A

### **Cases Cited:**

*Alexander v The Queen* (1981)145 CLR 395

*Attorney-General’s Reference (No 2 of 2002)* [2003] 1 Cr App R 321

*Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180

*Clare & Peach v R* [1995] 2 Cr App R 333

*Darkan v The Queen* (2006) 163 A Crim R 80

*Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993)  
*Davies and Cody v The King* (1937) 57 CLR 170  
*Festa v The Queen* (2001) 208 CLR 593  
*Hallam & Karger v R* (1985) 42 SASR 126  
*Hontestroom (Owners) v Sagaporack (Owners)* [1927] AC 37  
*Jamal v R* (2000) 182 ALR 307  
*Lewis v R* (1987) 88 FLR 104  
*Li v The Queen* (2003) 139 A Crim R 281  
*Makita (Australia) Pty Ltd v Spowles* (2001) 52 NSWLR 705  
*Murphy v The Queen* (1994) 62 SASR 121  
*Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243  
*R v Bonython* (1984) 38 SASR 45  
*R v Britten* (1988) 51 SASR 567  
*R v Clark and Others* (1996) 91 A Crim R 46  
*R v Clarke* [1995] 2 Cr App Rep 425  
*R v Gorham* (1997) 68 SASR 505  
*R v Hookway* [1999] Crim LR 750  
*R v Palaga* (2001) 80 SASR 19  
*R v Paul Edward Gray* [2003] EWCA Crim 1001  
*R v Tang* (2006) 161 A Crim R 377  
*R v Trevor Elton Gardner* [2004] EWCA Crim 1639  
*R v Williams* [1983] 2 VR 579  
*Smith v R* (2001) 206 CLR 650  
*Stockwell v R* [1993] 97 Cr App Rep 260  
*The Queen v Murdoch* [2005] NTSC 76  
*The Queen v Murdoch (No 1)* [2005] NTSC 75  
*The Queen v Murdoch (No 4)* [2005] NTSC 78  
*The Queen v Murdoch (No 5)* [2005] NTSC 79  
*Warren v Coombs and Another* (1979) 142 CLR 531  
*Weiss v R* (2005) 224 CLR 300

## **REPRESENTATION:**

### *Counsel:*

Appellant: I Barker QC, G Algie, I Read  
Respondent: R Wild QC, J Down, A Barnett

### *Solicitors:*

Appellant: NT Legal Aid Commission  
Respondent: Office of Director of Public Prosecutions

Judgment category classification: B  
Judgment ID Number: Ang200701  
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IN THE COURT OF CRIMINAL APPEAL  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Murdoch v The Queen* [2007] NTCCA 1  
No. CA 2/06 (20215807)

BETWEEN:

**BRADLEY JOHN MURDOCH**  
Appellant

AND:

**THE QUEEN**  
Respondent

CORAM: ANGEL ACJ, RILEY J & OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 10 January 2007)

**THE COURT:**

**Introduction**

- [1] The appellant appeals against his convictions, following verdicts of a jury, of the crimes of murder, deprivation of liberty and aggravated assault.
- [2] The appellant also appeals, by leave, against a non parole period fixed by the learned trial judge in relation to sentences imposed on him consequent on the convictions.

- [3] The appellant was refused leave by a single judge to appeal against the sentences imposed on him in respect of the convictions for deprivation of liberty and aggravated assault. However, pursuant to the provisions of s 429(2) of the Criminal Code, he requested that his application for leave in that regard be considered and determined by the Court of Criminal Appeal. On the hearing of the appeal he did not pursue that request.
- [4] This Court also has before it applications for extension of time within which to make application for leave to appeal against his convictions on a variety of additional grounds.
- [5] In the event, this Court determined that it would receive detailed submissions as to the substance of all matters sought to be advanced by the appellant and rule at a later date on whether necessary extensions of time and leave ought to be granted.
- [6] The grounds of appeal sought to be relied on have waxed and waned in number since the institution of the present appeal. On the hearing of the appeal, counsel for the appellant intimated that he only desired to rely on grounds or proposed grounds that had been numbered 1, 5, 6, 7, 11, 12, 14 and 15 respectively. Accordingly, these reasons are limited to a consideration of those grounds and proposed grounds, the numbers of which will be retained as a matter of convenient reference to the relevant documentation.

## **Relevant narrative background**

[7] The Crown case, as presented, may be summarised as follows:

- (1) As at July 2001 the witness Joanne Lees and the alleged murder victim Peter Falconio were aged 28 and 27 years respectively. They met in 1996 and had lived together since August 1997.
- (2) Following Mr Falconio's graduation from university in 2000, he and Ms Lees embarked on a world trip together. In the course of the trip they came to Australia on a working holiday, arriving in Sydney in January 2001. They remained in that city for several months and, whilst there, purchased an orange coloured Kombi van.
- (3) On 25 June 2001 the two of them departed Sydney in the van, with the intention of travelling a route that would take them through Canberra, Melbourne, Adelaide, Alice Springs and then to Darwin. They intended, thereafter, to go to Cairns, Brisbane and New Zealand, although, at some point, Mr Falconio planned to go to New Guinea on an adventure trip, whilst Ms Lees remained in Sydney.
- (4) The couple duly arrived in Alice Springs on 11 July 2001. The jury was told that, on 14 July 2001 at some time after attending the Camel Cup, they departed Alice Springs in the Kombi van. They proceeded north on the Stuart Highway, travelling towards Barrow Creek. They

stopped at Ti Tree to watch the sunset. What follows is the substance of the narrative evidence given by Ms Lees.

- (5) At some point shortly after passing through Barrow Creek and at about 8 pm when it was dark, the two of them became aware that another vehicle was following the Kombi van. That vehicle (which proved to be a white four-wheel drive utility fitted with a bull bar) pulled alongside the Kombi van. Its interior light was switched on.
- (6) The utility was driven by a man wearing a black baseball cap with a motif on it and a long sleeve shirt with what appeared to be a T-shirt or something else under it. He had what Ms Lees described as a Mexican moustache that drooped down past the sides of his mouth. A dog was also seen to be sitting on the passenger seat of the utility.
- (7) The driver of the other vehicle gestured to the occupants of the Kombi van to pull over and pointed to the back of the van. Mr Falconio stopped the Kombi, with its nearside wheels on the gravel verge and its offside wheels on the bitumen. The four-wheel drive utility pulled up somewhere behind it.
- (8) Mr Falconio got out of the Kombi and went to the rear of it, whilst Ms Lees slid over into the driver's seat to get a better view of what was occurring. She noted that the other driver had got out of his vehicle and was speaking with Mr Falconio near the rear of the Kombi. Because the Kombi driver's door had not been fully closed

when Mr Falconio exited the vehicle, its interior light had come on and it stayed on.

- (9) Ms Lees heard some discussion between the two men concerning sparks coming from the exhaust, following which Mr Falconio came back to the driver's door of the Kombi, collected his cigarettes and asked Ms Lees to rev up the engine, which was still running.
- (10) She did so a number of times following Mr Falconio's return to the rear of the vehicle. As she did so, she heard a sound like a vehicle backfiring. A man, whom she later identified as the accused and the driver of the four-wheel drive utility then came to the driver's door of the Kombi holding a silver revolver in his right hand.
- (11) The man instructed her to turn off the motor of the Kombi. She attempted to do so, but was shaking too much. He thereupon partly entered the vehicle as she backed away from him and he turned off the ignition. He told her twice to put her head down and her hands behind her back, pointing a gun at her right temple.
- (12) She eventually complied and the man then tied her wrists together. He placed some sort of cuff quite tightly on each wrist with the two cuffs joined about 3 or 4 inches apart. It subsequently transpired that she had been manacled with handcuffs made of tape and cable ties.

- (13) Although she could not remember precisely how it occurred, Ms Lees said that she was somehow taken out of the Kombi through the passenger side door and forced to the ground onto her knees. The man straddled her, facing her legs. He then lifted her legs and attempted to tie them together. Her head was facing the bush and her feet were towards the Kombi.
- (14) Ms Lees struggled and the man was unable effectively to tie her legs, although there was some tape around them. He punched her on the right temple, partly stunning her. He next lifted her up, standing behind her and holding her at the base of the neck. She screamed out to Mr Falconio to help her, but there was no response.
- (15) The man forced Ms Lees over to the utility and tried to put tape across her mouth. She resisted, continuing to call for help. The man was unsuccessful in taping her mouth. He lifted up the corner of the canvas canopy to his vehicle behind the passenger's door and pulled out a sack, which he put over her head for a short time.
- (16) She was pushed backwards into the passenger seat area of the utility and saw the dog then sitting on the driver's seat. She described the animal as being of medium build, chunky and a patchy black or dark brown and white colouring. At that point, the bag had been removed from her head, the interior light was on in the vehicle and she saw the man's face from a distance of only about 18 inches.

- (17) Ms Lees said that she eventually found herself in the rear of the utility. Initially she thought that this might possibly have been by means of moving through a gap between the front two seats. Later, she said that it was possible that her assailant had pushed her through the side canvas canopy. She was clear that she did not walk around to the rear of the vehicle and get in from there. She was initially on her stomach, but turned over. She asked the man why he was doing this. "Did he want money?" "Did he want to rape her?" He told her to shut up or he would shoot her.
- (18) The man went away for a short time and Ms Lees heard a noise like gravel scraping, as if something was being moved. She sat up with her hands still tied behind her back. She eased her body towards the rear of the vehicle, hung her legs over the back of the tray, got to the ground and then ran into the bush.
- (19) She said that she ran slightly to the right from the near side of the vehicle and the bush got thicker as she went. It was rough going and she tended to stumble. It was pitch black. She could hear the man somewhere behind her. She hid in the scrub, crouching under some bushes. She heard the man moving about and, at one stage, saw some torchlight.
- (20) After a time, Ms Lees heard vehicle doors opening and closing and an engine start up. She saw vehicle headlights turned on. She then

heard a vehicle move off, she thought, in a southerly direction. She remained where she was and, after a time, once more heard a crunching noise of a person moving about.

(21) Ms Lees subsequently again became aware of a noise of vehicle doors and then of something being dragged. There was a noise of a vehicle door closing and an engine being started. A vehicle thereafter drove off to the south.

(22) She remained in the bush for what she thought was some hours. At the point when the second vehicle was being driven off, Ms Lees managed to pass her legs through between her hands and bring her still manacled hands to the front of her body.

(23) She tried to rid herself of the manacles by attempting to bite through the bonds joining them, but was unsuccessful in doing so.

(24) She then managed to get some lip balm out of a pocket of her board shorts. She bit the top off and spat it out and then rubbed the balm on the wrist bands. However, she was still unable to remove them. The lip balm tube fell to the ground.

(25) Ms Lees eventually moved back to the road. It was still pitch black. She crossed to the far side of the road and collapsed in some long grass. She decided to wait for a road train and first allowed a car to

pass without moving. She feared that her assailant might return in such a vehicle.

(26) When she saw a road train approaching, she ran out on to the road in front of it with her hands in front and then off the road again when it looked as if the vehicle might not stop. It did, however, stop after it had passed her and she ran after it and made contact with the driver, showing him her manacled hands. The driver proved to be the witness Mr Millar, who had another person, the witness Mr Adams, with him.

(27) Ms Lees briefly told Mr Millar what had happened and asked for assistance in removing her manacles and finding her boyfriend. The men in the road train cut off her cable ties and placed them in a toolbox. Tape was also removed from her legs and from in her hair.

(28) Mr Millar and Mr Adams disconnected the trailers from the prime mover and then used the latter, with its headlights on, to search the general area. The Kombi van, the utility and Mr Falconio were not found. The trailers were again attached to the prime mover.

Ms Lees was driven to Barrow Creek, arriving shortly prior to 2 am.

(29) There was a party in progress at the Barrow Creek Hotel and Mr Millar went inside to notify the police of the situation. Initially Mr Adams stayed in the cab with Ms Lees, attending to her injuries with a first-aid kit. She was then taken into the hotel and looked

after, while the police were contacted. She eventually lay down on a bed in a bedroom.

(30) Mr Millar's report of the incident was received at the Alice Springs police complex at about 2 am. Police arrived at Barrow Creek at about 4:20 am and were subsequently taken by Mr Millar to the area where he had picked up Ms Lees. She was eventually conveyed to Alice Springs and received appropriate medical treatment.

(31) Ms Lees described her assailant to the police as being a tall man "45 +" years of age. She said that he had a "long and ovalish face – longish face. Narrow.", with deep set eyes, sunken cheeks and scraggly hair coming out from under a black baseball cap. There was a lot of grey in his collar length hair and he had grey flecks in his eyebrows and moustache. The moustache was a Mexican style that drooped at the ends. His eyes were drooping and his face was very lined. He wore a check pattern shirt with a dark T-shirt under it, and heavy duty trousers, possibly jeans.

(32) After the police had arrived Ms Lees identified a standard white Toyota Land Cruiser utility with a green canvas cover as being somewhat similar to the vehicle driven by her assailant. However, she said that there were some differences. For example, in the vehicle looked at by her it was not possible to go through from cab to

the tray at the rear. The canopy also seemed to be a different colour on the inside.

(33) She remained in Alice Springs for some weeks to assist the police.

### **Key circumstantial evidence**

[8] The attention of the jury was invited to a substantial number of items of circumstantial evidence. A summary of some of that material follows, although it is unnecessary, for present purposes, to traverse all of the evidence called or tendered.

[9] The witness Mr Millar testified that, shortly prior to 1 am on 15 July 2001, he was driving a road train along the Stuart Highway in a southerly direction towards Barrow Creek. He confirmed that a young woman, who proved to be Ms Lees, suddenly jumped out from the left side of the road in front of the prime mover, holding her hands up near her head. This caused him to swerve to his right.

[10] Mr Millar told the jury that he then straightened up again and applied his brakes, thinking that the young woman may have actually gone under one of the trailers. It took nearly a kilometre to pull up.

[11] When he eventually dismounted and walked back to examine the trailers, he heard the sound of Ms Lees running down the other side of the trailers. She

called out for help and came to his side of the road train by moving, crablike, under one of the trailers. She asked him to look at her hands.

[12] Because the light was not good, he took her to the front of the vehicle and saw that her hands were manacled. He tried to undo the ties, but could not. He thereupon awakened the witness Mr Adams who was sleeping in the vehicle and asked him to go to a toolbox to get some cutters.

[13] Mr Adams did so and then cut the ties, whilst Mr Millar held Ms Lees' hands. The two men also assisted her to remove duct tape from around her legs and where it adhered in her hair. The cut ties and removed duct tape were kept and placed in the toolbox. At some point Ms Lees gave a brief account to the two men of what had happened to her.

[14] Mr Millar confirmed that, having placed Ms Lees in the cab of the prime mover, she requested that they look for her boyfriend and her vehicle. He told the jury that he and Mr Adams drove the road train off the road, unhitched the prime mover and then drove back up the road to a point near where Mr Millar had first seen Ms Lees.

[15] He said that, in that area, he saw what he described as a small pyramid of dirt on the road, although he could not recall precisely where it was on the road surface. When asked, Ms Lees did not know what it was.

[16] Further searches failed to reveal the presence of either Mr Falconio or the Kombi, although some fresh vehicle marks were seen on a track leading to a

gate. After a time, the trailers were re-hitched to the prime mover and Ms Lees was conveyed to Barrow Creek, just over 10 kms distant.

[17] After the police had arrived Mr Millar went to the scene and indicated relevant locations to police officers, including the position of the so-called “dirt pyramid”.

[18] Mr Millar told the jury that, at the time at which he and Mr Adams picked up Ms Lees she had lost a lot of skin from her elbows and knees.

[19] The witness Mr Adams essentially confirmed his part in the sequence of events, as had been narrated by Mr Millar. He said that, when he initially saw Ms Lees, she was shaking and shivering and appeared in shock.

[20] Ms Lees was examined by Dr Wright at about 6:40 pm that day. He noted the presence of multiple abrasions on both elbows and knees, some scratches around one ankle, a small laceration over the front surface of her left knee and a scratch on the lower back. Many of the abrasions were dirty and required cleaning.

[21] Mr Pilton, the proprietor of the Barrow Creek Hotel, said that Mr Millar's road train arrived at the hotel at about 1:30 am on 15 July 2001. He assisted Mr Millar to make contact with the police in Alice Springs, as the Ti Tree police station was not manned at that hour.

[22] This witness then went out to the road train and there saw Ms Lees in the cab in the foetal position. He and the two drivers coaxed her to leave the

cab and then took her into the hotel. When she was in the hotel he saw severe red wrist marks on both of her wrists, lacerations on both elbows and knees and a swelling mark on her ankle. Her face appeared swollen and she said "Where's Pete?" "I can't find Pete", "I need Pete". Mr Pilton made a bed available to her.

[23] Ms Pamela Brown related that she had been in a car with her partner and other family members on an unspecified Saturday night preceding a Sunday on which she had heard of an incident near Barrow Creek. Their vehicle was heading south on the Stuart Highway, having attended a football match at Ali Curung.

[24] After stopping at Taylors Crossing to change a flat tyre, the vehicle in which Ms Brown was a passenger then proceeded south on the Highway. By then it was a dark, moonless night. At one point Ms Brown saw vehicle headlights come from the verge onto the road and then a white vehicle that looked like a Toyota Land Cruiser wagon came past heading north. She subsequently saw an orange Kombi van on the side of the road facing north. Its lights were not on.

[25] This witness marked relevant locations of the vehicles observed on a photograph exhibit P 52.

[26] Ms Brown's partner, Mr Jasper Haines, gave evidence somewhat to the same effect as hers. He confirmed that he knew the area where the vehicles were seen quite well because he went hunting there. A so-called bore road in the

vicinity led into the hunting area. He said that he went hunting the following day after seeing the vehicles and observed police cars in the area. He later heard of the events near Barrow Creek and went to the police and made a statement.

[27] At trial, it was Mr Haines' memory that the white vehicle seen was a 4 wheel drive Land Cruiser utility with a green canopy. However, such professed observation was not consistent with what he initially told the police or the magistrate at the committal. His earlier statements were to the effect that he thought that the 4 wheel drive vehicle might have been either a Troop Carrier or a Ford Courier.

[28] The bore road referred to by Mr Haines was later traversed by a police officer. It ran off the Stuart Highway to the West just north of the crime scene. It was found to extend for about 12 kilometres, terminating at an old bore and cattle yards.

[29] The witness Ms Laracy, an accountant, gave evidence to the effect that she had an appointment with Peter Falconio in Alice Springs at 10 am on 14 July 2001. At that time she gave him certain advice concerning his taxation affairs.

[30] Evidence was led before the jury that the Camel Cup race meeting was held in Alice Springs on 14 July 2001 and that the Camel Cup race itself was held commencing at about 2:30 pm.

- [31] Several witnesses gave evidence that two persons answering the general description of Peter Falconio and Joanne Lees came to the Aileron roadhouse about 132 kilometres north of Alice Springs and were served with toasted sandwiches between 3:30 and 4:30 pm on 14 July 2001. An orange coloured Kombi van was seen to be parked outside. At trial an issue arose as to whether the persons seen were in fact Peter Falconio and Joanne Lees or whether they had ever stopped at Aileron.
- [32] Mr Millar had accompanied the police back to the crime scene. Shortly after 7 am on 15 July 2001 police officers walked south along the Stuart Highway from about the location where Ms Lees had been picked up by Mr Millar. About a kilometre south of that location one of the officers walking on the west side of the Highway observed the top of a van in the tree line about 104 metres, or a little further, off the road. On examination this was found to be an orange Kombi van that appeared to be unoccupied.
- [33] When the police officers returned to the Highway in that general location they observed a stain on the road with dirt and rubble near it. This appears to have been the site of the dirt pyramid previously referred to. The area was cordoned off. The Kombi van was forensically examined *in situ* and subsequently removed by tow truck that evening and taken to Alice Springs, where it was secured in the forensic building.
- [34] Police crime scene examiners observed and recorded vehicle track marks leading from the general area of the stain on the road to the location of the

Kombi van where it was found in the scrub. No keys were found in the ignition of the Kombi or on searching the area, even using a metal detector. Some keys were later found in the Kombi under other items.

[35] On 16 July 2001 a lip balm container lid was found in the scrub near a tree or bush about 63 metres south of the bloodstained area. There was an area of flattened grass near it. On 15 October 2001 a lip balm tube and two pieces of black tape were located under the tree or bush in question. Subsequent chemical analysis indicated that the residue of the contents of the tube and cap were identical with a greasy residue found on the cable ties removed from Ms Lees.

[36] Forensic examination revealed that the segments of tape recovered from the person of Ms Lees, in the area where the lip balm container was found and on the manacles were of various types and configurations. These were all products readily available at retail outlets and similar to rolls of tape later found in various locations said to have been occupied by the appellant.

[37] Forensic pathology evidence indicated that it could well be the situation that, dependent on the nature of the wound inflicted and its location, there might not be a sound made by the victim of a small calibre gunshot after receiving a fatal wound. It was also possible that there would be no external extrusion of brain or other tissue and relatively limited blood loss.

[38] A substantial volume of expert evidence was led before the jury concerning forensic examinations made of the Kombi van and the crime scene and, in

particular, of the presence of blood and other material from which DNA could be extracted and profiled. In summary, this evidence was to the following effect:

- (a) No evidence of human blood was found on or in the Kombi van;
- (b) a Ventolin inhaler said to have been used by Mr Falconio to relieve asthma symptoms was retrieved from the van and a DNA profile obtained from it;
- (c) the validity of such profile, as being that of Mr Falconio, was verified by reference to DNA profiles obtained from specimens taken from his father and brother;
- (d) DNA profiles were also obtained from specimens taken from Ms Lees, and the witnesses Messrs Adams and Millar;
- (e) when sprayed with luminol at night, a number of locations on the road and ground at the crime scene gave a positive presumptive result suggesting the presence of blood;
- (f) these included a large pool of apparent blood staining on the bitumen near the edge of the road that had been covered with dirt and loose stones and measured about 60 centimetres by 40 centimetres, two smaller areas to the south of the main stain (that could, possibly, have been comprised of material scattered

from the main area of staining) and some "dotting" to the west of the main stain;

- (g) there was no presumptive evidence of blood staining in the location in which the Kombi van was eventually found;
- (h) swabs or other samples were taken from the steering wheel, gear stick and front seats of the Kombi van, as well as other items found in that vehicle;
- (i) forensic tests were carried out on clothing worn by Ms Lees on the night in question and on the manacles cut from her hands;
- (j) the main stain on the bitumen and several other samples taken from areas adjacent to it were found to be human blood, the DNA of which was identical in profile to that of Mr Falconio;
- (k) initial testing by a forensic scientist based in the Northern Territory revealed the presence of material bearing DNA profiles identical with those of Ms Lees and the witness Mr Millar on the ties and wrist bands of the manacles and the presence of material bearing a DNA profile identical to that of Ms Lees on samples of tape ties;
- (l) tests of what appeared to be a series of blood stains in locations on the back of the T-shirt that had been worn by Ms Lees

yielded positive DNA profiles identical with that of the appellant;

- (m) a forensic examination of the swab from the gear knob of the Kombi van produced a partial DNA profile that, inter alia, did not exclude the appellant. This material was sent to an expert scientist in the United Kingdom and subjected to a specialised technique known as Low Copy Number technique with a view to obtaining additional results. The evidence concerning that technique was the subject of a significant amount of debate and contention at trial. However, it was the firm evidence of the United Kingdom expert that the swab of the gear knob revealed a mixed DNA profile that did not exclude the appellant as a major donor. The effect of the expert evidence was that the chance of a second unrelated person producing the partial DNA profile obtained from the swab that matched that of the appellant was less than one in 13,000;
- (n) the use of a similar technique in relation to the swab of the steering wheel of the Kombi van indicated the presence of DNA that had originated from at least three people. Individual major or minor components could not be identified, but Mr Falconio, Ms Lees and the appellant could not be excluded as contributors;

(o) the United Kingdom expert witness further examined the cable tie restraints that had been applied to Ms Lees and in particular a specific individual loop of them. He took a sample from the adhesive surface of the innermost layer of tape that had been applied around the inside of the loop in question. This was an adhesive surface that was actually against the inside of the cable tie. The sample gave mixed DNA profile results that indicated that there had been two contributors. The expert evidence was to the effect that the minor bands in the profile also exist in the profiles of both Ms Lees and Mr Falconio. However, the major component was a substantial profile that was not entirely complete. That profile matched the relevant segments of the appellant's DNA profile.

[39] Widespread searches of relevant areas of country at and about the crime scene and even further afield failed to reveal any trace of Mr Falconio or his body and nothing has been heard of him since, save for one possible sighting of him subsequent to the events in question - the validity of which was not verified. Similarly, those searching failed to find any weapon or other relevant metal object.

[40] A very considerable volume of additional circumstantial evidence was placed before the jury including, but not limited to, evidence as to the movements or asserted movements of the accused at relevant times, a Land Cruiser utility with canopy owned and driven by him, his dog, his asserted

ownership of and practice of carrying firearms (and particularly hand guns) in his vehicle and various other aspects. It is unnecessary to traverse this in detail, save to the extent that it specifically arises in the context of the grounds of appeal relied upon.

## **A consideration of the grounds of appeal**

### **Ground 1 – Identification evidence (appeal as of right)**

[41] The first ground of appeal asserts that the learned trial Judge erred in admitting evidence of Ms Lees purporting to identify the appellant and his dog because, it is said, in neither case was the evidence spontaneous or reliable and it was tainted in all the circumstances or, alternatively, its probative value was outweighed by its unfair prejudice to the appellant. What is in issue is the refusal of the learned trial Judge to exercise his discretion to exclude the evidence of the Internet, photo board and dock identification of the accused by Ms Lees and certain of her evidence concerning his dog. In essence, this ground seeks to impugn the validity of the reasoning of the learned trial Judge as expressed in written reasons for decision ultimately published by him on 15 December 2005 (*The Queen v Murdoch (No 1)* [2005] NTSC 75).

[42] This Court was informed by counsel for the respondent that the learned trial Judge gave a series of rulings on these and a number of other topics prior to trial on the express footing that they were liable to review as the trial proceeded, dependent on how the relevant evidence actually developed. The

various written reasons for the rulings were published in terms that reflect such a situation.

[43] Evidence was given at trial by Ms Lees, over the objection of counsel for the accused, concerning four important aspects going to the identification of the appellant as her assailant on the night in question. These have been referred to as the internet identification, the photo board identification, the dock identification, and the dog identification respectively. It is convenient to consider the relevant issues under those titles.

[44] In addressing these matters it is to be noted that the Crown case against the appellant by no means rested entirely or substantially upon the impugned evidence of Ms Lees. That evidence was but some of the evidence going to the identity of the offender, which included a substantial body of material of a circumstantial nature including, for example, the DNA evidence said to link the appellant to the scene of the events at Barrow Creek.

[45] By way of introduction to the topics above referred to, it should be noted that, commencing at some time on 15 July 2001, Ms Lees worked with a police artist to produce a so-called "Comfit" representation of the facial appearance of her assailant, whilst her memory was still fresh. The police were anxious to circulate such a likeness as soon as possible.

[46] Such a representation was produced, although Ms Lees said in evidence that she was not entirely happy with the final result because, in particular, "the hair wasn't quite right". She stated that she could not find a hair

configuration in the Comfit book that was entirely accurate. She also gave an oral description of her assailant to the police. That description is recorded in Exhibit P 274.

### **The Internet identification**

[47] Ms Lees returned home to the United Kingdom at about the end of 2001.

[48] In October 2002 she was working in Sicily. She had become aware that, at some point, a suspect was in police custody in Australia.

[49] A friend drew her attention to the existence of a BBC news site on the Internet. As the learned trial Judge expressed the situation in his reasons:

"In her evidence she said she was receiving lots of messages from the media and her friends and she decided to have a look on the Internet to see what people were writing. In her statement of 18 November 2002, Ms Lees stated that a friend of hers had told her that a really nice article about her had been written".

Later in his reasons the learned trial Judge went on to say:

"The decision to admit the evidence of the identification of the Internet photograph was made before Ms Lees gave evidence in the trial and on the basis of the material and circumstances discussed earlier in these reasons. At trial, Ms Lees said that she looked at the website because a friend had said that the media were writing positive things about her. She was in Sicily and wanted to know what she could expect when she returned to the United Kingdom. She accessed the particular web site looking for information about herself. She was not looking for information about a suspect or the accused. Ms Lees said that she did not expect to see a photograph of a suspect or a man who might be the person who attacked her".

[50] The learned trial Judge concluded that Ms Lees accessed the Internet on 10 or 11 October 2002, at a time not long after she had been advised by the police by telephone that they had a suspect. He accepted that, at the time, she did not know that there would be any images with the article. In the course of his reasons the learned trial Judge commented:

"In that context Ms Lees stated:

‘I saw an article and a square picture of a male I recognised immediately as the same male who'd attacked me. The male was completely clean shaven in the picture and he had very short hair. I could tell that it was the same male even though he'd completely changed his appearance. I didn't know there was going to be a picture there to look at’."

[51] The learned trial Judge also said in his reasons:

"The picture of the accused in the article is approximately four centimetres in width by four and a half centimetres in height. It depicts a slightly angled frontal view of the accused's clean shaven face. The accused's hair is very short.

In the description given on 15 July 2001 to the police, Ms Lees described the offender's hair as ‘grey, scruffy, straggly hair sticking out from under his cap’. She said he had a grey moustache.

The Internet article also contained a photograph of the brothers of the deceased and of the deceased together with Ms Lees. The article included the following statements:

‘The family of murdered backpacker Peter Falconio say they are hopeful a DNA breakthrough in the case will bring them justice.

Peter's brothers, Nicholas and Paul Falconio, say they were ‘very positive’ about Australian police's decision to name Bradley John Murdoch as a prime suspect in the case.

DNA tests linked Mr Murdoch, 44, to the crime through a blood sample taken from the scene.

.....

### *Arrest warrant*

Bradley Murdoch has so far used his right to silence and refused to answer police questions at the Adelaide gaol where he is being held on separate rape and abduction charges.

Police are also examining items taken from the engineer's home.

Assistant Commissioner John Daulby said police were 'unable to exclude him' from their investigations and will be seeking a warrant for his arrest over the murder.

... ..

Mr Daulby said police would not rely on DNA evidence and that they still wanted to know more about the activities of Mr Murdoch around the time of Mr Falconio's disappearance [under the same photograph of the accused appeared the words 'Police will not rely on DNA to prosecute Mr Murdoch'].

... ..

Mr Murdoch is currently being held in the state of South Australia in connection with the abduction and rape of a 12-year-old girl and her mother.

Officials there are still to decide whether to allow a murder trial in the Northern Territory jurisdiction to go ahead'.

Ms Lees was subsequently shown a hard copy of the particular Internet article. In a statement of 29 November 2002 Ms Lees said she was "pretty sure" that it was the same article and also "pretty sure" it was the same photograph, although she could not be one hundred per cent certain. She added:

‘What I am sure of is that this is the same person who attacked me and Peter on 14 July 2001.

As I said in my statement from yesterday, I would recognise this man no matter what changes he might make to his appearance.

I didn't access the Internet with the intention of looking at a picture of the offender, I simply wished to read an article that a friend of mine has said was positive about me (for a change for the media!).’”

[52] The learned trial Judge noted in his reasons that, on 22 October 2002, the accused had declined to participate in an identification parade.

[53] Having referred to various relevant authorities on the topic and recognised the fact that these emphasised the dangers associated with confronting a victim with a person unknown to the victim in circumstances which convey to the victim the fact that the person is a suspect, the learned trial Judge expressed the view that the circumstances before him were significantly different from those that existed in *Hallam & Karger v R* (1985) 42 SASR 126 and like cases.

He said:

"..... Although Ms Lees was aware that the police had a suspect who had been arrested in South Australia on other matters, when she accessed the Internet Ms Lees was not expecting to see an article about the person who had been arrested. She thought she was about to read an article which was complimentary about her. She was unaware that there would be any images with the article. Upon seeing the picture, Ms Lees immediately recognised the person depicted as the person who had attacked her.

Notwithstanding the content of the article accompanying the image of the accused, the identification by Ms Lees was more in the nature of a spontaneous recognition of the person depicted in the photograph in circumstances where Ms Lees was not expecting to see an image of the suspect".

[54] Having noted the decision of the Full Court of Victoria in *R v Williams* [1983] 2 VR 579 and the judgment of Kirby J in *Festa v The Queen* (2001) 208 CLR 593, the learned trial Judge said:

"Although the area was dark and the events traumatic, Ms Lees saw the offender from a very close position under light and for ample time to gain a clear impression of the offender's features. While the circumstances of identification of the Internet photograph were less than ideal, the evidence is capable of significant probative value. It was a spontaneous recognition of the person in the photograph. Whether that spontaneous recognition was reliable or whether the reliability was adversely affected by the circumstances, including the content of the article, are questions of weight for the jury".

[55] The learned trial Judge was of the opinion that, accepting the situation to be as described by him, the potential for unfair prejudice did not outweigh the probative value of the evidence. He considered that it was not unfair to admit the evidence and declined to exclude it in the exercise of his discretion.

[56] He emphasised that his initial view in that regard had not changed after having heard the evidence of Ms Lees at trial. He recalled that, having been asked what she thought when she saw the picture, Ms Lees had replied "That, that's the man". He drew attention to the fact that, during cross-examination when it had been put to Ms Lees that she was mistaken in her

identification of the image of the accused on the Internet as the person who attacked her at Barrow Creek, she gave the following evidence:

His Honour:

"Q. Do you agree with that proposition, you were wrong when you picked the man on the Internet?"

A. I wasn't looking for the man on the Internet. I didn't - the picture just came up, I just glanced at it, I really - I recognised him as being my attacker."

Mr Algie:

"Q. But the article at which you were looking on the Internet concerned the man who had been identified as a suspect for Barrow Creek, didn't it?"

A. I can't really remember what the article said now. At the end of the day I was there, I know what happened, I don't need to read it from the press.

Q. Did the article and the person being identified as a suspect influence you at all in your identification of that person?"

A. No, I'd recognise him anywhere".

[57] Additionally, in the course of Ms Lees' cross-examination the following exchanges occurred:

"As you would appreciate I am here to represent Mr Murdoch. You obviously became aware through conversations with police that Mr Murdoch became a suspect, I think, late in 2002. And indeed you looked at the Internet you've told us. Is that right?---I didn't look through the Internet. I looked at one particular web site. I wasn't looking for the defendant. I was just looking for information about myself.

But the point I am simply making is that the reason you looked at that particular article or website on the Internet was because you'd been made aware, I think, by Northern Territory police that a suspect had been identified?---No, the reason why I looked at that web site at that time was because a friend had said, 'The media are writing some positive things about you', and the fact that I was in Sicily, away from the UK, I just wanted to know what I could expect when I returned to the UK."

[58] There was no evidence at trial as to the extent to which, if at all, Ms Lees had read the text of the Internet website prior to seeing the appellant's photograph, although the obvious inference is that the viewing of the image occurred very rapidly after the website had been brought up on screen. Neither the Crown nor the defence pursued that aspect with her.

[59] Further, it was not established whether the photograph of the appellant appeared on the website on the same screen as the text reproduced in the hard copy material or whether it was on a second screen, as appears on the hard copy print out of the article. Nor was it ever established that the pagination of the print out necessarily followed corresponding screen sequences as they appeared on the website.

[60] These matters are not without significance. Mr Wild QC, for the respondent, was prepared to concede that it was a fair inference that, by the time that she viewed the appellant's image, Ms Lees would have been aware that the image in the article was that of a person described as being a suspect.

- [61] The core complaint expressed by the appellant in his relevant ground of appeal was to the effect that the categorisation by the learned trial Judge of the identification by Ms Lees as being spontaneous was not open on the evidence.
- [62] It was asserted that there was a real risk that the conversation with the police concerning a suspect and the material set out on the Internet with the photograph detracted from the likelihood that the identification in fact was spontaneous and, accordingly, the evidence of it should have been excluded in the exercise by the learned trial Judge of his discretion.
- [63] Mr Barker QC, for the appellant, invited attention to a series of authorities touching on the admissibility of identification evidence. It is unnecessary to retrace all that ground in detail.
- [64] A convenient commencement point is the judgment of King CJ in *Hallam and Karger* (1985) 42 SASR 126. The learned Chief Justice said that, if a trial Judge admits identification evidence and the accused is convicted, the true question for the Court of Criminal Appeal is whether, having regard to the whole of the evidence, it would be so unsafe or unsatisfactory to allow the conviction to stand that to do so would amount to a miscarriage of justice.
- [65] The courts have long adopted the attitude that, in cases in which a witness has not become familiar with the appearance of an accused person by reason of previous knowledge or association and has not seen the accused since the

events in question, evidence of identification will not normally be admitted where the purported identification has occurred in circumstances in which the accused is specifically presented to the witness as a person who is suspected of having committed the relevant crime.

[66] As was said in *Davies and Cody v The King* (1937) 57 CLR 170 and by Gibbs CJ in *Alexander v The Queen* (1981) 145 CLR 395, there is the danger that the witness will too readily come to believe, without any true recollection, that the person charged is the person whom the witness had previously seen, particularly if the memory of the witness has become dim and there is some resemblance between the offender and the person identified.

[67] It was for that reason that evidence of identification in *Hallam and Karger* was held wrongly admitted where the victim of a robbery was called by police to a shopping centre where they had detained two men as suspects and the victim was presented with them and merely asked whether they were his assailants.

[68] It is for the same reason that dock identifications are not usually permitted, other than as confirmatory of an acceptable prior out-of-court identification: *Jamal v R* (2000) 182 ALR 307, *R v Gorham* (1997) 68 SASR 505).

[69] Nevertheless, each case must be examined in light of its own circumstances. There may well be situations in which the context will indicate that the person identified is suspected of some offence but nevertheless it is proper

to admit the identification evidence, for example if it is apparent that the problem referred to in *Davies and Cody v The King* and *Alexander v The Queen* does not exist.

[70] The decision of the Full Court of Victoria in *R v Williams* [1983] 2 VR 579 focused on just such a situation. The accused in that case had been charged with a bank robbery. The witness gave evidence that, whilst waiting alone and outside the Court to give her evidence, she saw the accused taken into Court in handcuffs. She had not been asked to watch out for him or anyone else. She instantly recognised him as a person who had been sitting in a vehicle outside the bank shortly prior to the robbery and wearing a Collingwood beanie of the type that had been worn by the bank robber.

[71] That evidence was objected to as being of no greater value than an impermissible *ab initio* dock identification.

[72] The Full Court held that the evidence was of a quite different qualitative nature to the type of evidence criticised in *Davies and Cody v The King*. As Gobbo J said, it was not a situation in which the accused had been presented to the witness. It was a wholly spontaneous identification by the witness, who had simply been sitting alone, not looking for anyone in particular nor responding to any invitation from the police or anyone else to look for a suspect. It was, he said, true that her memory had apparently been revived when she saw the accused being conducted towards the Court in handcuffs,

but that was a matter for weight that the jury was properly and repeatedly urged to take into account.

[73] As the learned trial Judge pointed out in his *voir dire* reasons, the validity of such reasoning was accepted by Kirby J. in the course of his judgment in *Festa v The Queen* (2001) 208 CLR 593 at 640.

[74] As has been said, the evidence in the present case is silent as to the format of the article as it actually appeared on the website and as to the extent to which, if at all, Ms Lees absorbed any of the text prior to seeing the appellant's photograph. Be that as it may, the critically important aspects for present purposes are these:

- (a) In no relevant sense was the website photograph of the appellant presented to Ms Lees by the police for identification purposes. She accessed the website to view what a friend had told her was a complimentary article about her, with no expectation of seeing any such photograph;
- (b) Even if it be accepted that she had read some of the relevant introductory text, she was unequivocal in her assertion that she spontaneously recognised the person depicted in the photograph. She said she would recognise him anywhere and had not been influenced by anything that she might have read;

(c) The learned trial Judge was of the opinion on the whole of the material before him and confirmed by Ms Lees' actual evidence at trial that, having regard to her opportunities to observe her assailant at Barrow Creek and her evidence as to viewing the website, what occurred *was* in the nature of spontaneous recognition, in circumstances in which Ms Lees was not expecting to see an image of the appellant. By inference his reasons indicate an acceptance of the fact that her reaction to the photograph was the product of her clear memory of the events of the night in question and was not substantially affected or tainted by any knowledge that she may have possessed that the appellant was a suspect in relation to those events.

[75] The ultimate finding so made by the learned trial Judge was not an inference drawn from established facts. It was a specific acceptance of a fact which was confirmed by the testimony given at trial. His conclusion in that regard was the product of his assessment of the credibility and reliability of Ms Lees, an aspect as to which this Court is in that permanent position of disadvantage adverted to by Lord Sumner in *Hontestroom (Owners) v Sagaporack (Owners)* [1927] AC 37 at 40, re-affirmed by their Lordships in the well known case of *Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243 and accepted by the High Court in *Warren v Coombs and Another* (1979) 142 CLR 531. The reasoning in those cases is of general

application, notwithstanding that they were decisions in the civil jurisdiction.

[76] Of course, it is trite to say that it remains the responsibility of this Court to conduct its own independent examination of the evidence but, having done so, there is simply no compelling reason to reject the specific conclusion of the learned trial Judge. It was fairly open, given an acceptance by the learned trial Judge of Ms Lees as a witness of credibility and truth.

[77] The learned trial Judge clearly recognised that any knowledge that Ms Lees may have had, at the time of spontaneous recognition, of the fact that the appellant was a suspect in relation to the events at Barrow Creek was a less than ideal situation. However, he considered that, given ultimate appropriate directions and warnings, whether the spontaneous recognition was reliable or whether it was adversely affected by the circumstances, including any content of the article read by Ms Lees, were essentially questions of weight for the jury.

[78] That was a view to which he was properly entitled to come. Having regard to what he accepted was the spontaneity of the recognition, the potential for unfair prejudice did not outweigh the considerable probative value of the evidence. The learned trial Judge was justified in declining to exclude it in the exercise of his discretion.

[79] Applying the test enunciated in *Alexander*, this was not a situation in which the learned trial Judge ought necessarily have been compelled to the

conclusion that the evidence proposed to be led was of little weight, as well as grossly prejudicial to the accused person. Moreover, the directions that he gave the jury in relation to the evidence in question were appropriate to the situation and would have ensured that the jury reviewed and weighed the material before them in a correct and balanced fashion.

[80] It was submitted on behalf of the appellant that, in concept, the situation was akin to and no different from a situation in which a police officer had approached Ms Lees, provided her with the information contained in the web site article, produced the relevant photographic image and then posed to her the question "Is that the man you saw on 14 July 2001?".

[81] We disagree. In *Williams*, the subject person was seen to be a person obviously in custody being taken into the court room. The present appellant was known to be in custody and under suspicion of the Barrow Creek offences. However, the crucial common feature of *Williams* and the present case was the sudden, unexpected and incidental appearance of the person/image in the focus of the witness and the unsolicited and spontaneous reaction of that witness to what was observed.

### **The photo-board identification**

[82] Ms Lees testified that, on 18 November 2002, Australian police officers came to see her in Sussex in the presence of a local police officer. What occurred on that occasion was recorded on video tape. That tape was played at trial and tendered as exhibit P 47.

[83] The police officers requested Ms Lees to examine a photo-board containing 12 photographs (exhibit P 48). As the learned trial Judge expressed the situation in his summing up, those photographs were of 12 different men with varying shapes of faces and full beards and moustaches.

[84] One of the photographs was that of the appellant, albeit that the photograph in question presented him quite differently from what had been seen on the Internet. To adopt the description of the learned trial Judge in his reasons:

"The photographs under consideration are significantly different. Notwithstanding an underlying similarity, the direct front on view of the photograph on the photo-board is different from the slightly angled view on the Internet. The expression that appears in the posed photograph on the photo-board is quite different from the expression in the Internet photograph which appears to have been taken while the accused was walking along a street. There is a small difference in the length of the hair. The accused is clean shaven in the Internet photograph, but possesses a full beard and moustache in the posed photograph on the photo-board".

[85] As was depicted in the video film exhibit P 47, Ms Lees indicated photograph 10 as being that of her assailant. It is not in dispute that photograph 10 was a photograph of the appellant. The learned trial Judge described what was revealed by the video tape in these terms:

"Ms Lees was instructed to take her time. After a short delay during which it was apparent that Ms Lees was examining the photographs, Ms Lees indicated photograph number 10 and said "I think it's number 10". Ms Lees was asked what she meant by the words "I think". Her attention was drawn to possible meanings ranging from "I am very uncertain" to "I am very positive", and she was asked what her state of mind was when she identified photograph number 10. Ms Lees replied "I was very positive".

[86] There was no evidence to suggest that, at the time at which Ms Lees was requested to look at the photo-board, the police were aware of the existence of the Internet web site or that she had already seen the appellant's photograph on it.

[87] In his reasons, the learned trial Judge observed that numerous authorities had recognised the dangers associated with identification that occurs after a witness has seen a photograph of a person unknown to that witness, but known to the witness as the accused or a suspect. He accepted that this danger applies regardless of whether the identification that follows seeing the photograph is a process of identification by way of photo-board, identification parade, or dock identification.

[88] He referred to the phenomenon commonly referred to as the "displacement" effect and the potential problem of the so-called "rogues gallery" effect, because the photograph or group of photographs might convey to the jury that the accused has a criminal history. He further recognised the inherent deficiencies of photo-board identification, regardless of whether or not the witness has previously seen a photograph of the suspect or the accused.

[89] In summing up to the jury, the learned trial Judge carefully drew its attention to these problems and stressed the need to give due consideration to them. Having drawn attention to the differing presentations on the Internet site and in exhibit P48, he commented:

"What weight you give the evidence of Ms Lees when she identified this photograph as the person who attacked her is a matter for you. However, as I have said, you must bear in mind this was only one month after Ms Lees had identified the photograph on the Internet. You will quickly appreciate that you cannot place too much weight on the identification of the photograph in the photo-board because it is obviously a photograph of the same man whose photograph appeared on the Internet. In those circumstances it is hardly surprising that Ms Lees would pick the photograph because you would still expect her to have in mind the image of the photograph she saw on the Internet. However, the identification of photograph 10 is a matter for you to bear in mind and to give such weight as you see fit".

[90] As appears from his reasons, the learned trial Judge was of the opinion that the so-called "rogues gallery" phenomenon was not a significant issue in the present case, particularly having regard to the careful preliminary directions that he had given at the outset of his summing up. He pointed out that, quite apart from issues related to photo-board identification, it would be necessary to give appropriate directions regarding evidence touching on the use of amphetamines and the selling of cannabis to ensure that the jury made proper use of likely evidence or information dealing with the past activities of the appellant and did not engage in an impermissible line of reasoning.

[91] He expressed the view that the admission into evidence of the photograph on the photo-board added nothing in terms of the potential prejudice and the directions that ought to be given. Additionally, from the perspective of the jury, the involvement of the accused in illegal activities relating to drugs and the previous criminal proceedings in South Australia provided potential sources for the photograph on the photo-board, as the jury would well appreciate.

[92] The learned trial Judge was of the opinion that there was a further factor of considerable relevance in relation to this aspect. He pointed out that the appellant was charged with a particularly serious crime and that the circumstances alleged by the Crown and the evidence at committal had attracted very extensive publicity and speculation. As he said, the jury would need to be given strong directions as to their duty to put aside anything that they read or heard and to determine the appellant's guilt only on the evidence given in court. He commented that, if the jury speculate that the appellant might have a criminal history that led to him being photographed, such speculation would pale into insignificance in the particular circumstances under consideration. There was simply no reason to doubt that the jury would heed the directions to put aside speculation and anything heard or read outside the Court.

[93] So it was that the learned trial Judge said that he was satisfied that the probative value of the evidence of the photo-board identification far outweighed any prejudicial effect. He did not consider the admission of the evidence unfair and declined to exclude it in the exercise of his discretion. It was his opinion that the photo board identification was an exercise that was, in reality, different from that carried out in Sicily. It had probative value in its own right.

[94] It was submitted that there was a real risk that Ms Lees' identification was of little weight, given that she had already seen a photograph of the accused in circumstances where she was aware there was information that there was

a DNA match. It was argued that there were real dangers in allowing the evidence to be led, notwithstanding the giving of the usual warnings.

[95] It may be that the learned trial Judge overstated the situation when he said to the jury that the photograph on the photo board was “obviously” a photograph of the same man whose photograph appeared on the Internet web site.

[96] A perusal of the relevant photo board reveals that it was a good production of its type. All photographs were of men with varying types of full beard and moustache and having a range of hair lengths and styles. Most, if not all, exhibited at least superficial similarities in presentation to one another and all were full frontal facial presentations.

[97] The image of the appellant did not stand out in the photographic line-up and his presentation in it was markedly different, in terms both of angle of presentation and facial appearance, from the Internet web site image. In the latter, the angle and facial expression differ, he has no moustache or beard and his hair seems quite closely cropped.

[98] It is by no means apparent that, merely by reason of having seen the web site photograph some weeks earlier, Ms Lees’ attention would necessarily have been drawn to the photograph of the appellant on the photo board. No doubt, with the benefit of hindsight, and by placing the two photographs together, it may become obvious on a study of them (particularly when

looking at the area of the eyes and nose, coupled with the ears) that they were images of the same person.

[99] Bearing these aspects in mind, the photo board identification was of substantial probative value.

[100] For the reasons articulated by the learned trial judge, the so-called "rogues gallery" effect was not really an issue and, such are the differences between the two photographs, that any danger arising from the displacement effect was, in this case, minimal.

[101] The fact that Ms Lees was, without equivocation, able to identify the man depicted in photograph 10 as her assailant after the lapse of some weeks and in the context of a quite different form of presentation was important as demonstrating a degree of consistency on her part that would otherwise not be relevant or significant, had the image presentation been similar to that seen on the web site.

[102] It is to be observed that her oral description of her assailant as recorded in Exhibit P 274 was consistent with the appearance of the appellant in both the Internet photograph and photograph 10.

[103] As the learned trial Judge said to the jury it was, at the end of the day, a matter of what weight they were prepared to accord the evidence, given the careful directions and warning that he gave them.

[104] There is no substance to the appellant's complaint concerning the admission of this evidence.

### **Dock identification**

[105] At trial it was apparent to the jury that Ms Lees had made a dock identification of the appellant during the committal proceedings. The learned trial Judge further permitted her to make a dock identification in giving evidence before the jury.

[106] In his reasons he stressed that, against the background of two photographic identifications, the dock identification of the accused was essentially a formality. He then proceeded to demonstrate, by reference to a series of published authorities, that such a process was, in the circumstances, both proper and desirable.

[107] It was the contention of the appellant that, because the Internet and photo-board identification evidence ought to have been excluded, so also the dock identification should not have been permitted.

[108] It was also contended that, even if the Internet and photo board identification evidence was properly admitted, the dock identification nevertheless remained inappropriate. It was submitted that there is no principle of completeness that requires a Criminal Court Judge to permit an empty ritual which, of its very nature, was unfair to the accused.

[109] In the course of his reasons the learned trial Judge reviewed a substantial number of relevant authorities bearing on this aspect. It is unnecessary to retrace his steps.

[110] It will suffice, for present purposes, to say that the dicta in *R v Britten* (1988) 51 SASR 567, *R v Gorham* (1997) 68 SASR 505 and *R v Clark and Others* (1996) 91 A Crim R 46 readily demonstrate the rationale for allowing a dock identification in such circumstances. The process is, in reality, no more than identifying in the dock the person already identified in the photographs, so as to confirm that the person previously identified is, in fact, the person before the Court. There is ample authority to support the approach adopted by the learned trial Judge.

### **Dog identification**

[111] There were two dogs seen by Ms Lees on the night of 14/15 July 2001. The first was seen by her in the assailant's vehicle at the crime scene. The second was a blue heeler dog named Tex, subsequently seen by her at the Barrow Creek Hotel.

[112] The evidence before the jury was to the effect that the appellant travelled across Australia on a regular basis and was always accompanied by his dog, Jack. The dog regularly travelled in the front seat of the vehicle in the position in which Ms Lees saw a dog on the night, although sometimes it travelled in the rear of the vehicle or on the floor.

[113] The Crown proposed to lead evidence from Ms Lees to the effect that, when shown a photograph of the appellant's dog, she described it as "very similar to the dog the man had".

[114] This proposal was objected to by counsel for the appellant. He argued that, by reason of preceding events, the proposed evidence was demonstrably unreliable, tainted, and lacking in probative value. Any probative value was outweighed by unfair prejudice to the appellant.

[115] In statements made by her shortly after the events at Barrow Creek Ms Lees described the dog in the offender's vehicle as "medium-size, brown and white, short-haired". In a statement made on 16 July 2001, she described the dog as being "medium-size, it's a blue heeler, brown and white, short haired".

[116] In the course of his reasons the learned trial Judge said:

"... .. after Ms Lees waved down a truck, the driver took her to Barrow Creek. Ms Catherine Curley was employed at the Barrow Creek roadhouse. She was woken at about 1:50 am on Sunday 15 July 2001 by the truck driver. Ms Curley made her way to the bar of the roadhouse and saw Ms Lees. Later she attended to comforting Ms Lees when Ms Lees became upset. While Ms Lees was at the roadhouse she saw Ms Curley's dog.

.....

In her evidence at the preliminary hearing, Ms Lees explained that she had not seen a Blue Heeler before the events. She then gave the following evidence which explains how she could refer to the dog as a Blue Heeler:

‘Q. How do you know it was a Blue Heeler?’

A. Because I clearly saw the dog and later when I was taken to Barrow Creek I saw a dog almost identical.

Q. We’ll come to that when we come to Barrow Creek.

A. Yep.

Q. How big was he?

A. I was - I’d call it a medium-size dog.

Q. Can you tell us what colour he was?

A. It was brown - brown and white.’

Later in her examination Ms Lees said there was a discussion between her and the young woman about the dog:

‘Q. What was said?’

A. I asked the girl who owned the dog what breed of dog that was because I recognised it is the same breed of dog as the one that the man had.

Q. What was the response?’

A. She told me it was a Blue Heeler dog.’

According to the statement of Ms Curley dated 17 July 2001, she accompanied Ms Lees to the toilet. She described the events as follows:

‘We walked back out and into the laundry and my puppy came running in. I think I asked her if the dog had looked like my dog, and she said it did sort of but it was black and brown.’

In the statement dated 17 April 2004, Ms Curley said that she and Ms Lees had been discussing the fact that the offender had a dog. She said that when she and Ms Lees walked through the laundry her dog 'bounded up to us'. The statement continues:

'I/S: Did he look like this dog here? (Pointing to Tex)

S/S: Yeah, he did look similar.'

The dog Tex was born in November 2000. Ms Curley said that in July 2001 he was about three quarters the size he would become as a full-grown dog. Two photographs of Tex are attached to Ms Curley's statement of 17 April 2004 which shows him fully grown. According to Ms Curley the photographs show the same colouring as at July 2001.

Tex is a black and white Blue Heeler. He has a pointed nose and white/grey colouring extending from around his nose and mouth up to the forehead. There are two areas of black around each eye extending back over the cheek bones. The remainder of the body is a dappled black and white/grey colouring."

[117] The learned trial Judge observed that the case for the Crown was that the appellant's dog Jack was a Dalmatian/Blue Heeler cross. A photograph of Jack reveals that the dog was predominantly white with black or dark brown spots. Its facial appearance indicated that the dog was not a pure bred Dalmatian. It was plainly a different breed from the dog seen by Ms Lees at the Barrow Creek Hotel.

[118] On 18 November 2002, some 14 months after the event, Ms Lees was shown a book described as a "Dogalog", which contained photographs of 400 breeds of dogs. She was asked to select one which was like the dog she saw in the offender's vehicle. She settled on an Australian Cattle Dog as being

closest. Mr Barker QC submitted that, as at that time, the evidence of Ms Lees was exculpatory of the accused because the dog that she selected from the Dogalog was, in appearance, quite unlike the appellant's dog, Jack.

[119] Mr Wild QC for the respondent submitted this evidence was not exculpatory of the accused because it was obvious from Ms Lees' evidence that a major factor in her selection from the book was that it referred to a "blue heeler" and she thought that the height, size and width of the dog was appropriate. As appears from her cross-examination, she particularly focused on the text description of the dog, rather than any colouring in the photograph in the book and said that the general build and size were similar to that of Jack.

[120] On 12 May 2004, shortly before she was due to give evidence at the preliminary hearing, Ms Lees met with the Director of Public Prosecutions. During a conversation with the Director, Ms Lees described the offender's dog as having 'dark brown mixed fur - part white - quite chunky'. She was then shown a photograph of Tex and said she was 'not sure' if that was the dog she saw at the Barrow Creek hotel. Ms Lees was then told it was a photograph of Ms Curley's dog.

[121] Ms Lees told the Director that she knew that the dog in the cabin of the offender's vehicle was a Blue Heeler because she was shown a Blue Heeler at the Barrow Creek hotel and the dog in the vehicle was like the dog at the hotel.

[122] The learned trial Judge found that, following those exchanges, the Director showed Ms Lees a photograph of the appellant's dog. He said that, according to the affidavit of the instructing solicitor present at the conversation, Ms Lees was not told anything about the ownership of the dog. When shown the photograph of the appellant's dog Ms Lees said the 'body shape and the ears' were 'very similar' to the offender's dog and 'the build and the ears [are] similar'. It was after Ms Lees responded in that manner that she was told that the photograph was of a dog belonging to the accused.

[123] During her evidence at the committal, Ms Lees was shown the same photograph of the appellant's dog. She said 'It's very similar to the dog the man had'.

[124] Counsel for the accused objected to the admission of evidence that Ms Lees observed a photograph of the appellant's dog and described it as very similar to the dog in the offender's vehicle. Although Ms Lees was not initially told that it was a dog belonging to the appellant, counsel suggested she was likely to have inferred that fact at the time that she was asked to look at the photograph. Counsel also relied upon additional events that had previously occurred with respect to identifying the dog, to which it is now necessary to turn.

[125] When asked at the preliminary hearing about picking the dog from the book, Ms Lees gave the following evidence:

- ‘Q. What were the particular matters of similarity with that dog and the dog that you saw on the night?
- A. Its size, its width, its build, the shape of the dog's face and the ears of the dog.
- Q. What about the colouring?
- A. Not exact.
- Q. What do you saw (sic) about the colouring - what do you say about the colouring of the dog you saw?
- A. That it was dark brown and white.
- Q. Similar build though was it?
- A. Similar.
- Q. Just to explore that a bit further. When you say "brown and white", are you able to give us any proportions of colour?
- A. At least half and half.
- Q. And anything else about the configuration of the colouring?
- A. Patches of dark colour.’

[126] When it was put to Ms Lees in cross examination at the preliminary hearing that obviously she did not pick out a Dalmatian, Ms Lees responded:

‘I was going on the build of the dog, the shape of the dog's face, the height, the fur, the length of fur.’

[127] At trial counsel for the accused submitted that Ms Lees should not be permitted to give evidence that the appellant’s dog as depicted in the

photograph she was shown is similar in particular respects to the offender's dog. It was contended the evidence should have been restricted to the comparison with Ms Curley's dog and a selection of the cattle dog from the book.

[128] The learned trial Judge noted that the challenged evidence was not evidence of positive identification of the appellant's dog as the dog seen in the offender's vehicle. Nor was it evidence that the appellant's dog was of the same breed or possessed features that were identical to the offender's dog. At its highest it would be evidence that it was "very similar" in build, shape of face and ears.

[129] He concluded that the evidence had probative value as a piece of circumstantial evidence. He went on to observe:

"While the circumstances in which Ms Lees first saw the photograph of the accused's dog would have suggested to her that she was observing a photograph of the suspect's dog, against the background to which I have referred and in view of the response of Ms Lees, in my view this is not a case in which it is appropriate to exercise the discretion to exclude the evidence. Ms Lees' state of mind can be explored as can the differences between the three dogs about which Ms Lees will give evidence. Bearing in mind that the jury will hear of Ms Curley's dog and the cattle dog in the book, in my opinion it is appropriate for the jury to hear what Ms Lees says about the accused's dog.

I am satisfied that the risk of unfair prejudice is minimal. The jury will be able to compare the three photographs involved and draw their own conclusions. The circumstances in which Ms Lees saw the photographs will be before the jury. Any dangers or risks associated with the evidence can be readily explained and understood."

[130] In his reasons the learned trial Judge recorded that, when Ms Lees gave evidence before the jury, although counsel for the accused did not renew the objection to the admissibility of Ms Lees' evidence concerning the photo of the appellant's dog, he nevertheless reconsidered his ruling. He recorded that, shown the photograph of the appellant's dog, Ms Lees said that the dog depicted was very similar to the dog she saw at Barrow Creek. She said it looked like the dog that accompanied the offender. Asked about the similarities, Ms Lees identified size, ears, width of head, width of the dog and colouring.

[131] He pointed out that she said that, on the occasion she was first shown the photograph of the appellant's dog, she was also shown a photograph of the dog from Barrow Creek. She recognised the photograph of the dog from Barrow Creek and was told that the other dog was owned by the accused. She said the photographs were "just shown" to her by the Director of Public Prosecutions. Ms Lees was not asked about the precise sequence of what had occurred, either generally or with specific reference to the sequence described in the affidavit of the solicitor who was present during the discussion between the Director and Ms Lees.

[132] The learned trial Judge went on to stress that Ms Lees said that she was never asked to comment as to whether her knowledge that the dog in the photograph belonged to the appellant influenced her assessment of whether the dog in the photograph appeared to be similar to the dog in the four-wheel-drive. She was just presented with the two photographs and asked if

they looked similar. She agreed she has since been asked to say whether the dog she now knows belonged to the appellant is similar in appearance to the dog in the four-wheel-drive. Asked again whether her knowledge that the dog in the photograph belonged to the appellant influenced her assessment of whether the dog in the photograph was similar to the dog in the four-wheel-drive, Ms Lees answered:

“No, the knowledge, the fact that I knew it was the accused’s hasn't influenced my decision. Both dogs are clearly similar, the accused's dog and the dog at Barrow Creek.”

[133] The appellant's formulated ground of appeal recites that Ms Lees was shown two photographs by the Director of Public Prosecutions, one of a dog named Tex (of Blue Heeler appearance) she had seen at Barrow Creek and a second photograph of the appellant's dog Jack (of Dalmatian appearance). This was against a background where Ms Lees had pointed to Tex after her rescue as being similar. It further recites that, some time later when shown a "dogalogue (sic)", she picked out a Blue Heeler. The ground of appeal complains that, at the time of describing the appellant's dog as being "very similar to the dog that the man had", there was a real risk that this description was the product of suggestion in circumstances where her observations on the night were plainly in conflict. It is further complained that this evidence was more prejudicial than probative and should have been excluded in exercise of the discretion of the learned trial Judge.

[134] On the hearing of the appeal it was the submission of the appellant that the process of identification should have stopped when Ms Lees saw the “*dog photo-board*” in the form of the Dogalog and selected an Australian Cattle Dog. The Crown should not have been able to proceed as it did and show her the photograph of the appellant’s dog. It was submitted that to mistake either the dog, Tex, or the Australian Cattle Dog selected from the Dogalog for the appellant’s dog, Jack, “is just not believable”.

[135] There is some prima facie force in this submission when one looks at the photographs. The dog, Jack, is predominantly white with black or brown spotted markings. The other two dogs are darker and their markings could not be described as spotted.

[136] However, in her evidence before the jury, Ms Lees said that she saw similarities between Tex and the offender’s dog and those similarities were “colouring, width of the dog, breed of the dog, the head of the dog, quite a broad face, head, the ears”. She said the colouring was “pretty much as you see it in the photograph”. She was taken to the Dogalog book and, in particular, to an entry in relation to Dalmatians. She was asked whether she regarded that dog as one that she had seen on the night and she said she did not:

“Because I regard Dalmatians as friendly, floppy eared, always reminds me of the film 101 Dalmatians, and I don’t think of that as an Australian dog and the dog the man had that night was clearly an Australian dog, blue heeler breed that I’d never recognised before or seen before.”

[137] Ms Lees was cross-examined about the photographs of the cattle dog and the photograph of Jack. These questions and answers then followed:

“Q Would you agree with the proposition that from a visual perspective Jack the dog and the Australian cattle dog look nothing alike?

A The colouring looks nothing alike, but the build and size of the dog to me are similar. Also, when I was asked to look through this dogalog I was also reading descriptions “The Australian cattle dog, country of origin: Australia, first use today, other names, and the first name you come to is a blue heeler which I’m conscious of the girl in Barrow Creek, when I asked the name of the breed of dog saying to me it was a blue heeler.

Q So you were looking for the name in the Dogalog book, were you not looking at how the dog appeared, is that what you’re saying?

A I was looking at all of the – I was reading the descriptions, looking at the appearance.”

[138] Ms Lees was then asked a series of questions by the learned trial Judge which concluded with the following questions and answers:

“Q You acknowledge that reading that the cattle dog was a blue heeler influenced your decision to pick it?

A Yes.

Q You knew that the dog in the photograph was a dog of the accused – belonging to the accused?

A Yes.

Q Did that knowledge have any influence on your assessment of whether that dog appeared to be similar to the dog in the 4-wheel drive?

A I was never asked to give an assessment, I was just presented with the two photographs and asked if they looked similar and looked alike.

Q But you have since been asked to say whether the dog that you know belongs to the accused is similar in appearance to the dog in the 4-wheel drive?

A Yes.

Q Has your knowledge that the dog in the photograph belonged to the accused influenced your assessment of whether the dog in the photograph was similar to the dog in the 4-wheel drive?

A No, the knowledge, the fact that I knew it was the accused's hasn't influenced my decision, both dogs are clearly similar the accused dog and the dog at Barrow Creek."

[139] The submission made is that Ms Lees, being aware that she was looking at a photograph of the appellant's dog, would be unlikely to say that that was not the dog she saw on the night. However, it needs to be borne in mind that the photographs were before the witness and were also before the jury. The jury was in as good a position as the witness to determine whether the dogs were similar and whether there were differences between the dogs. If it was "not believable" that Jack looked like Tex or the dog chosen from the Dogalog, then it would be obvious to the jury from the photographs placed before them.

[140] In his address to the jury the learned trial Judge dealt with the evidence and noted that Ms Lees did not claim to identify the appellant's dog in the photograph as the dog that was in the offender's vehicle. He said: "She told you of what she regarded were the similarities between the dog at Barrow Creek and the dog she saw with the offender". He went on to comment:

"In considering the weight to be given to that evidence you should bear in mind that when Ms Lees first saw the photograph of the accused's dog she knew it was a photograph of the suspect's dog. She told you, however, that her knowledge that the dog belonged to the accused or the suspect did not influence her decision. She said she was never asked to assess whether the dog we know to be the accused's dog was similar to the dog in the 4-wheel drive. She was presented with the two photographs, that is the photograph of Tex on the one hand and the photograph of the accused's dog on the other, and was asked if they looked similar or alike."

[141] The appellant complains that the fact that Ms Lees was shown a photograph of the appellant's dog was contrary to accepted practice, as discussed in the authorities earlier referred to. The fact that what was here involved was a dog rather than a person is, it was submitted, immaterial. It was, counsel said, an endeavour to obtain evidence from which the jury could infer that the dog Ms Lees saw was the dog belonging to the appellant.

[142] It was also said to be objectionable because it amounted to a rehearsal of what she would say in evidence. It was a "foregone conclusion" that she would say that the dog was similar. Further, the approach adopted "unfairly deprived the appellant of the benefit of exculpatory evidence which had the

potential to result in an acquittal because if it wasn't his dog, it wasn't him".

[143] Such contentions fail to address the point stressed by the learned trial Judge, namely, that the purpose of leading the evidence of Ms Lees was not to demonstrate that the dog she saw on the night was the dog belonging to the appellant. It went no further than demonstrating that there were identified points of similarity between the two. The evidence was led as a piece of circumstantial evidence, not as evidence of identification. Whatever may have been the view of Ms Lees as to the similarities or differences between the three dogs about which she gave evidence, the jury was able to make its own assessment.

[144] It is important to emphasise that, by the end of the trial, the jury had before them a series of photographs including exhibits P 41, P 42, P 44, P 245 and the Dogalog. These readily enabled the jury to make their own assessment of the degree of validity of the points of similarity asserted by Ms Lees. It must be said that they indicate a number of points of distinct similarity between the dogs Jack and Tex, particularly in terms of the shape of the heads and ears and, to some extent, type of colouring. There are also points of similarity with the so-called Australian Cattle Dog, specifically as to shape of head and the type of head colouring and general build.

[145] Insofar as that evidence may fairly be said to have been exculpatory of the appellant it remained so and was available to the jury so that they could

make their own judgment in light of the meticulous directions that were given to them. The issues were quite clear to them, the evidence was of probative value and they were in a position to assess what weight ought to be attributed to it in all of the circumstances.

[146] The appellant has not made good this ground of appeal.

**Ground 5 - Lie as evidence of a consciousness of guilt** (Applications for extension of time and leave)

[147] By this proposed ground the appellant seeks to challenge the learned trial Judge's instruction to the jury that if they found the appellant told a lie about whether he was present at the Truck Stop, as alleged by the Crown, the lie could be used by the jury as evidence of a consciousness of guilt of the offences charged.

[148] It was the appellant's assertion at trial that he was nowhere near Barrow Creek at the time of the events related by Ms Lees. In fact, he was well on his way across the Tanami Desert, en route to Broome.

[149] In the course of the trial the Crown led evidence designed to establish that the appellant had been present, with his Toyota Land Cruiser utility, at the Shell Truck Stop in Dalgety Road Alice Springs in the early hours of 15 July 2001. Two employees who were on duty at the Truck Stop at the time were called to give evidence.

[150] The witness Mr Head said that, at about 12:30 am, he observed, by means of a monitor at the console, a white Toyota Land Cruiser single cab tray top utility with a green canvas canopy at the diesel pump. He could not see its registration number.

[151] A man subsequently came in and paid for the fuel and some other items such as iced coffee, water and ice, all of which were paid for in cash.

[152] This witness gave a description of the man as being slightly taller than himself (he being 175 centimetres in height), of slim build, wearing a cap with some sort of white motif and some sort of jacket and jeans. This man had a dark, messy moustache and his hair was down to his collar. The witness thought that his hair was black. He was wearing sneakers. His age appeared to be in the late thirties or 40.

[153] The cash record for the items purchased showed a time of 0045 hours and a cash total as \$136.65.

[154] Mr Head identified the man as being the person depicted in the video exhibit P 251 (being the electronic record from the Truck Stop video security system).

[155] The witness Deborah Southerden said that she actually authorised the use of the fuel pump when the console first beeped, because Mr Head was temporarily absent from the console, restocking the fridge. She thought that she noted the number of the vehicle at the time, but could not subsequently

find any record of it. She had a memory of 333 in the number. (There does not appear to have been any direct Crown evidence of the registration number of the appellant's Land Cruiser at the time of the Barrow Creek incident, although there is evidence of registration numbers of vehicles owned by him at other times. None of the latter include a digit combination of 333).

[156] This witness also identified the content of exhibit P 251 as being related to the incident.

[157] Other evidence was called by the Crown with the object of establishing that the person who is seen in the security video was, in fact, the appellant. The detail of that evidence will be canvassed in relation to other proposed grounds of appeal.

[158] The appellant elected to give evidence. He said that he left South Australia on Thursday 12 July 2001 in his 75 series Land Cruiser, towing a camper trailer. He had arrived at Port Augusta by about midnight. He said that he eventually arrived in Alice Springs at about 10:30 am on Saturday 14 July 2001. His evidence was to the effect that he first went to the Red Rooster store to purchase some chicken and then took his vehicle to Kittle's car wash and cleaned it with a high-pressure spray.

[159] The appellant testified that, having gone to Barbecues Galore and Repco to make some purchases, he drove to a BP service station in Alice Springs and refuelled his vehicle. He told the jury that he thereafter drove north about

20 kilometres out of Alice Springs and turned off on the Tanami Track at about 3:30 pm.

[160] He asserted that, at about 8 pm on 14 July, he would have been almost to Yuendumu on the Tanami Track and nowhere near Barrow Creek. He denied that he was the person depicted in the Truck Stop security video. He further testified that, between midnight and 1 am on 15 July, he was somewhere near Granite Mine on the Tanami Track - about 500 kilometres from the Stuart Highway.

[161] Against that background the learned trial Judge, inter alia, directed the jury in the following terms:

"Now with respect to the accused and being untruthful about being at the truck stop. If you are satisfied that the accused was untruthful when he denied to you and others that he was at the truck stop, there is additional use that you may make of that fact that the accused has been untruthful. If you are satisfied that the accused has deliberately lied about being at the truck stop, and if you are satisfied that the accused told the lie because he knew that the truth would implicate him in the murder of Peter Falconio, you may use that lie as some evidence of consciousness of guilt on the part of the accused. If you are satisfied that the accused disclosed in this way a consciousness of guilt, it is another piece of circumstantial evidence that on its own cannot prove guilt, but is to be considered in conjunction with the rest of the proven facts.

In giving you this direction, I must emphasise some matters. First, you must be satisfied that the lie was deliberate. Secondly, you must be satisfied that the lie relates to a material issue in the case. You might think there is little doubt that a lie by the accused as to whether he was at the truck stop is material to the case. Thirdly, and importantly, it is only if the accused told the lie because he perceived the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him. It must be a lie which an innocent person would not tell. You will quickly appreciate that

innocent people tell lies for a number of reasons, including panic, or perhaps because they think that even though they are innocent, the truth might wrongly implicate them in the offence. Before you can use the evidence of the lie about the truck stop as evidence of a consciousness of guilt on the part of the accused, you must reject all other possible reasons and be satisfied that the telling of the lie is explicable only on the basis that the accused knew the truth would implicate him in the offences. That is, that the accused was conscious that if he told the truth, the truth would convict him.

This direction, ladies and gentlemen, only applies to a lie by the accused, if you find that he lied, about being at the truck stop. If you find the accused has lied to you or anyone else about other matters, those lies about other matters cannot be used as evidence of a consciousness of guilt. Other lies may, however, be used by you, if you see fit, as reflecting adversely upon the accused's credibility as a witness. I stress that you may only use a lie as reflecting adversely upon the accused's credibility if you are satisfied that he deliberately told a lie.

Well, are you satisfied that the accused lied about being at the truck stop. If you are so satisfied, are you satisfied to reject all innocent explanations. Are you satisfied that the lie is explicable only on the basis that the accused knew the truth would implicate him in the crime, that is that he lied because of a consciousness of guilt.

Well, ladies and gentlemen, for example, you must carefully consider whether it is reasonably possible that the accused lied because he was afraid that he would be falsely implicated. On the other hand, the Crown put to you that with the exception of Mr Hepi, right from the outset, before he was a suspect and before he might have had reason to lie if innocent, the accused displayed a consciousness of guilt by falsely denying that he was at the truck stop."

[162] The learned trial Judge directed the jury that they should bear in mind that the appellant had a specific reason for not wanting to be involved with the police or with an investigation of any sort, because he was running drugs. He said that they also needed to consider whether it was reasonably possible that he lied to his friends and acquaintances in Broome about the matter for

that reason. He reminded the jury that they should further consider whether it was reasonably possible that, having earlier told a lie, the reason that he might have subsequently lied was that he did not wish to admit having lied in the first place and had just continued with it.

[163] In the foregoing circumstances the appellant asserts that the directions concerning inferences as to guilt that the jury could draw if they were satisfied that he had lied concerning his presence at the Truck Stop were problematic in circumstances when presence at the truck stop *simpliciter* could not be shown to be linked forensically with the crime at Barrow Creek.

[164] On the hearing of the appeal, Mr Barker QC intimated that the appellant was content to rely on that submission.

[165] Mr Wild QC stressed that the proposed ground of appeal, as formulated, had to be considered in the context that, during his summing up with regard to the evidence of Dr Sutisno and in reference to a series of captions such as "offender image" on documents and like oral references made by her, the learned trial Judge gave the following specific directions:

"... Now obviously it is you who needs to decide in this case who the offender was and if eventually you are satisfied that it is the accused who is shown in this Truck Stop video, then all that would prove would be that the accused was in Alice Springs at that time in the early hours of 15 July. That becomes a piece of circumstantial evidence, that is, evidence of one circumstance to be considered by you in conjunction with the rest of the evidence.

The fact that the accused was in Alice Springs, if that's your finding eventually, in the early hours of 15 July, of course, by itself and I stress by itself could not prove that the accused was the offender. So please just ignore those sort of captions if you like because they are there for the working purposes of Dr Sutisno and others.

And just bear in mind that what we're talking about here are a series of circumstances which eventually you'll be asked to put together, make findings about, and put together.

So I will direct you further about that later on, but I emphasise the mere fact, if you find it to be a fact eventually, that the accused was in Alice Springs at this time cannot by itself prove that he was the person at Barrow Creek. It will become, if that's your view, one of the circumstances."

[166] Attention was drawn to the fact that the effect of the directions given was to render it plain to the jury that they could not move direct from findings that it was the appellant at the Truck Stop and that he had lied about that situation, to a finding of guilt of murder.

[167] Mr Wild QC submitted that the Crown case was presented on the footing that the appellant's presence at the Truck Stop gave him an opportunity, in time and space, to have been at Barrow Creek when the relevant events occurred there.

[168] There is no substance in the proposed ground of appeal on the basis sought to be formulated by the appellant. To the extent that this proposed ground may have an inter-relationship with the proposed Ground 14, that is an aspect that falls to be dealt with in that setting.

[169] No proper basis has been shown either for an extension of time or the granting of leave in respect of this proposed ground. The directions given by the learned trial Judge were beyond reproach and the ground sought to be promoted is plainly untenable. The relevant applications must therefore be dismissed.

**Ground 6 - Evidence as to possession/ownership of firearms**  
**Ground 7 - Use of such evidence as circumstantial evidence adverse to the Appellant** (Applications for extension of time and leave)

[170] By the proposed Ground 6 of his grounds of appeal the appellant seeks to challenge a ruling by the learned trial Judge as to the admissibility of certain evidence bearing on the applicant's ownership and possession of firearms and his possession of a silver handgun.

[171] The formal reasons for the ruling were ultimately published on 15 December 2005 (*The Queen v Murdoch (No 5)* [2005] NTSC 79).

[172] The specific complaint of the appellant is that the learned trial Judge erred in admitting the evidence of Mr Hepi, Mr Johnston, Ms McPhail and Ms Maxwell as to:

- (a) the applicant's ownership or possession of firearms, and
- (b) the applicant's possession of a silver handgun,

because, it is said, the evidence was irrelevant or, alternatively, its probative value was outweighed by unfair prejudice to the appellant.

[173] At the time of his initial ruling the learned trial Judge had before him details concerning evidence that the Crown would potentially lead from five separate witnesses namely William Gibbs, James Hepi, Brian Johnston, Julie-Anne McPhail and Rachel Maxwell. However, Gibbs had not given evidence at the committal and the Crown foreshadowed that it might not be able to guarantee his attendance at trial. In the event, Gibbs did not appear as a witness.

[174] Having briefly recited the salient features of the encounter near Barrow Creek and, in particular, the manner in which the assailant pointed a gun at Ms Lees, the learned trial Judge (inter alia) said:

"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.’

..... she did not see the butt of the gun which was under the offender's hand. Nor did she see the trigger.

Ms Lees gave instructions to an artist for the sketching of the weapon. The artist drew the butt and trigger without instructions.  
.....

During cross-examination Ms Lees said she couldn't 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 boxlike border.’

..... 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.

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 4 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.

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.

Mr Gibbs also spoke of the accused owning a .357 Magnum revolver and two black Glock 9 mm 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.

Mr Gibbs did not give evidence at the preliminary examination. Although the Crown intends to call Mr Gibbs, it cannot guarantee his attendance at trial.

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.

In a statement dated 4 November 2002 Mr Hepi said the .357 had a grey metal barrel of 10 to 12 inches in length. The stock was wooden with a 'criss-cross 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.

In his statement Mr Hepi said that the handguns 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.

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.

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.

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 the weapon from the inside of the driver's door as described in his statement to which I have referred.

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 the 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 the 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 10 centimetres in length'.

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'.

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.

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.

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.'

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.

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 the 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.'

In response to a subsequent question as to whether it was a 'Wild West one', Ms Maxwell reply 'Wild Western thing, something like that, yeah.'

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'.'

[175] The learned Judge said that, 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 handgun in the vehicle in which he travelled. Considered in conjunction with the evidence of Ms McPhail and Ms Maxwell, such evidence possessed probative value as to the capacity of the accused in July 2001 to carry out killing by shooting.

[176] He noted that Ms Lees had 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 that he considered reasonably consistent with the length described by Ms Lees. In March 2001 Ms Maxwell observed the accused and Mr Hepi at the table with bits of a

gun that she described as silver and which reminded her of a Western or John Wayne type of gun.

[177] The learned trial Judge expressed the view that it would be open to the jury to conclude that the descriptions of the silver weapon provided by Ms McPhail and Ms Maxwell were, in a very general way, consistent with the description by Ms Lees of the weapon used by the offender. He pointed out that, considered in isolation from the remainder of the evidence, such evidence was incapable of proving that the accused possessed the weapon described by Ms Lees. However, he said, as a piece of circumstantial evidence, the evidence was capable of probative value and, for that reason, was admissible. He declined to exclude it in the exercise of his discretion.

[178] He was of the view that the potential prejudicial effect of the evidence did not outweigh its probative value. He considered that, in normal circumstances, particularly in view of the evidence that the accused was engaged in the illegal activity of trading in cannabis, it was highly unlikely that a jury hearing of the evidence of the accused's possession of such a weapon would engage in an 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 trip. He felt that, given appropriate directions, the risk of impermissible use by the jury was minimal.

[179] The learned trial Judge concluded his reasons by pointing out that his initial decision was based on material before him prior to commencement of the trial with the jury. He said that, having heard the evidence of the witnesses other than Gibbs, who did not give evidence, he remained of the view that the evidence was admissible and should not have been excluded in the exercise of discretion.

[180] Against that background the appellant asserted in his relevant proposed ground of appeal that there was no identification of the firearm allegedly used at Barrow Creek, other than a description in very general terms in circumstances where Ms Lees' recollection and reliability was very much an issue. Although it was said that there may be some minor circumstantial value pointing to capacity, the appellant sought to argue, that the prejudicial effect of the evidence as presented unavoidably infers that the appellant was preoccupied with handguns and was prepared to use them.

[181] It was said that the critical issue in the trial was the identity of the offender. There was no real issue that Peter Falconio was shot dead although, in the absence of a body, the defence could not properly make such concession. The person who pulled over Ms Lees and Mr Falconio shot Peter Falconio. It was stating the obvious that the offender had the capacity to do so. It was not to the point that the appellant had access to similar guns and used them in bizarre circumstances as described by the witness Ms McPhail. This tended only to establish propensity, particularly when looked at in conjunction with the evidence as to the appellant's amphetamine usage and

the prosecutor's general comments about the appellant's attitude towards people. The overall effect was to attack the appellant's general character impermissibly.

[182] This criticism necessarily needs to be considered in light of the relevant directions given by the learned trial Judge during the course of the trial.

[183] After the conclusion of the evidence of the witness Mr Hepi, who referred in some detail to guns owned and possessed by the appellant, the learned trial Judge directed the jury in these terms:

"Ladies and gentlemen, you will recall yesterday I gave you a direction about the use of evidence related to cannabis and the dealings in cannabis and I warned you against reasoning that, because Mr Murdoch was involved in dealing with cannabis, he was a person of poor character and therefore a person who was likely to commit the type of crime charged. The same warning applies to the evidence you've just heard about the weapons.

You will appreciate that as Ms Lees said, that a weapon was pointed at her. Evidence that the accused had access to a weapon or weapons is a material matter for you to consider. It becomes a question of whether it is linked to Ms Lees' evidence or not.

You will recall of course, that Ms Lees described the gun as a silver weapon and we've heard at the moment from Mr Hepi that the weapons he saw were two dark coloured weapons. Now whether you find the evidence of assistance in due course, will be a matter for you. But again I warn you that you must not, because Mr Murdoch, as you've heard, if you accept it, was in the habit of carrying weapons or possessed weapons of that nature, you must not draw some sort of conclusion that he is a person of poor character and therefore likely to have committed the crimes charged.

You all know yourselves, again, that's a very unfair line of reasoning, you must not adopt it. You will appreciate that there are lots of people in our community who, for one reason or another,

carry weapons or possess them and you have heard from Mr Hepi of course, that at least on one occasion, he borrowed one of the weapons because he was worried about being - if you like - ripped off with the drugs. So it would not be surprising if someone was carrying drugs from South Australia to Western Australia and travelling in that sort of country with a load of drugs that they might carry a weapon with them for that sort of protection.

So it's all part of the evidence before, it relates back to the evidence before, it relates back to the evidence of Ms Lees, but you must not engage in that impermissible line of reasoning.....".

[184] During his summing up the learned trial Judge told the jury:

"As to the possession of a weapon and habit of carrying a weapon, the Crown puts this evidence forward as demonstrating that the accused had the capacity to carry out the crime of murder by shooting Mr Falconio. The Crown seeks to link that evidence with the accused's practice of carrying a weapon on his trips, to prove that the accused could well have had such a weapon with him on this occasion.

Now ladies and gentlemen as to Ms Lees' evidence, you will appreciate if you accept her evidence that the only time she had an opportunity to see the weapon was when the offender confronted her with it, as he moved into the Kombi van and put it to her head. She told you that as the man moved into the Kombi she was concentrating on the man's face and not upon the gun.

Ms Lees said that through the window of the driver's door she saw it was a silver gun. A few moments later when the man was in the Kombi van and pointed the gun to her head, she got her best sighting of it. She did not ever see the butt of the gun or the trigger.

This was her description: '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'. Later in her evidence Ms Lees said the barrel was shining and she demonstrated the length of the barrel by the length of her hand which was then measured at about six to seven inches. Six inches is approximately 15 and a quarter centimetres.

Ms Lees went through the same process with the artist as she did with the drawings of the vehicle and the drawings of the gun are in exhibit P 31. During cross-examination Ms Lees told you she could not give a description of the scrolling. She just described it as scrolling engraved along the barrel. She agreed that on 15 July she told the police that the gun had a scroll like pattern without words or symbols engraved in a box like border.

As to whether the pattern on the final drawing is a fair representation of what she saw, Ms Lees said she could not say. She added that it was not a good representation, but it was hard to describe and she could not remember vividly what the engraving was, only that there was some engraving. As to whether what is seen in the drawing is similar to what she saw on the night, Ms Lees responded that it was similar.

Well, ladies and gentlemen, Mr Hepi only saw two dark coloured guns, that is handguns. Mr Johnston did not see a silver handgun.

Two witnesses spoke of the accused and a silver handgun. First Ms McPhail who said she told the accused she had always wanted to buy a pearl handled ladies gun. She said the day after they had the rest at the head of the Bight, when they came to the quarantine station the accused told her to go ahead. She did so. Later as she passed a sign indicating she was entering the Iron Triangle, she saw the accused stopped on the side of the road. She told you he was stopped in the dip where you could not see him until you were right there.

According to Ms McPhail she came up behind the accused and stopped. He had the passenger side of the vehicle open and when she went around to that side the accused pulled out a small gun and offered to sell it to her. Ms McPhail described the weapon as a silver palm sized revolver. She declined the offer and she told you the accused fired a shot into the bush. She said the weapon had a short barrel and she did not recall seeing any ammunition.

The accused denied there was any talk at any time about Ms McPhail wanting to buy a weapon. He said his last contact with Ms McPhail was west of Ceduna. He mentioned Penong. He denied meeting later on the side of the road and showing Ms McPhail a weapon. The accused said he did not own a silver handgun.

As to whether you should or should not accept the evidence of Ms McPhail, you are entitled to bear in mind your impressions of her as a witness. Did she impress you as quite forthright and natural or did she try and evade answering questions. Apart from a suggestion that they may have seen each other in some general way in Broome, there is no suggestion in the evidence that Ms McPhail knew the accused or would have any reason to be other than truthful with you about these events generally and, in particular, about the weapon.

Counsel for the accused suggested you should have serious concerns about the reliability of Ms McPhail's evidence. He mentioned her consumption of alcohol and drugs. Obviously that is a relevant factor for your consideration and that is your consideration of the capacity of Ms McPhail to take in events that were occurring around her and to later accurately recall them. We all know the consumption of alcohol and drugs can have an adverse impact on our mental faculties.

As to the evidence about the gun specifically, counsel suggested that the story is simply unbelievable. Mr Algie put to you that unprompted and out of the blue here was Ms McPhail telling the accused she had always wanted to buy a pearl handled ladies handgun. In addition Mr Algie posed the question as to why the accused would be parked on the side of the road with a weapon out as claimed by Ms McPhail. He pointed out that she was a way out with her times in connection with travel from Ceduna to somewhere in the Iron Triangle.

In response to those suggestions Mr Wild put to you that the whole episode of travelling together is bizarre, yet the accused agrees with all of it except those bits that hurt him. So says Mr Wild, why would you doubt that Ms McPhail was telling the truth about a part of this episode that might otherwise seem unusual.

Well, ladies and gentlemen, as always, it is a matter for you. If you have a doubt about her reliability with respect to the weapon, then you would put Ms McPhail's evidence aside. On the other hand, if you were satisfied she is telling truth, the Crown asks you to infer that the accused owned or was in possession of a silver handgun late in June 2001 which is consistent with the weapon seen by Ms Lees. If you are satisfied the accused was in possession of such a weapon, that would be another piece of circumstantial evidence to be considered in conjunction with the rest of the evidence.

The other witness who spoke about the silver handgun was Rachel Maxwell. She told you of an occasion when the accused and Mr Hepi were sitting at a table at Mr Hepi's place at Sedan. She walked in and there was a revolver on the table which she described as about 21 centimetres in length. She said it was silver chambered, a revolver with a swinging chamber. A wooden handle. She described it as an older style gun like a country and western weapon and she was thinking of John Wayne. The Crown, of course, put to you that that is very consistent with the description given by Ms Lees.

During cross-examination, Ms Lees [sic ?Maxwell] gave the following evidence:

‘What was happening with the gun, was it just sitting on the table or was it being passed between the two of them?’

I've just - it was sitting on the table when I walked in, yeah. Like in between both of them.

Just sitting there?

Yeah.

So, neither of them were touching it?

Not that I recall. I honestly didn't take much notice, if you know what I mean, of what they were doing. I just seen that and went in and walked back out.

And neither of them were saying anything about the gun?

I don't know. I seen the gun and I just went, okay, that's not my business, you know what I mean. Yeah.

Because I suggest there was never an occasion when Mr Hepi and Mr Murdoch had a silver gun sitting on the table?

Okay, well, that's what I seen.

And I suggest there was never an occasion when you saw Mr Hepi and Mr Murdoch with a silver gun?

Well, that's what I seen, yeah.'

Ms Maxwell was then asked about the accused's appearance and, in particular, his moustache. And the question then returned to the issue of the gun:

'Just finally, in relation to this silver gun, could it have been that it was Mr Hepi who had the silver gun?

It could well have been. I honestly don't know whose it was. It could well have been James, yes.

And I guess what I am suggesting is could it be, if you actually saw a silver gun, you saw it with Mr Hepi and Mr Murdoch wasn't even there.

It could well. I'm pretty sure they were both there but, yeah, it could –

Might it been just Mr Hepi?

Yeah.'

Well, ladies and gentlemen, the accused denied in evidence that there was ever any such occasion. You heard from that evidence that Ms Maxwell said she was pretty sure they were both present, but she agreed it might have been just Mr Hepi. What you make of that evidence is for you. In considering that evidence, you are entitled to take into account the evidence, if you accept it, of Ms McPhail.

Finally, in connection with the weapon, I remind you of the evidence of Mr Hepi and Mr Johnston that the accused regularly carried a handgun with him on his trips. The accused agrees he did so for protection because in one direction he was carrying large quantities of money and in the other, a large quantity of cannabis.

The accused said that he had the 357 with a very large dark grey barrel and a black Beretta. He said he has never owned a silver revolver or a .22. He told you that he did not always carry a weapon, but when he did so it was either in the fuel tank or under the seat or in the side of the door panel.

Ladies and gentlemen, as you appreciate, it is the Crown case that the accused shot Mr Falconio with a small calibre weapon that did not cause a large amount of bleeding. On the evidence, if you accept it, such a weapon could be a .22 revolver. If you are satisfied the accused owned a silver handgun consistent with the weapon described by Ms Lees and if you are satisfied the accused regularly carried a weapon with him on the trips, it would be open to you to find that the accused had means by which to carry out the murder of Mr Falconio in the circumstances put forward by the Crown. If you find that to be a fact, then the fact that the accused possessed such means does not, in itself, prove he committed the murder, but it is a piece of circumstantial evidence to be considered in conjunction with the rest of the facts.

Are you satisfied he owned such a weapon or do you have a reasonable doubt about it? This comes back to your view of Ms McPhail and Ms Maxwell and you have heard counsel's submissions."

[185] The proposed Ground 7 sought to be relied upon by the appellant asserts that the learned trial Judge erred in his directions to the jury that the evidence about ownership and possession of firearms was circumstantial evidence which could be used adversely to the appellant and that the jury could conclude that the silver handgun described by Ms McPhail was consistent with the weapon said to have been seen by Ms Lees, because the evidence was about firearms different from the handgun said to have been seen by Ms Lees.

[186] It is submitted on behalf of the appellant that, given the equivocal state of the evidence relating to a silver gun, the direction given amounted to an

invitation to the jury to speculate and did not constitute a sound piece of circumstantial evidence. That had to be set against Ms Lees' general inconsistencies concerning descriptions of the vehicle, the colour of its bullbar and so on.

[187] In essence, the appellant contended at the hearing of the appeal that:

- (a) none of the handguns referred to in evidence matched the description of the weapon referred to by Ms Lees;
- (b) by reason of the manner in which the evidence developed, the jury had before it information concerning the ownership or possession by the appellant of a series of guns of types and descriptions that in no sense matched the description given by Ms Lees;
- (c) the vast majority of the weapons identified as having been carried or possessed by the appellant were of a calibre far bigger than that promoted by the Crown as a possible murder weapon; and, accordingly,
- (d) the Crown evidence did no more than demonstrate an inherent predisposition on the part of the appellant to carry firearms.

[188] Mr Barker QC argued that not only was the evidence irrelevant, but it was also highly prejudicial, propensity material. As to this he sought to derive

support from *Festa* and other authorities touching on the so-called "tools of trade" concept.

[189] In *Festa* a person accused of bank robberies was found to have at his house guns and ammunition which, as ultimately emerged, had been purchased by that accused at a time subsequent to the robberies in question.

[190] McHugh J pointed out in that case that, in the particular circumstances, possession of the relevant weapons did no more than impermissibly point to the criminal character and tendencies of the accused and to a propensity on his part to commit crimes of the nature charged. They threw no light on the admissible evidence connecting the accused with the crimes charged and were not inextricably interwoven with the admissible evidence, such that the matter could not properly be presented if the former were excluded.

[191] The Crown submitted that there are several fallacies inherent in the appellant's contentions.

[192] First, it is a considerable overstatement to suggest that none of the handguns matched the description given by Ms Lees. As the learned trial Judge pointed out, given that the jury were entitled to consider that, having regard to the trauma to which she had been subjected and the circumstances of the offences, her description of the weapon used by her assailant may not have been very precise, there was evidence that certain of the weapons with which the appellant was associated were a silver colour and could, potentially, have been regarded as items that might be reasonably consistent

with the description given. In particular, there was the silver revolver seen by Ms McPhail to have been in the appellant's possession only a few weeks prior to the Barrow Creek incident.

[193] Second, much of the evidence criticised actually got before the jury by virtue of the understandable desire of the defence to demonstrate that many of the weapons said to have been possessed or carried by the appellant were, in terms of colour, calibre and general appearance, manifestly not of the type adverted to by Ms Lees.

[194] Third, the appellant's contention that the state of the evidence was such as to invite the jury to embark upon an impermissible process of speculation misconstrued the Crown's purpose in advancing the relevant evidence and also ignored the terms in which the learned trial Judge had repeatedly directed the jury.

[195] Mr Wild QC was at pains to point out (as the learned trial Judge clearly explained to the jury) that the sole aim of the Crown was to demonstrate that the appellant habitually carried one or more handguns in his vehicle whilst travelling. This, like the presence of a dog and the use of a vehicle resembling the general description given by Ms Lees, was simply proffered as an item of circumstantial evidence that, particularly in the case of guns, essentially bore on the issues of opportunity and capacity to carry out the killing of Mr Falconio in the manner in which he was, on the Crown case, actually murdered. It was admitted on that express basis. It was not

admitted as propensity evidence (cf the reasoning in *R v Palaga* (2001) 80 SASR 19).

[196] Further, the evidence of the witness Ms McPhail, for example, was quite consistent with the Crown thesis that Mr Falconio may well have been killed with a small calibre, silver coloured weapon of the type seen to be possessed by the appellant.

[197] The learned trial Judge repeatedly emphasised, both in the course of the trial and his directions to the jury, that propensity reasoning based on evidence of poor character such as drug running, use by the appellant of amphetamine and possession of firearms must play no part in their reasoning.

[198] In the context of the instant case, there is an air of unreality in the contentions advanced by the appellant.

[199] No doubt, in many cases, the production of evidence of bad character, associated with conduct such as habitually carrying firearms, would be both irrelevant and highly prejudicial to the degree that it ought to be excluded. However, in the present case, it was inevitable that the facts that the appellant was of bad character, had been accused of other serious offences and was a habitual drug runner would come before the jury. These were matters necessarily inherent in and interwoven with the relevant events.

[200] As the learned trial Judge said, it would come as no surprise that the jury would hear that a drug runner operating in the manner adopted by the

appellant would routinely carry firearms. Hence, the requirement for carefully crafted and repeated directions and warnings concerning the permissible and impermissible uses to which the information of bad character could and should be put.

[201] On reviewing what occurred during the trial and the content of the ultimate summing up by the learned trial Judge, it is impossible to perceive how the impugned evidence could have led to the prejudice asserted. By way of contrast, the probative value of the evidence, as an item of circumstantial evidence to be considered together with the other circumstantial evidence, was significant.

[202] There is no substance in these proposed grounds of appeal. Because the subject matter was at least fit for debate, there should be an extension of time and leave as sought. However, the ground has not been made out and must be dismissed.

**Ground 11 - Admission of the evidence of the witnesses Allan, Johnston and Hepi as to the identity of the person shown in the truck stop video**  
(Applications for extension of time and leave)

[203] This proposed ground asserts that the learned trial Judge erred in admitting the evidence of Ms Allan, Mr Johnston and Mr Hepi as to their opinions concerning the likeness of the person in the Truck Stop video to the appellant. It seeks to challenge the validity of his reasoning expressed in *The Queen v Murdoch (No 4)* [2005] NTSC 78 at paras 56 to 81.

[204] In addressing this ground of appeal it is necessary, first, to say something about the evidence of the three witnesses.

[205] The appellant was well known to each of those persons. Each of them saw the appellant shortly after his return from South Australia in July 2001, at a time when he changed his appearance somewhat, including shaving off his moustache.

[206] Ms Allan has lived in Broome since 1997. She first met the appellant as a customer of her employer. From about October 2000, she became his close friend and saw him quite frequently when he was in Broome. For example, in April 2001, she went on a weekend trip with him and his dog in his HJ75 white Land Cruiser utility to Kununurra. She testified that she was well aware that he was in partnership with the witness Hepi in, as she put it, 'running drugs up from South Australia'.

[207] In August 2001, as a result of a telephone call from the Territory police, this witness went to the appellant's home in Broome and told him that police were looking for somebody.

[208] On that occasion the appellant drew her attention to the front page of the West Australian newspaper of 7 August 2001, which contained photographs taken from the security video at the Shell Truck Stop in Alice Springs. They showed images of a Toyota Land Cruiser utility on the driveway and of the driver entering the shop.

[209] Ms Allan's evidence was to the effect that she "was fairly convinced that it was him at the time" because "..... of the way that he - his whole body posture, you know, stance. When you know someone you know someone".

[210] She said that, at that point, she had not previously seen the photographs. Her evidence was that it was the appellant who drew her attention to them and that he was at some pains to point out what he contended were differences between the detail of the vehicle depicted and that which had been driven by him at about that time.

[211] In the course of her evidence she was not able positively to identify the vehicle as that which had belonged to the appellant. She was only able to say, with relation to the vehicle depicted in exhibit P252, "it's similar to it".

[212] When shown a still photograph of the man at the truck stop (exhibit P 253) she said "I do believe that's Bradley Murdoch". She referred to what he was wearing, the way he held himself and the hat. She testified that, when she last saw the appellant in October 2001, the whole back of his Land Cruiser had been changed.

[213] In cross-examination, Ms Allan adhered to her view that the person depicted in the photographs shown to her was the appellant.

[214] The witness Mr Hepi met the accused in Broome in about 1998. He gave evidence to the effect that he left Western Australia for a time in about 1999 and went to live at Sedan (near Swan Reach) in South Australia, where he

purchased a property. He said that he returned to Broome in November 2000, after a brief absence in New Zealand.

[215] Mr Hepi testified that he subsequently formed a business association with the appellant, the object of which was, ... as he put it, "... to run drugs around the country...". He went on to say that, this arrangement having been made, he wrapped up his affairs in Broome and, fairly early in 2001, returned to his property at Sedan. The plan was to run cannabis between Sedan and Broome.

[216] This witness stated that, once the arrangements were put into effect, the accused would stay with him at Sedan when he came to pick up cannabis; and that when Mr Hepi did trips to Broome he would stay with the appellant. Various routes were used, depending on the time of the year. Each of them would have done about four round trips over a six-month period, with a return trip occupying about a week.

[217] Having viewed the actual video from the Truck Stop Mr Hepi stated that the Land Cruiser vehicle depicted (cf exhibit P 252) was that owned by the appellant. He had personally driven it around the countryside, he said. This witness expressed the view that, in the video, as the vehicle moved off, it became apparent that what looked like projections at the top of it (which the appellant had sought to rely on as indicating that the vehicle was not his vehicle) were actually portions of the fuel bowsers that had initially been behind the vehicle.

[218] Mr Hepi gave evidence to the effect that at some time in about August 2001 the appellant showed him the photographs that appeared on the front page of the West Australian newspaper of 7 August 2001. The appellant volunteered a statement that the vehicle could not have been his because it still had the spikes above the canopy. As to the picture of the man at the truck stop Mr Hepi responded "The man, that's Brad. The way he walks".

[219] When asked whether there had been any further discussion about the photographs at that time the witness responded:

"Later on, he said well, it was him because we got to discussing it. He had to be in Alice Springs at that time. That's the way he was going home and yeah. He said, ' It was a photo of me in the service station'..... '

[220] This witness said that he got to further discuss the matter with the appellant at a later stage, at a time when Mr Hepi had seen part of the Truck Stop video screened on television. In response to questions put to him by the learned trial Judge Mr Hepi gave evidence to the following effect:

"Q. Mr Hepi, you said that you got to discussing it because he had to be there at that time because this was the way home?

A. Yes.

Q. Now what you mean by that? Do you mean you and he had talked about the way home or what was it that gave rise to that belief?

A. I'd seen this in the photo. This has actually come on the telly as well. On the telly there was a much better picture. That

itself is not a very good picture. On the telly there had been part of the video tape. And there's a certain way in which Bradley walks, the way he was wearing the hat to disguise his face, the whole likes of - we got talking about it later because it appeared on the telly quite a bit in Broome.

Q. And you got talking about it?

A. Yeah?

Q. Go on?

A. And then he just said 'Well, it was me', but that was just the way he would be coming home to come home from Sedan to Broome, and he claimed that he used the Tanami Track.

Q. That's what he said to you?

A. Yes. Later on. He didn't.....".

[221] Having been shown the video in the course of giving evidence, the witness was asked the question "You've seen the man in the picture. What can you tell us about him?" His response was "The way Brad walked. It's his stance. Looks like my shirt on him. Yeah, just the way he walked, the way he kept his figure. He always kept his arms out of pose so no one could get close".

[222] The witness Mr Johnston gave evidence that he met the accused in Broome some time in 2000. He became friendly with him and agreed to work for him, helping him with driving his vehicle between Broome and Swan Reach.

[223] This witness said that he did three round trips, the first being in about February 2001. At that time they were travelling in the appellant's F100.

[224] Mr Johnston said that, on the second trip, the appellant purchased a Land Cruiser utility in South Australia and the green canvas canopy that had been on the F100 was transferred across to the new vehicle. The third trip was carried out in the Land Cruiser.

[225] In the course of his evidence the Truck Stop video was viewed by this witness. He then gave the following evidence in relation to it:

"Q. What do you say about the vehicle in that video?

A. Yeah. It looks very similar to the one Brad had.

Q. What do you say about canopy configuration? You've got pictures in front of you now of that vehicle?

A. Yep.

Q. What do you say about configuration of the canopy on it?

A. Yeah, it looks very much the same.

Q. And as to the bull bar, can you see the bull bar on it?

A. Yep. That looks like it.

Q. Is that what you've just endeavoured to describe to us?

A. Yep.

Q. What about the man walking into the shop?

A. What about the man walking in the shop?

Q. Yes, on the video?

A. Yeah.

Q. What can you say about that?

A. Yeah, it looks like Brad.

Q. What looks like Brad?

A. Just the way he carries himself and just the way, yeah.

Q. What do you mean by the way he carries himself,  
Mr Johnston?

A. The way he walked and that and yeah."

[226] This witness further gave evidence concerning the general appearance of and clothing worn by the person in the video. In essence, he said that his appearance was similar to that of the appellant and that the clothing was similar to clothing worn by him.

[227] In the course of cross-examination it was put to Mr Johnston that the man in the video might not be the appellant. His reply was "I think it is". When it was put to him that he might be wrong he conceded that it was a possibility.

[228] By this proposed ground of appeal the appellant seeks to assert that it was not open to find that the opinion evidence of these witnesses came within the foreshadowed exception discussed in *Smith v R* (2001) 206 CLR 650 at

656 in the context that there was a finding that the images were far from clear. It was found by the learned trial Judge that the comparison between the image from the security film and photographs was far from straightforward. The members of the jury were warned specifically and carefully about not coming to their own conclusions due to the poor quality of the images. It follows, it was submitted, that there is a real risk that these witnesses simply could not have formed any reliable probative opinion due to the poor quality of the images. In any event as lay persons the witnesses did not have any advantage in circumstances where photographs and film of the appellant were available for the jury.

[229] It was further asserted that the admission of this evidence does not sit logically with the fundamental rationale for admitting the opinion evidence from the witness Dr Sutisno, insofar as such an expert is only able to give evidence because of special skills in enhancing and analysing images otherwise impermissible for a jury to use due to the poor quality of the images. Reference was made to the principles in *Smith* as discussed in *R v Tang* (2006) 161 A Crim R 377 at 401.

[230] This proposed ground must be considered against the background of the summing up of the learned trial Judge. In the course of that summing up his Honour carefully reviewed the evidence of the various witnesses who were invited to comment on the content of the relevant photographs and video material. He preceded that review with the following comments:

"Leaving aside for a moment the views of witnesses who have looked at that video, you are entitled to look at the video and, within limits, draw your own conclusions. But in the context of your drawing your own conclusions from your observations of the video, I must add a note of caution.

I am sure you appreciate that the quality of the video is not good, you hardly need me to tell you that there are dangers in trying to draw conclusions from your own observations of the images of poor quality. In addition you have the evidence of Professor Spring who spoke about information or data being lost every time there is a copying process unless it is a digital to digital process and how the software is programmed to reinterpret or fill in data. Professor Spring expressed the opinion that the film and photographs available to you are not suitable for analytical purposes. He said there is a risk that some of what you see is artefacts introduced to the images by software in an endeavour to improve the general appearance of the picture. So, ladies and gentlemen, you need to exercise great caution in trying to draw your own conclusions from your observations only.

In addition, when it comes to comparing the vehicle in the truck stop with the accused's vehicle, you do not have photographs of the accused's vehicle as it appeared in July 2001. All you have are the descriptions by the witnesses. So in that situation, although you may make a general comparison, it will be obvious to you that from your viewing the video alone - and I stress from your viewing of the video alone - you could not safely draw a conclusion as to whether the vehicle in the video was the vehicle driven by the accused. I will come back to the evidence concerning the vehicle when dealing with the evidence of witnesses who were familiar with that vehicle, but I am dealing with you drawing your own conclusions purely from looking at the video. At best, if you accept the general description given by the witnesses and leaving aside specific issues such as the bull bar etc, from your own viewing, at best, you could conclude that the vehicle shown on the video is similar to the accused's vehicle.

As to the man depicted in the video, the warning I gave you a moment ago based on evidence of Professor Spring applies with even greater force. The quality of the image of the person in the truck stop is poor. You might think that there are some very general features apparent on the images, but the image is far from clear enough to enable you to draw a conclusion beyond reasonable doubt, from your own viewing alone, that the man in the video is the accused. The images are simply not clear enough.

One of the general features you might think you can discern on the man in the video - and this is a matter entirely for you - is what might be called rounded shoulders or stooped posture. I will come to the evidence of Dr Sutisno later, but in the context of that feature I remind you of the evidence of Mr Johnston and Ms McPhail. When Mr Johnston was asked how the accused stood, he said, 'There might be a slight stoop in the shoulder.' Later in his evidence it was put to him that Mr Murdoch does not appear stooped and Mr Johnston replied, 'No I wouldn't say stooped, no.' When it was put to Mr Johnston, however, that the accused adopts quite an erect, upright posture, Mr Johnston replied 'I don't know about erect but depends on what degree of erect and whatever, I don't know.' When it was suggested that the accused stands upright, square shouldered, Mr Johnston replied 'Not really, not to my knowledge anyway.'

As you know Ms McPhail saw the accused on 19 and 20 June 2001. She said that when she first saw the accused as she drove past and he was parked on the side of the road, she saw that the man was 'Tall and lanky, and a bit stooped.' She said, 'He was a bit rounded in the shoulder', and she described the man as 'Standing there with his dog, hands on his hips in a very relaxed pose, I suppose.' Now that was her evidence of her first view of the accused at a time when she did not know him and she drove past and saw him on the side of the road.

Asked to describe the accused and this is a description being given by Ms McPhail having got to know the accused on that trip, Ms McPhail gave this answer:

'He was a very tall man, very wiry, you know. He was quite lean and tall. He had a moustache.'

'Was there anything specific about his posture that you remember?---With being so tall, he was quite stooped'.

Ladies and gentlemen, Ms McPhail's evidence about the accused's stooped posture and lean build was not challenged in cross-examination. Ms McPhail also said the accused had a moustache and was wearing simple clothes. Jeans and maybe a windcheater or a flannelette checkered, coloured shirt.

Well, it is a matter for you how you view those descriptions and whether those descriptions compare as consistent with what you see of the man in the video or otherwise.

Now, as I have emphasised, I have been talking about what conclusions you might or might not be able to draw from your viewing of the video alone. Obviously, there is a deal of other evidence to which you should have regard in deciding whether you are satisfied that it is the accused and his vehicle depicted in the video.

I remind you that the evidence of Professor Spring applies to the other evidence as much as applies to your viewing of the video. There is a need for caution because of the factors identified by Professor Spring and you should bear those matters in mind when you are considering the evidence of other witnesses who have been asked to express views based upon their viewing of the video."

[231] Mr Barker QC submitted that, if the quality of the video was such as to require the calling of expert evidence, then it is inconsistent to call the type of evidence here in question. As will emerge in due course from a discussion of the evidence of Dr Sutisno and Professor Henneberg, there is in fact no inconsistency involved. The evidence properly admitted goes to similarity, rather than direct identity.

[232] The foregoing summary of the relevant evidence sought to be impugned clearly indicates that, in each instance, despite the relatively poor quality of the video record, the witness in question was able to identify particular physical characteristics said to be similar to those of the appellant. The evidence given essentially went to and was based on those characteristics.

[233] There can be no doubt that the evidence in question fell well within the permissible scope discussed by Kirby J in *Smith v The Queen* (2001) 206 CLR 650 at 656. That reasoning was applied by Ipp JA in *Li v The Queen* (2003) 139 A Crim R 281 at 294-295, where he said that the poor quality of

the relevant videotape did not detract from the probative value of evidence, given by a person duly qualified to give it, of the characteristics of the appellant compared to those apparent in the video material.

[234] Each of the relevant witnesses in the instant case was singularly well qualified, by his or her close association with and knowledge of the appellant at the relevant times, to make the comparisons expressed. Conformably with what Kirby J said in *Smith*, the evidence was particularly important when it is borne in mind that the appellant had deliberately changed his appearance from that at the time of the alleged offences. Each of the witnesses concerned knew him well both before and after that change.

[235] In our opinion the reasoning of the learned trial Judge was soundly based. The factual situation as to witness qualification addressed by him was the direct antithesis of that which was rejected by the court in *Smith*, where there had been no change of appearance and the prior knowledge of the proposed witnesses was limited.

[236] There is no substance in the proposed ground of appeal. The applications for extension of time and leave must be rejected.

**Ground 12 - Evidence of the witness Hepi as to identity of the person in the video** (Applications for extension of time and leave)

[237] By this proposed ground the appellant seeks to assert that the learned trial Judge erred in admitting the evidence of Mr Hepi that the person in the Truck Stop video was the appellant.

[238] The relevant evidence of this witness has already been summarised in relation to the preceding proposed ground.

[239] The appellant separately seeks to aver that Mr Hepi purported to identify the appellant accurately in the Truck Stop video in circumstances in which such identification was not objectively realistic and should not have been permitted, both for the reasons already recited in relation to the proposed Ground 11 and also the following considerations:

- (a) he did not initially identify him positively;
- (b) this only occurred in the context of an alleged admission by the appellant afterwards;
- (c) the identification was not independent of a knowledge and viewing of the vehicle and awareness of the appellant's general whereabouts; and
- (d) the witness demonstrated an utter contempt for the appellant raising a real issue as to whether any legitimate probative weight could be given to the evidence of this witness.

[240] The summary of the evidence given by this witness in relation to proposed Ground 11 only needs to be complemented, for present purposes, by the following exchanges that occurred in the course of his cross-examination:

“... Well, the photos, where did they come from? The Shell Service Station in Alice Springs.

The photos certainly came from the Shell Service Station in Alice Springs but they're not showing Mr Murdoch?---Yeah? How do you come to that conclusion?

If Mr Murdoch was using the BP at Alice Springs, you reject that?---Well, who is the bloke in the photo at the Shell Service Station?

Somebody who is not Mr Murdoch?---Yeah, right-oh. That's your assumption, mate.

You don't even countenance that possibility?---I look at the photo and I know exactly who it *is*. I spent a lot of time around this man. I know how he stands. I know how he walks. I know the car down to a T. I helped work on it. If that's not Mr Murdoch's car in the Shell BP (sic) and him in the shop---".

[241] The positive identification so made by the witness was essentially a spontaneous comment by him when pressed by counsel for the appellant. The substance of his evidence is as previously referred to. It was evidence that fell well within *Smith* and was given by a person who probably knew the appellant better than any other witness, over a lengthy period of time. He was even able to give detailed evidence of the deliberate practice of the accused in changing his appearance from time to time.

[242] The specific complaints made by the appellant go to the weight rather than the admissibility of the relevant evidence. All of them, including the obvious antipathy of the witness towards the appellant, were readily apparent to the jury and were thoroughly canvassed both by counsel and the learned trial Judge.

[243] The jury was made well aware of the requirement to approach Mr Hepi's evidence with great caution. They were given ample warning of the problems associated with it in general and what were said to be the specific weaknesses of it in particular.

[244] No reasonably arguable point as to admissibility, beyond what was discussed in relation to proposed Ground 11, has been identified by the appellant.

[245] The applications for extension of time and leave in relation to proposed Ground 12 must be dismissed.

**Ground 14 - Facial and body mapping or photo comparison** (Applications for extension of time and leave)

[246] The appellant complains that the learned trial Judge erred in admitting the evidence of Dr Sutisno because it was not established that body mapping, face and body mapping or posture comparison were recognised fields of specialised knowledge nor was it established that Dr Sutisno was an expert in any identified aspect of a field of specialised knowledge relevant to her evidence.

[247] The appellant submitted that the techniques and methodology used by Dr Sutisno were not shown to fall within the parameters of a particular recognised field of expertise and, further, it was asserted that, upon the evidence, it was not open to find that there was an area of expertise known as body mapping. There was no material before the court to support a

conclusion that such a technique was recognised within the scientific community as objective and reliable for the purposes of image comparison.

### **Evidence on the voir dire**

[248] Dr Sutisno gave evidence on the voir dire. She graduated in 1993 with a Bachelor of Science with her special area of study being anatomy. She proceeded to obtain Honours in Forensic Anatomy, which she described as being the “identification of people from their anatomical parts, whether or not from their remains or from images, but basically looking at the whole anatomy in terms of identification”. She then completed her PhD with her area of study being facial identification “in terms of facial reconstruction, recognition and identification”. She has lectured in the area and has worked with police both in Australia and abroad “identifying people from their remains or surveillance images”.

[249] In her written report dated 12 May 2005, which became exhibit P21 on the voir dire, she described face and body mapping as a process of identification rather than recognition. The identification is based on the principle that no two individuals are the same in morphology and habits, no two skulls and no two faces are alike or identical in their entirety. The process involves a feature by feature approach to identification. A combination of different elements such as morphology, relative proportions, posture, gait, racial traits, distinguishing features (or unique identifiers), and habitual characteristics enable the identification of a person.

[250] Dr Sutisno said that the application of face and body mapping in forensic identification evolved in the late 1980s as the use of surveillance video cameras increased around the world. Face and body mapping involves several processes. The first is morphological analysis of the face, head and body to determine the absolute visual similarities or differences between subjects. The analysis involves a thorough feature by feature evaluation of the face, head and body by a process of comparing two images, one from the scene as recorded by the security video or closed-circuit television and the other of the suspect. The process is to subdivide the face and the body into components and, in the words of Dr Sutisno:

“Particularly important is the attention to detail and combination of different elements such as morphology, relative proportions, posture, gait, racial traits, distinguishing features (unique identifiers) and habitual characteristics for a complete assessment to individualise a person. This is best carried out with full understanding of human anatomy. It is through the holistic approach of looking at all the features rather than just one feature alone which then identifies the individual.”

[251] The process “focuses upon identifying relative similarities and/or differences between the images as well as the presence of any distinguishing ‘unique identifiers’ that make the person unique, unusual or distinct”.

[252] A further application of face and body mapping was described as photo-anthropometry which involves “metrically comparing anthropometric indices using measurements taken from specific reference points or anatomical landmarks on the face”. That process was not adopted in this case because of an absence of direct frontal and profile views for the purposes of

comparison. It is not necessary to further consider this aspect of face and body mapping.

[253] The final application is photographic superimposition which involves overlaying two comparably enlarged images to demonstrate the alignments of matched morphological features or areas of marked differences. It is said to provide a visual display through the use of video or computer technology of the definitive resemblances or differences between the offender and the suspect. The process allows the expert to “develop and demonstrate a series of visual effects and to focus on morphological details and dimensions and enables the viewer to ‘see the entire procedure and visualise exactly how the expert came to his or her conclusions’”.

[254] In the present case, Dr Sutisno employed a control mechanism to evaluate the degree of clarity and level of distortion from the security video taken on the night. She conducted the same comparative process with two of the people who had been present on the night, being the shop attendant who served the male in question and another customer.

[255] In relation to the appellant Dr Sutisno compared images taken from the security video footage recorded at the Shell truck stop on 15 July 2001 with images of the appellant obtained from media footage, Supreme Court footage, forensic photographs and a surveillance video recording at Berrimah Correctional Facility.

[256] The results of the morphological analysis conducted by Dr Sutisno were reduced to tabular form and were available for comparison with the source material relied upon by her. Similarly the results of the photographic superimposition were available.

[257] On the voir dire Dr Sutisno expressed the conclusion that “the male in question featured on the security video (CCTV) footage captured from the Shell truck stop on Dalgety Road in Alice Springs on the 15<sup>th</sup> day of July 2001, and the alleged accused (sic) Bradley John Murdoch are one and the same”.

[258] In her evidence on the voir dire Dr Sutisno said that facial mapping was a recognised field of scientific expertise in the United Kingdom and in the United States of America, although under different names. The methodology was the same as Dr Sutisno used in the present case. In relation to incorporating mapping of the whole body she said the only other person using that technique was Professor Hashimoto of Japan. Body mapping was, she said, essentially an extension of facial mapping.

[259] In the course of cross-examination on the voir dire Dr Sutisno was not challenged as to the existence of a body of expertise in these areas. She was asked whether her assessment that the person shown on the video image from the truck stop was the same person as the appellant could be wrong and she responded: “Not given the multiplicity of match features”.

[260] In subsequent submissions to the learned trial Judge counsel contended that “the fact that it’s been admitted in the UK, it shouldn’t be a field of science recognised and admitted here”. Further he submitted that Dr Sutisno should not be permitted to express “the ultimate view, ie they are one and the same person”.

[261] Following the voir dire the learned trial Judge ruled that the evidence of Dr Sutisno was admissible and would not be excluded in the exercise of his discretion. He subsequently provided reasons for so doing: *The Queen v Murdoch (No 4)* [2005] NTSC 78 at paras [82]-[118].

### **Evidence in the trial**

[262] When Dr Sutisno gave evidence before the jury she explained in greater detail the approach she took to identification and the reasons for her conclusion that the person shown in the truck stop video was one and the same as the appellant. She detailed the principles underlying her work. She went through each of the factors that led her to that conclusion. In aid of this process Dr Sutisno produced 18 photoboards bearing some images from the truck stop video and some images of the appellant extracted from footage filmed by the media and other sources. She explained to the jury what she saw as the similarities and differences between them. She also conducted demonstrations of the process of superimposition. She described that process as a “visual display of the results that were found from the analysis”. She was cross-examined on those processes with assistance from

the footage and the photoboard. To this extent this was not a case of a “bare ipse dixit”. The jury was placed in a position which permitted a critical evaluation of the opinion expressed by Dr Sutisno. The members of the jury were able to see the material upon which Dr Sutisno relied and to follow her reasoning process.

[263] The conclusion reached by Dr Sutisno and expressed to the jury was that:

“The multiple number of features matched, which includes the most noticeable or recognisable features, the distinctive, unique identifiers, the habitual characteristics and racial traits indicate the level of identification is the same person.”

[264] In cross-examination the principal challenge was to the observations made by Dr Sutisno and whether the quality of the photographs and images permitted her to draw the conclusions that she drew. There was no cross-examination to the effect that there was no relevant field of specialised knowledge. Of course, that failure may have followed a forensic decision made by counsel for the appellant consequent upon the ruling made on the voir dire. The evidence in chief and the cross-examination demonstrated how the field of specialised knowledge possessed by Dr Sutisno applied in the present case. The reasoning process employed by Dr Sutisno was exposed.

[265] The defence called Professor Masiej Henneberg. Professor Henneberg holds the Wood Jones Chair of Anthropological and Comparative Anatomy at Adelaide University and he is also the head of the Department of

Anatomical Science at that university. In the course of his evidence he confirmed that he had experience in the forensic comparison of people in images. His involvement in this area commenced in the 1970s and continued into the 1980s. He had been using the process in paternity analysis in times before DNA analysis became known. The process involved anatomically assessing facial features and other features of mother and child and then making an assessment of the same features of a suspected father in order to determine whether it was likely that the alleged father was in fact the father of the child. The evidence was given in court. The witness said that he “applied the same principles to analysis of images as now images started to become more popular because CCTV systems were installed in various premises”. He confirmed that he had been published in scientific journals on “facial approximation, identification from images, identification from the skull as well as from the skeleton”. The process he described, and which he referred to as photo-comparison, was similar to that adopted by Dr Sutisno. He advised that whilst it was possible through such processes to say that two separate images showed the same person he had not ever written a report “stating with 100% certainty that the person on the CCTV image is the accused”. He usually gave probabilities. He has given evidence of analysis of CCTV or photographs in comparison with suspects in courts in South Australia, Queensland and New South Wales.

[266] Professor Henneberg discussed the quality of the images in this particular case and gave evidence contrary to that given by Dr Sutisno. He indicated

that he did not accept the conclusions of Dr Sutisno. His principal concern was that the CCTV images could not, in his opinion, be used to assess the anatomical detail that Dr Sutisno described in her report as appearing on those images. Except in the case of some peculiar disfigurement or anatomical anomaly he did not regard it as possible to identify a person in one image as the same person in another image to the degree of “100% certainty”. In the course of his evidence he discussed the “particular body build” of the person seen on the truck stop CCTV images as well as movements of the person which he thought showed “nothing peculiar or unusual”. He was unable to discern the “flat back position” seen by Dr Sutisno. He criticised Dr Sutisno for “incorrect use in several instances of anatomical terminology”.

[267] In cross-examination Professor Henneberg described the process undertaken by Dr Sutisno as “the same basic principle approach of comparing images, feature by feature, the images from CCTV footage and images of suspects. To that extent it’s the same procedure”. He expressed concern that “she calls it the face and body mapping and she claims it’s her own method”. Whether it is truly her “own method” is not a matter for discussion in this forum. Dr Sutisno undertook the same approach to comparisons as the professor. We should not be misled by labels. The criticism is not of her approach or methodology but of her conclusions. The acceptance of the evidence of one expert over another is, of course, a matter for the jury and not a matter for concern in relation to this ground of appeal.

[268] The learned trial Judge, as we have said, made it clear to the jury that the relevance of the evidence as to the identity of the person at the truck stop video was of limited effect. If the person was demonstrated to be the appellant, that would only prove that he was in Alice Springs at a particular time in the early hours of 15 July 2001. That then would be a piece of circumstantial evidence to be considered in conjunction with the rest of the evidence. It would not, by itself, prove that the appellant was the offender but, rather, was a matter to be taken into account.

### **The ruling**

[269] The learned trial Judge noted that evidence of facial mapping has been accepted in the United Kingdom since the early 1990s. He made reference to *Stockwell v R* (1993) 97 Cr App R 260; *R v Clarke* [1995] 2 Cr App R 425; *R v Hookway* [1999] Crim LR 750 and *Attorney-General's Reference (No 2 of 2002)* [2003] 1 Cr App R 321. In relation to the last of those cases he quoted from page 327 where the court said:

“A suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury ... .”

[270] The learned trial Judge then went on to conclude:

“[109] In my view, applying the language of King CJ in *R v Bonython* (1984) 38 SASR 45, facial mapping ‘forms part of a body of knowledge or experience which is sufficiently organised or recognised to be acceptable as a reliable body of knowledge or

experience'. Further, by study and experience, Dr Sutisno possesses a sufficient knowledge of the subject matter to render her opinion of value in resolving the issues before the Court.

[110] Body mapping has received limited attention within the scientific community. For that reason it may be regarded as a new technique, but as Dr Sutisno explained it is merely an extension of the well recognised and accepted principles of facial mapping to the remainder of the body. I am satisfied that the technique has 'a sufficient scientific basis to render results arrived at by that means part of a field of knowledge which is a proper subject of expert evidence'."

[271] The learned trial Judge declined to exclude the evidence in the exercise of his discretion. The evidence was admitted.

[272] In this Court the appellant addressed in detail the basis upon which he submitted that there was no relevant field of specialised knowledge and that it was not established that Dr Sutisno was an expert in any identified aspect of a field of specialised knowledge. Such detailed submissions were not made to the learned trial judge.

[273] It was acknowledged by the appellant that there was a finding by the learned trial Judge that there existed a specialised field of knowledge and this amounted to a finding of fact. The submission was that there was no evidence to support that finding. It was the contention of the appellant that facial mapping aside, there is no field of expertise of either body mapping or face and body mapping.

[274] Reference was made to the decision of the Court of Appeal in *Lewis v R* (1987) 88 FLR 104 where it was pointed out by Maurice J that whenever the

Crown wishes to rely upon forensic evidence the Crown has a duty to acquaint the jury in ordinary language with those aspects of an expert's discipline and methods necessary to put them in a position to make some sort of evaluation of the opinions to be expressed.

[275] Where, in a case such as the present, the evidence is of a comparatively novel kind the duty resting upon the Crown is heightened. It is necessary for the Crown to demonstrate the scientific reliability of the evidence.

[276] The Court was taken in detail to the report of Dr Sutisno presented on the voir dire examination. It was pointed out that Dr Sutisno's claim that face and body mapping evolved in the 1980s was inaccurate in that the evidence upon which she relied showed only that face mapping evolved during that period and face and body mapping has not, as yet, evolved as a recognised area of scientific endeavour. Reference to the curriculum vitae of Dr Sutisno reveals that the great majority of her published work relates solely to facial mapping. There has not been identified any paper published by Dr Sutisno or any other person on the topic of body mapping or face and body mapping. Her references in her report to papers by others relate solely to facial mapping.

[277] It was submitted that there was no evidence that Dr Sutisno had written about the issue or obtained any agreement or approval for her theories from anyone other than herself. She said the only person she knew who incorporated "the whole body" in the mapping process was Professor

Hashimoto of Japan. There was no evidence as to his qualifications or as to his opinions. There was no suggestion that he had published any papers on the topic. The evidence of Dr Sutisno did not go beyond the mere assertion that Professor Hashimoto also engaged in face and body mapping.

[278] It was submitted on behalf of the appellant that, whilst the trial Judge made mention of four cases from the United Kingdom dealing with the issue of facial mapping, a more recent decision from that jurisdiction had not been drawn to the attention of his Honour. In the unreported case of *R v Paul Edward Gray* [2003] EWCA Crim 1001 the Court of Appeal (Criminal Division) dealt with a case where the jury had been invited to compare stills from CCTV footage with the appellant as he appeared in court. In disposing of the matter the court addressed facial mapping in some observations which were obiter dictum.

[279] The court said:

“We do not however wish to pass from this appeal without making general observations about the use of facial imaging and mapping expert evidence of a reliable kind. Mr Harrow, like some other facial imaging and mapping experts, said the comparison of the facial characteristics provided ‘strong support for the identification of the robber as the appellant’. No evidence was led of the number of occasions on which any of the six facial characteristics identified by him as ‘the more unusual and thus individual, were present in the general population, nor as to the frequency of the occurrence in the general population, of combinations of these or any other facial characteristics’. Mr Harrow did not suggest that there was any national database of facial characteristics or any accepted mathematical formula, as in the case of fingerprint comparison, from which conclusions as to the probability of occurrence of particular facial characteristics or combinations of facial characteristics could safely be drawn. This court is not aware of the existence of any such

database or agreed formula. In their absence any estimate of probabilities and any expression of the degree of support provided by the particular facial characteristics or combinations of facial characteristics must be only the subjective opinion of the facial imaging or mapping witness. There is no means of determining objectively whether or not such an opinion is justified. Consequently, unless and until a national database or agreed formula or some other such objective measure is established, this court doubts whether such opinions should ever be expressed by facial imaging or mapping witnesses. The evidence of such witnesses, including opinion evidence, is of course both admissible and frequently of value to demonstrate to a jury with, if necessary, enhancement techniques afforded by specialist equipment, particular facial characteristics or combinations of such characteristics so as to permit the jury to reach its own conclusion – see *Attorney-General's Reference (No 2 of 2002)* [2002] EWCA Crim 2373; but on the state of the evidence in this case, and if this court's understanding of the current position is correct in other cases too, such evidence should stop there.”

[280] In *Gray* the Court of Appeal made it clear that opinion evidence of this kind is both admissible and frequently of value in demonstrating particular facial characteristics or combinations of such characteristics. It does not extend to positive identification. The passage quoted was adopted in the subsequent Court of Appeal decision of *R v Trevor Elton Gardner* [2004] EWCA Crim 1639 where it was described as a “strong warning” in relation to new techniques of identification. The court went on to quote with approval the following passage from the judgment of Taylor LCJ in *Clare v Peach* [1995] 2 Cr App R 333:

“If admitting evidence of this kind seems unfamiliar and an extension of established evidential practice, the answer must be that, as technology develops, evidential practice will need to be evolved to accommodate it. Whilst the courts must be vigilant to ensure that no unfairness results, they should not block steps which enable a jury to gain full assistance from the technology.”

[281] The Court of Appeal in *Gardner* accepted the following summary of the present position in the United Kingdom as to the admissibility of evidence relating to analysis of images from CCTV from *Attorney-General's Reference (No 2 of 2002)* (supra):

“In our judgment, on the authorities, there are, as it seems to us at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing up, a jury can be invited to conclude the defendant committed the offence on the basis of a photographic image from the scene of the crime:

- (i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock;
- (ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this; and this may be so even if the photographic image is no longer available for the jury;
- (iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonable contemporary photograph of the defendant, provided that the images and the photograph are available to the jury;
- (iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available to the jury.” (Cited authorities omitted)

[282] The most recent consideration of the issue in Australia was in the judgment of the New South Wales Court of Criminal Appeal in *R v Tang* (2006) 161 A Crim R 377 where Spigelman CJ considered the admissibility of the evidence of Dr Sutisno in the circumstances of the case then before the court. In *Tang* there were two aspects to the opinion evidence considered by the court: the first was an identification based on facial characteristics or facial mapping; and the second was an identification of the appellant on the basis of physical characteristics or body mapping. His Honour noted that the evidence regarding specialised knowledge with respect to body mapping was of a “qualitatively different character to that relating to” facial mapping. He observed that the addition of “body mapping” to “facial mapping” was of significance.

[283] In *Tang* the exercise was guided by the requirements of s 79 of the Evidence Act 1995 (NSW) which in this Court it was conceded, for present purposes, was reflective of the common law. The section provided as follows:

“If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.”

[284] In the course of his judgment Spigelman CJ (with whom Simpson and Adams JJ concurred) made the following observations:

1. “The grounds of appeal focus particular attention on the admissibility of the opinions expressed in the evidence and also on the quality of that evidence. It appears to me that

there are three distinct pieces of opinion evidence given by Dr Sutisno with respect to the Appellant. These are:

- (i) Dr Sutisno's evidence that the two bodies of photographs depict the same person;
- (ii) Dr Sutisno's evidence that, on the six point scale she applied to the photographic evidence, 'the similarities' did 'lend support' to the conclusion that the offender and the Appellant were one and the same person;
- (iii) Dr Sutisno's characterisation of certain matters as 'unique identifiers'.

The evidence of identity referred to in (i) is plainly an opinion. The 'six point scale' in (ii) is derived from *Bromby* and has no scientific basis. It is no more than a series of convenient labels, arranged in an ascending hierarchy, that state a conclusion. As to (iii) the categorisation of an 'identifier' as 'unique' similarly has no scientific basis and is no more than an emphatic statement of an opinion." (paras 87 and 88)

2. "In the circumstances of this case, the evidence of particular similarities between the two categories of photographs of the accused and the third offender was admissible. The process of identification and magnification of stills from the video tape was a process that had to be conducted by Dr Sutisno out of court. Furthermore, the quality of the photographs derived from the video tape was such that the comparison of those stills with the photographs of the appellant could not be left for the jury to undertake for itself. The identification of points of similarity by Dr Sutisno was based on her skill and training, particularly with respect to facial anatomy. It was also based on her experience with conducting such comparisons on a number of other occasions. Indeed, it could be supported by the experience gained with respect to the video tape itself through the course of multiple viewing, detail selection, identification and magnification of images. By this process she had become what is sometimes referred to as an 'ad hoc expert'." (para 120)

3. “With respect to the first limb of s 79, I have set out above the evidence of the nature of the specialised knowledge which Dr Sutisno said she had brought to bear in the formulation of the three opinions she expressed. There does appear to be a body of expertise based on facial identification. The detailed knowledge of anatomy which Dr Sutisno unquestionably had, together with her training, research and experience in the course of facial reconstruction supports her evidence of facial characteristics.” (para 135)
4. “Nothing was presented to the Court which indicates, in any way, that Dr Sutisno’s extension from facial to body mapping, with respect to matters of posture, has anything like that level of background and support. Specialist knowledge of posture can of course exist. (See eg *Li v The Queen* at [106]). But the foundation for admissibility must be lain. It was not lain in the present case. The so-called ‘unique identifier’ of posture was an essential element of Dr Sutisno’s evidence of identity in the present case.” (para 136)
5. “In the case of the Appellant the relevant evidence about posture was expressed in terms of ‘upright posture of the upper torso’ or similar words. The only links to any form of ‘training, study or experience’ was the witnesses’ study of anatomy and some experience, entirely unspecified in terms of quality or extent, in comparing photographs for the purpose of comparing ‘posture’. The evidence in this trial did not disclose, and did not permit a finding, that Dr Sutisno’s evidence was based on a study of anatomy. That evidence barely, if at all, rose above a subjective belief and it did not, in my opinion, manifest anything of a ‘specialised character’. It was not, in my opinion, shown to be ‘specialised knowledge’ within the meaning of s 79.” (para 140)
6. “Evidence in the traditional form has been upheld since *Daubert (Daubert v Merrell Dow Pharmaceuticals Inc 509 US 579 (1993))*. However, in the US debate emphasises the significance of the step from evidence of similarity, to a conclusion about the identity of the suspect and the offender. Facial mapping, let alone body mapping, was not shown, on the evidence in the trial, to constitute ‘specialised knowledge’ of a character which can support an opinion of identity.” (para 146)

[285] His Honour went on to observe that an expert witness has to identify the expertise that can be brought to bear. For expert opinion evidence to be admissible it must be agreed or demonstrated that there is a field of specialised knowledge. He quoted Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 where his Honour said (at par 85):

“It must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert’s evidence must explain how the field of ‘specialised knowledge’ in which the witness is expert by reason of ‘training, study or experience’, and on which the opinion is ‘wholly or substantially based’ applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert’s specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight.”

[286] It is necessary to expose the reasoning process in order to demonstrate that the opinion is based on specialised knowledge.

[287] Spigelman CJ quoted with approval the passage from *R v Gray* set out above. He concluded:

“The three opinions of Dr Sutisno in the present case do not, in my view, go beyond a ‘bare ipse dixit’. Dr Sutisno did not identify the terms of the ‘strict protocol’ that she purported to have applied, nor did she set out the basis on which the ‘protocol’ was developed. Indeed, she said that this information was confidential because of what she described as a ‘process of patenting my innovations’. Accordingly, she had not published any of the ‘innovations’. The critical matter is that she did not identify her ‘protocol’ or explain its basis.” (para 154)

[288] Spigelman CJ drew a distinction between evidence of resemblance and evidence of identification. Evidence falling short of positive identification may be of significance when considered in the context of the whole of the evidence: *Festa v The Queen* (2001) 208 CLR 593 at 599; *Murphy v The Queen* (1994) 62 SASR 121 at 123-145. In the circumstances his Honour expressed the view that “the evidence of Dr Sutisno of similarity, at least with respect to the facial features, is capable of adding strength to the Crown’s circumstantial case. Even if she is not able to express the conclusory opinions of the character she did express, she can give evidence which supports the Crown case”.

[289] Similar observations may be made in the present case, given that there was here quite detailed evidence of Dr Sutisno's methodology and the application of that methodology to the available evidence.

[290] As has earlier been demonstrated, the process of so-called facial mapping has been recognised and accepted as constituting a field of specialised knowledge, on the basis and to the extent adverted to by the Court of Appeal in *Gardner*. This is premised on the generally accepted scientific concept that each human skull is unique in its structure.

[291] Body mapping was said by Dr Sutisno to be a simple extension of such a process. However, there was no evidence either of the invariable uniqueness of other parts of the human body or that Dr Sutisno's view was shared by

members of the relevant scientific community other than Professor Hashimoto, about whom and whose work nothing is known.

[292] That said, it is important that the real issues in this case ought not to be obscured by profitless debate of a semantic nature. It will be recalled from the evidence of Professor Henneberg, to which reference has been made earlier in these reasons, that, for the best part of 30 years, a process of analysis of anatomical features by what he described as "photo comparison" or "photo identification" has frequently been carried out and been the subject of a number of published papers. That process, as described by Professor Henneberg appears to have extended well beyond mere analysis of facial characteristics.

[293] Nevertheless, at this stage, the proposition that the procedure adopted by Dr Sutisno was a mere extension of the concept of facial mapping is, in reality, no more than an assertion on her part. This may or may not be accepted by the relevant scientific community in due course as being valid.

[294] This does not mean that evidence of similarities between the body and movements of the person in the truck stop video and the appellant could not be led. The admissibility of such evidence was contemplated in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Smith v The Queen* (2001) 206 CLR 650 where they said (at 656):

“In other cases, the evidence of identification will be relevant because it goes to an issue about the presence or absence of some identifying feature other than one apparent from observing the

accused on trial and the photograph which is said to depict the accused. Thus, if it is suggested that the appearance of the accused, at trial, differs in some significant way from the accused's appearance at the time of the offence, evidence from someone who knew how the accused looked at the time of the offence, that the picture depicted the accused as he or she appeared at that time, would not be irrelevant. Or if it is suggested that there is some distinctive feature revealed by the photographs (as, for example, a manner of walking) which would not be apparent to the jury in Court, evidence both of that fact and the witness's conclusion of identity would not be irrelevant."

[295] Similarly in *Li v The Queen* (2003) 139 A Crim R 281 at 294 a detective who made extensive observations of the appellant was able to testify as to the distinctive posture and manner of walking of the appellant. Such evidence was said to be 'not irrelevant and properly admissible'. See also the observations of Spigelman CJ in *Tang* (supra, at par 120).

[296] By virtue of her study of the appellant and of the images from the truck stop video, and given her general skill and training, Dr Sutisno had become a so-called "ad hoc expert": *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180; *Li v The Queen* (supra at 286); *R v Tang* (supra) and *Attorney-General's Reference (No 2 of 2002)* (supra). She could identify similarities that would not be readily apparent to the jury from their observations of the appellant in court. However such evidence would not extend to expressing the opinion that the images were of the same person.

[297] Contrary to the conclusion of the learned trial Judge it was not established that body mapping or "face and body mapping" is a technique that has a

sufficient scientific basis to render results arrived at by that means a proper subject of expert evidence.

[298] In our opinion Dr Sutisno was able to give evidence of points of similarity regarding the facial features of the persons shown in the images. She had training and expertise that permitted her to do so. She could also give evidence of similarities of body and movement based upon her detailed study of the images.

[299] The learned trial Judge, having concluded that Dr Sutisno was able to give expert evidence, then considered whether that evidence should be limited to a comparison of the relevant features of the person in the truck stop video and the appellant. He concluded:

“Further, in my view, it is not appropriate to limit the assistance to merely identifying the relevant characteristics. When regard is had to the nature and detail of the characteristics and the methodology employed by Dr Sutisno, it is readily apparent that her knowledge and expertise in the area of anatomy give Dr Sutisno a significant advantage in the assessment of the significance of the features of comparison both individually and in their combination. Dr Sutisno possesses scientific knowledge, expertise and experience outside the ordinary knowledge, expertise and experience of the jury. This is not a case in which the jury, having been informed of the relevant features, would not be assisted by the expert evidence of Dr Sutisno as to her opinion of the significance of the features individually and in their combination.”

[300] This Court has found that the technique employed by Dr Sutisno did not have a sufficient scientific basis to render the results arrived at by that means part of a field of knowledge which is a proper subject of expert evidence. However the evidence given by Dr Sutisno was capable of

assisting the jury in terms of similarities between the person depicted in the truck stop footage and the appellant. It was evidence that related to, and was admissible as, demonstrating similarities but was not admissible as to positive identity. Dr Sutisno was not qualified to give evidence, as she did, based on “face and body mapping” as to whether the two men were, indeed, the same man. Her evidence in this regard should not have been received.

### **The proviso**

[301] We have concluded that his Honour was in error in accepting that body mapping or face and body mapping (as distinct from facial mapping) is a technique qualified as a proper subject of expert evidence and, further, in finding that Dr Sutisno was able to give opinion evidence to the effect that the appellant and the male shown in the truck stop video were one and the same person. In light of those conclusions it is necessary to consider whether the proviso to the Criminal Code has application in all the circumstances.

[302] Section 411 of the Criminal Code NT sets out the proviso which is in common form with other jurisdictions in Australia. The relevant parts of the section are in the following terms:

“411. Determination of appeal in ordinary cases

(1) The Court on any such appeal against a finding of guilt shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the

court of trial should be set aside on the ground of the wrong decision on any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal.

(2) The Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.”

[303] The application of the proviso was considered in the judgments of the High Court in *Weiss v R* (2005) 224 CLR 300 and *Darkan v The Queen* (2006) 163 A Crim R 80. In a unanimous judgment in *Weiss* the court identified the fundamental task committed to an appellate court by the proviso as being, in accordance with the terms of the section, to decide whether a “substantial miscarriage of justice has actually occurred”. The court went on to observe:

“[39] Three fundamental propositions must not be obscured. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt.

[40] Reference to inevitability of result (or the converse references to “fair” or “real chance of acquittal”) are useful as emphasising the high standard of proof of criminal guilt. They are also useful if they are taken as pointing to “the ‘natural limitations’ that exist in the case of an appellate court proceeding wholly or substantially on the record.” But reference to a jury (whether the trial jury or a hypothetical reasonable jury) is liable to distract attention from the statutory task as expressed by Criminal Appeal Statutes, in this case, s 568(1) of the Crimes Act. It suggests that the appeal court is to do other than decide for itself whether a substantial miscarriage of justice has actually occurred.

## The statutory task and the proviso

[41] That task is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the ‘natural limitations’ that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. There will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction. In such a case the proviso would not apply, and apart from some exceptional cases, where a verdict of acquittal might be entered, it would be necessary to order a new trial. But recognising that there will be cases where the proviso does not apply does not exonerate the appellate court from examining the record for itself.”

See, also *Darkan*, at [84].

[304] The present trial was procedurally fair. The wrongful admission into evidence of Dr Sutisno’s opinion of identity was not, in the circumstances of this case, such a departure from the essential requirements of the law that it went to the root of the proceedings such as to exclude application of the proviso: see *Darkan*, at [94].

[305] The High Court in *Weiss* noted that there will be cases in which it is possible to conclude that error made at trial “would, or at least should, have had no significance in determining the verdict that was returned by the trial jury”. The court went on to say:

“[44] No single universally applicable description of what constitutes ‘no substantial miscarriage of justice’ can be given. But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused’s guilt of the offence on which the jury returned its verdict of guilty.”

[306] The evidence of Dr Sutisno went to only one part of the circumstantial case presented by the Crown. Her evidence, along with the evidence of similarity between the man in the video and the appellant from the witnesses Beverley Allan, Brian Johnston and James Hepi, was intended to show that the appellant was at the truck stop at Alice Springs on that night. If that evidence be accepted it placed him at a location and at a time that made it possible for him to have been at the site north of Barrow Creek at the time of the events described by Ms Lees. It was, as his Honour expressed it, evidence of “the opportunity of being at Barrow Creek at the time the Kombi van was pulled over and Ms Lees attacked”.

[307] The submission of the respondent was that, should the evidence of Dr Sutisno be excluded from the proceedings, the Crown case against the appellant would remain compelling.

[308] Whilst the defence made no concessions there is no longer any real dispute that the events of the night unfolded substantially as Ms Lees described. No issue is taken with the contention of the Crown that Mr Falconio is deceased and that blood located at the scene, when analysed, was found to be consistent with his DNA profile. The real issue in the case at trial was the

identity of the assailant. In that regard the Crown case was that the appellant was the assailant and the Crown presented a range of evidence in support of that contention.

[309] Significant evidence of the identity of the appellant as the assailant is to be found in the results of the DNA analysis of blood found on the shirt worn by Ms Lees at the time. Further, in support of the identification of the assailant, the Crown relies on the following items of evidence:

- (a) the identification of the appellant by Ms Lees;
- (b) the appellant's presence in Alice Springs on 14 and 15 July 2001 including his presence at the Shell Truck Stop at approximately 12.38 am on 15 July 2001;
- (c) the appellant's ownership of a vehicle and a dog similar to that described by Ms Lees;
- (d) changes made by the appellant to his personal appearance and the appearance of his vehicle on his return to Broome on 16 July 2001.

[310] It is necessary to consider each of those items of evidence.

### **DNA Evidence**

[311] The most vital piece of DNA evidence arose from the analysis of a blood spot located on the rear of the left shoulder of the T-shirt worn by Ms Lees on the night. The prosecutor described this as "the most single significant piece of evidence in this crime".

[312] There was no dispute that Ms Lees was wearing the relevant T-shirt and that it was referred to the forensic laboratory in Darwin for analysis. A forensic biologist, Ms Eckhoff, examined the T-shirt and noted the presence of the bloodstain. She said that the bloodstain did not have the appearance of resulting from a “flicking” of blood but, rather, was a deposit through contact with wet blood. This opinion was not challenged.

[313] Ms Eckhoff tested the T-shirt in July 2001 and determined that the profile did not match Mr Falconio, Ms Lees, the truck driver Mr Miller, or his offsider Mr Adams. She was unable to match the profile with any record on any of the databases in Australia. In January 2003 she used a different test which confirmed the results previously obtained, being across 10 sites, but which also provided results across an additional six sites. She therefore had a profile across 16 sites. It was not until December 2003 that Ms Eckhoff was able to match the profile obtained. She received a DNA profile of the appellant which, on 31 December 2003, she found was “an exact match” across all 16 sites with the profile obtained from the back of the T-shirt. The opinion expressed by Ms Eckhoff was that such a match demonstrates that it is at least 150 quadrillion times more likely that the DNA on the T-shirt came from the appellant than from any other person in the population selected at random. Her opinion as to the statistical probability was shared by Dr Buckleton, an expert in the statistical interpretation of DNA results, whose statement was admitted into evidence without objection.

[314] This evidence provides a compelling case for the conclusion that the blood on the rear of the T-shirt worn by Ms Lees was that of the appellant. This conclusion was not challenged on appeal.

[315] The question then arising is whether the Crown has established beyond reasonable doubt that the blood came to be on the T-shirt during the course of the events at Barrow Creek as described by Ms Lees and whether the Crown has negated to the requisite standard of proof any suggestion that the blood came to be there through some innocent or accidental means.

[316] There was no submission to the jury that the blood could have been deposited on the T-shirt after the events which occurred near Barrow Creek. The shirt was collected from Ms Lees at the hotel and was appropriately secured and transferred to the laboratory in Darwin. The only live issue was whether the blood of the appellant could have been deposited on the T-shirt whilst Ms Lees was in Alice Springs.

[317] At trial the submission of counsel for the appellant had been that the blood of the appellant may have been accidentally transferred to the T-shirt at the Red Rooster store in Alice Springs or elsewhere in Alice Springs. It was submitted that the evidence permitted a conclusion that both Ms Lees and the appellant were at the store during the course of the day of 14 July 2001. It was put that there may have been accidental contact at the store or elsewhere, or possibly, the blood of the appellant was left on a seat or a door frame at the store and Ms Lees brushed against it.

[318] The appellant gave evidence at the trial. He said that he had been at the Red Rooster store at about 10.30 am on 14 July 2001. His evidence was that he arrived in Alice Springs at about that time and “first thing in Alice, pulled into the Red Rooster, that’s a bit of a spot we always used to sort of go to. Not necessarily in Alice Springs. Went to – went into there. Chicken roll, box of nuggets for Jack. Jack was a bit of a liker on nuggets. Full chicken for the trip”.

[319] He said he did not eat in the store but took his purchases away in a “little white little carry bag”. He then went to the Toyota agent. The appellant did not suggest that he was bleeding at the time he went to the Red Rooster store. He did not suggest he ever became aware of his blood being on the carry bag or elsewhere. When asked how his blood came to be on Ms Lees’ T-shirt he responded that he did not know.

[320] If the evidence of the appellant be accepted for the purposes of considering this aspect of the case against him then he was in the Red Rooster store at about 10.30 am on 14 July 2001. The evidence was that he drove into Alice Springs and went directly to the store. It was not suggested that he had suffered any incident or accident that may have led to him bleeding at the relevant time nor did he suggest that he was bleeding at the time. He was there for the purpose of buying takeaway food and he did not eat there. He purchased his food and left. There is no evidence that he spent any time at the store or that he was at any time seated there or came into contact with other people there.

[321] Ms Lees gave evidence of going to the Red Rooster store on 14 July 2001.

She said that she did not recall the place being busy whilst she was there and: “I don’t recall bumping into anybody or anyone ever coming close to me or speaking to me”. She did not recall seeing Mr Murdoch at all.

[322] At the time of giving evidence her recollection was that the Red Rooster store was the last place she and Mr Falconio visited before leaving Alice Springs. That would place their attendance at the store in the afternoon. In cross-examination she was taken to a conversation which she held with Constable Andrews on 23 July 2001. Constable Andrews was at the time accompanying Ms Lees in the Alice Springs region. Ms Lees could not recall the conversation. Constable Andrews subsequently gave evidence of the conversation, a note of which she had recorded on a brown paper bag. Constable Andrews said that Ms Lees informed her that on the Saturday morning she and Mr Falconio had arisen at 0730 hours. They drove to the Araluen Centre and walked to the Stuart Caravan Park where they each had a shower. They then drove to the central business district and parked near to the library. Ms Lees went to the library and used the Internet. Mr Falconio attended upon an accountant and subsequently went to the library. Ms Lees waited in the Kombi van whilst Mr Falconio finished some emailing. They then drove to the Red Rooster store where they ate inside. The notes record “one other couple inside – quiet”. Thereafter they went to the airport, then to the Camel Cup and left Alice Springs at about 1600 to 1630 hours.

[323] Ms Lees advised that the appointment with the accountant was in the early morning. The accountant was subsequently called to give evidence and confirmed that the appointment was at 10 am. Mr Falconio was with her for about 15 minutes.

[324] It is not clear from the evidence of Ms Lees as to when she and Mr Falconio attended at the Red Rooster store. However, on one view of the evidence it may have been around the time the appellant says he was there. What is clear is that when Ms Lees did attend it was quiet and there may have been only one other couple present.

[325] The issue to be addressed is whether the blood of the appellant could have made it to the top rear of Ms Lees' T-shirt other than in the circumstances of the events at Barrow Creek. It was put to the jury by counsel for the appellant that transfer may have occurred in Alice Springs by means of primary or secondary transfer. He reminded the jury that on that day Ms Lees went to the Red Rooster store although it was not clear at what time. He went on to say:

“But whether she was there in the morning or in the afternoon or lunchtime is probably of no great consequence because it's the fact that she was there and you might think Brad Murdoch was there on the same day that is important. Because you know now that Brad Murdoch was in Alice Springs. He has told you the sequence of events as he recalls them, on 14 July. ... Isn't there a very obvious and reasonable possibility that given that evidence and that information there is a very real chance that any of his DNA on the back of her T-shirt could have been accidentally deposited without anybody knowing about it in Alice Springs. It may not have even been a primary transfer. It is possible, you might think, it could have been secondary transfer as, if Brad Murdoch is at Red Rooster, if he

has done some work on his car or done something, got a cut or something he could leave a small amount of blood on a seat, on a door, door frame, something like that. She comes along after and there is a secondary transfer that takes place. How easy could that happen, particularly when you might be prepared to accept that perhaps not surprisingly they were both in the same shop on the same day at the same time or at different times, it may not matter.”

[326] The prospect for primary or secondary transfer of blood from the appellant to Ms Lees in the manner described is fanciful. There is no suggestion that the appellant was bleeding or had done anything that might cause him to bleed prior to entering the Red Rooster store. He had been driving his vehicle for some hours and went directly into the store. Further, there is no evidence of him bleeding or being likely to have bled elsewhere in Alice Springs during the course of the day. Apart from the evidence regarding the Red Rooster store, there is no evidence to suggest that the paths of Ms Lees and the appellant crossed during the course of that day. She gave an account of her day which included being in the library, at a café in the mall, at the airport, at the Araluen Centre and the nearby caravan park, at the Camel Cup and so on. These were not places said to have been visited by the appellant during the course of his day in Alice Springs.

[327] The prospect of transfer of blood from the appellant to Ms Lees really comes down to that occurring at the Red Rooster store. However the descriptions of the respective visits to the store by the appellant and by Ms Lees do not suggest that anything occurred at that location. The evidence of Ms Eckhoff was that the blood was wet at the time it came into contact with the T-shirt and that it was smudged. She said the pattern on the shirt did not indicate a

flicking but, rather, direct contact because of the smudged stain. This would preclude blood being flicked on to Ms Lees from an injury suffered by the appellant. There is no evidence that they came into contact with each other. Neither the appellant nor Ms Lees suggests that occurred. The location of the bloodstain on the shirt is such that the suggestion of it being placed by the appellant on a door or a piece of furniture and then transferred while still wet onto the rear of Ms Lees' shirt is unreal.

[328] The suggestion that the blood came to be on the T-shirt of Ms Lees as a consequence of something that occurred in Alice Springs is simply not sustainable. Further, such a prospect only arises if the evidence of the appellant on this point is accepted. The Crown submitted that it should be rejected. We will address that issue shortly.

[329] The circumstances of the incident near to Barrow Creek demonstrate that the depositing of blood on the rear of the shirt of Ms Lees by the assailant was quite consistent with her description of events. The assailant was involved in some type of altercation with Mr Falconio and he had roughly handled Ms Lees. There was opportunity for him to have suffered a wound resulting in bleeding. The assailant was behind Ms Lees on a number of occasions. At one point he lifted her from behind. He was behind her when he took her from near to the Kombi van to his 4-wheel drive. He had his hand at the base of her neck. He was above her during part of the struggle. There were many opportunities for the blood of the assailant to be deposited on the rear of Ms Lees' T-shirt in the location subsequently analysed.

[330] On the basis of the DNA evidence regarding the blood of the appellant being on the rear of the T-shirt of Ms Lees there is, in our view, sufficient evidence to find beyond reasonable doubt that the appellant was the assailant. By reference to the other evidence properly admitted at the trial it follows that the appellant was guilty of the offences.

[331] The DNA evidence did not end there. It is necessary to consider the analysis of samples collected from the gearstick of the Kombi van, the steering wheel of the van and from the handcuffs or the cable tie restraints, as they were sometimes described, which had been applied by the offender to the wrists of Ms Lees. The analysis was, on each occasion, undertaken by Dr Whittaker, an eminent forensic biologist from the United Kingdom.

[332] It was the case for the Crown that the offender drove the Kombi van away from the point on the Stuart Highway where it had been stopped. The vehicle was hidden off the roadway and subsequently discovered by investigating police officers. The van was subjected to forensic examination and a mixed DNA profile was obtained from the gearstick. Dr Whittaker gave evidence that the profile was consistent with a mixture of DNA from Mr Falconio and from the appellant. It was the conclusion of Dr Whittaker that the profile consistent with that of the appellant was the major contributor to the profile and that the combination of DNA bands which match the appellant would be expected to occur in approximately one in 19,000 by reference to the United Kingdom Caucasian population. Dr Buckleton calculated the statistical probability of finding a second copy

of the profile by reference to the Northern Territory database as being one in 13,000.

[333] A swab was taken from the steering wheel of the vehicle and that was also analysed by Dr Whittaker. It was concluded that DNA on the wheel came from at least three people. Dr Whittaker was unable to exclude the appellant as a contributor. As the learned trial judge advised the jury, “nor were many, many others” excluded.

[334] In relation to the cable tie restraints it was the case for the Crown that these had been placed on Ms Lees at the time of the offence. Dr Whittaker had also examined them and a mixed DNA profile was said to have been obtained from the inner layers of the duct tape which was used to construct them. It was the opinion of Dr Whittaker that the major contributing profile was consistent with the profile of the appellant. He said that in this instance the combination of the DNA bands which match the appellant would be expected to occur in approximately one in 100 million of the United Kingdom population. The statistical expert, Dr Buckleton, calculated the probability of finding a second copy of the profile by reference to the Northern Territory database as also being one in 100 million.

[335] Before the trial commenced there was a challenge to the evidence of Dr Whittaker and, in particular, to the methodology adopted by him which was described as the low copy number test (LCN). The challenge was considered by the learned trial judge and, in *The Queen v Murdoch* [2005]

NTSC 76, he ruled that LCN had a sufficient scientific basis and general acceptance within the relevant scientific community to render the results received by the LCN part of a field of knowledge which is a proper subject of expert evidence. He permitted the evidence to be called.

[336] Dr Whittaker then gave evidence before the jury. The appellant called Dr Both, an experienced forensic scientist from the Forensic Science Centre in Adelaide, who also gave evidence before the jury challenging the scientific validity of LCN. Having heard both experts and having revisited his ruling the learned trial judge confirmed his conclusion that the evidence of Dr Whittaker was admissible and should not be excluded in the exercise of his discretion. That decision was not challenged on appeal.

[337] However, the challenge to the evidence of Dr Whittaker at trial by Dr Both creates a problem for the respondent in seeking to rely upon this evidence in support of the submission that no substantial miscarriage of justice has actually occurred. Whilst it was open to the jury to accept the evidence of Dr Whittaker over that of Dr Both, this court must make its own assessment of the admissible evidence bearing in mind the natural limitations that exist for an appellate court proceeding on the record from the trial. As we have noted, if those natural limitations compel this Court to conclude that it cannot reach the necessary degree of satisfaction the proviso will not apply.

[338] Dr Both was described by the learned trial judge as “well qualified and experienced in the area of forensic DNA”. She did not regard the LCN

technique applied by Dr Whittaker as having been scientifically proven, saying: “Dr Whittaker is pushing science to the limit”. She regarded it as a dangerous technique. Dr Both expressed concern as to the reliability of the results particularly having regard to what she saw as an increased prospect of contamination and the reduced ability to identify stutters which may mask a true allele. If a stutter masks a true allele Dr Both said: “It may be that you arrive including an individual where perhaps they shouldn’t be included or you may be excluding someone”.

[339] Ultimately the opinions of Dr Both and Dr Whittaker remained in conflict. The learned trial judge told the jury that they were each “very firm in their views”. In light of our conclusion as to the impact of the evidence as a whole we do not find it necessary to resolve this conflict. Suffice it to say that, having regard to the cross-examination of Dr Both and the observations of the learned trial judge to the jury in the course of his summing up, we do not find her criticisms of the evidence of Dr Whittaker to be compelling. However, in view of the conflict, the results of the analysis of the DNA obtained from the gear stick, the steering wheel and from the handcuffs may be put to one side in considering the application of the proviso.

### **Identification by Ms Lees**

[340] On 15 July 2001 Ms Lees provided the police artist with an oral description of her assailant. The description is set out in paragraph [7] (31) of these

reasons and accurately describes the key facial characteristics of the appellant.

[341] On at least three different occasions Ms Lees identified the appellant as the man who attacked her. The first was in October 2002 whilst she was working in Sicily when she saw his image on the Internet. The second was when she viewed a photoboard on 18 November 2002 in the United Kingdom and the third was when she formally identified the appellant in the dock. We have addressed each of these incidents of identification when dealing with ground 1. The circumstances of each identification are there set out. We will not now repeat them.

[342] At trial the evidence of Ms Lees regarding the Internet identification was compelling. The identification she described was both spontaneous and unequivocal. The witness said that she had not been influenced by anything that she might have read and that she could not now remember what the article said. She said of the appellant she would “recognise him anywhere”. As we observed when dealing with ground 1, the circumstances of the identification were the sudden, unexpected and incidental appearance of the image of the appellant to the witness and her unsolicited and spontaneous reaction to what was observed. Having revisited the evidence of Ms Lees at trial and having reminded ourselves of the requirement that identification evidence of this kind is to be approached with considerable care and with consciousness of the associated dangers we accept the evidence of Ms Lees.

[343] The photoboard identification followed the Internet identification in 2002. Ms Lees was shown a photoboard in which the appellant was depicted in a quite different way from his appearance in the photograph on the Internet. There was again a positive identification by Ms Lees of the appellant as being her assailant on the night. The fact that Ms Lees was able to positively and without difficulty identify the appellant as her assailant after a lapse of some weeks and in the context of a quite different form of presentation, demonstrated a degree of consistency on her part that would not have had significance had the image presented been similar to that found on the Internet on the earlier occasion. In our view the process had probative value in adding weight to her earlier observation that she would recognise the appellant anywhere.

[344] The dock identification occurred in circumstances which made it essentially a formality and did not add weight to the evidence of Ms Lees regarding the earlier identifications on the Internet and from the photoboard.

[345] We regard the identification by Ms Lees of the appellant as the assailant as powerful evidence in support of the Crown case.

### **The dog**

[346] Ms Lees also gave evidence of the presence of a dog on the night of the offence. There was evidence from others of the practice of the appellant to travel with his dog, Jack. As we observed in relation to ground 1 of the appeal, the photographs of Jack, of Tex (the dog at Barrow Creek) and of the

Australian cattle dog in the dogalog were all in evidence. It was the opinion of Ms Lees that there were points of similarity between Jack and the dog she saw on the night. This was not evidence of identification of Jack as the dog she saw on the night but rather of points of similarity between the two. Ms Lees was challenged as to her opinion by reference to her earlier descriptions of the dog Jack, the dog Tex and the Australian cattle dog shown in the dogalog. She identified the similarities upon which she relied as being “colouring, width of the dog, breed of the dog, head of the dog, quite broad face, head and ears”. We do not regard Ms Lees’ expression of opinion to have been shaken in cross-examination. It must be remembered that the evidence was of limited scope dealing, as it did, only with points of similarity. The evidence has probative effect in establishing that the offender was accompanied by a dog which had similarities to the dog which accompanied the appellant.

### **The presence of the appellant at the truck stop**

[347] The Crown relied upon a number of witnesses to establish that the appellant was the person shown in the truck stop video and, therefore, as being present at that location at 12.38 am on 15 July 2001.

[348] We have discussed the evidence of Dr Sutisno in this regard when dealing with ground 14. Her evidence is limited to demonstrating that the person in the video had the identified similarities with the appellant and no dissimilarities.

[349] The Crown also relied upon the evidence of Beverley Anne Allan, Brian Charles Johnston and James Tehi Hepi regarding their opinions concerning the likeness of the person in the truck stop video to the appellant. We have discussed this evidence in relation to ground 11 of the notice of appeal. The evidence given by each of the witnesses is there summarised and we noted that, in each instance, and despite the relatively poor quality of the video record, the witness was able to identify particular physical characteristics said to be similar to those of the appellant. Of course Mr Hepi went even further and, when challenged, expressed the opinion that the person shown in the video was one and the same as the appellant. We have discussed this evidence when dealing with proposed ground 12.

[350] The evidence of the three witnesses to the effect that the appellant had particular physical characteristics similar to the man shown in the truck stop video was consistent, firm and in our view convincing. The evidence of Dr Sutisno, in so far as properly admitted, lent support to the reliability of the evidence of these witnesses.

### **The presence of a similar vehicle at the truck stop**

[351] Further, there was evidence as to the similarity between the vehicle shown in the truck stop video and the vehicle driven by the appellant. Ms Allan said the vehicles were “similar”. Mr Hepi, who was very familiar with the vehicle driven by the appellant, identified it as that belonging to the appellant. He did so by comparing features that appeared on the video

including oversized wheels with white rims and the bug deflector. However, Mr Hepi described the bullbar in a manner inconsistent with that which is shown on the truck stop video. Mr Johnston, who was also very familiar with the vehicle, expressed the view that it “looks very similar to the one Brad had” and remarked that the configuration of the canopy “looks very much the same” and the bullbar “looks like it”. Mr Johnston was involved in transferring the canopy from an F100 to the subject vehicle. Mr Johnston was able to describe the “truckie-style bullbar” on the vehicle driven by the appellant and to identify the date upon which that had been put on the vehicle as before 15 July 2001. He was challenged in that regard but was able to fix the time by reference to the date he had left Broome.

[352] In considering the identification of the vehicle as being similar to that driven by the appellant it is necessary to bear in mind the evidence of Professor Spring as to the poor quality of the truck stop video and also to bear in mind that there are many vehicles of that make, model and approximate configuration travelling in the area at any given time. Notwithstanding those matters there was cogent evidence of similarities between the two vehicles.

### **Changes in appearance**

[353] Further, in support of the Crown case, was the evidence of the changes the appellant made to his appearance and to the appearance of his vehicle upon his return to Broome in July 2001.

[354] Ms Allan, who had known him as a close friend for some 12 months, described his appearance when he returned to Broome as having changed from having facial hair and hair on his head to being “completely clean shaven, no moustache, shaved his head ... complete crew-cut”. She said this was the first time she had seen him without a moustache. She said that she had last seen the appellant around October 2001 and, in relation to his vehicle, by that time “the whole back had been changed”. In cross-examination she said the vehicle had previously remained basically the same until he changed the back of it.

[355] Mr Hepi said that in July 2001 the appellant had a long handlebar moustache and longish hair. When he saw him on his return to Broome his hair had been cut and his moustache was shorter. On the day of his return the moustache came off completely and the hair was cut “back to number 1 or a number 2”. Mr Hepi said that it was not unusual for the appellant to change his appearance after such a trip, however to him the change “just seemed quite dramatic at the time” and for the appellant to shave the whole of his moustache off was unusual. In cross-examination it was pointed out to Mr Hepi that he had on an earlier occasion told police that the appellant went from having full facial hair to no facial hair but he maintained on this occasion that it was unusual. In his evidence the appellant claimed that the change was just part of his usual routine and that he still had his moustache when he saw Ms Allan.

[356] In relation to the changes to his vehicle the appellant acknowledged that changes had occurred but said that they had been planned over a period of time. He regarded “mucking around” with his vehicles as a hobby.

[357] The fact that there had been major changes to the vehicle subsequent to 14 July 2001 was not in dispute. Counsel for the appellant put to the jury that they would be invited by the Crown to regard it as a “complete transformation of the 4-wheel drive vehicle” but submitted that, notwithstanding the alterations that were made, the appellant still had a “4-wheel drive Land Cruiser with a green canopy and a black bullbar”. He submitted that whilst work was done, it was “done pretty much locally, everybody knew who he was, his name, it’s not very hard to prove, but the question for you, members of the jury, is what does it prove? Anything or just that he was a bloke who kept mucking around with his car?”.

[358] The submission understates the effect of the evidence. The changes were, as the Crown submitted, significant. They involved items from three vehicles being swapped around. The relevant canopy changed, the bullbar changed, the relevant compliance plate was changed and a turbo charger was added. These changes were of much greater significance than the appellant suggested. It was more than a man enjoying his hobby. Taken in context the evidence is significant. Although there was some general similarity in appearance to the vehicle as it was in July 2001, the effect was to completely change the vehicle upon closer inspection.

### **The evidence of Mr Hepi**

[359] In making reference to or relying on the evidence of Mr Hepi, as to the vehicle seen at the Truck Stop, the presence there of the appellant, the appellant's change of appearance on return to Broome and the changes in appearance to the Land Cruiser we are particularly conscious of the criticisms that were advanced by the defence and the strong warnings that were properly given by the learned trial Judge to the jury in relation to the consideration of his testimony. Clearly there was and is a need to scrutinise his evidence with great care. However, having done so, it must be observed that a significant amount of what he said was, ultimately, either not in issue or was substantiated by other acceptable evidence. Relevantly for present purposes, his evidence as to the matters referred to is both consistent with and derives considerable support from the other evidence to which we have specifically referred. Moreover, it carries with it the inherent ring of truth. We see no reason to question its accuracy.

### **The evidence of the appellant**

[360] The appellant gave evidence in the proceedings and appropriate directions were provided to the jury in relation to his evidence. The Crown invited the jury to disbelieve certain parts of that evidence including his assertion that he did not attend at the Shell truck stop in the early hours of the morning of 15 July 2001 and that he had attended at the Red Rooster store at about 10.30 am on 14 July 2001.

[361] In relation to his presence at the truck stop the appellant gave evidence that he had arrived in Alice Springs at about 10.30 am on Saturday 14 July 2001, had gone to the Red Rooster store to purchase some chicken and then taken his vehicle to a car wash, made some purchases at Barbeques Galore and then refuelled his vehicle at a BP service station in Alice Springs. He told the jury that he drove north of Alice Springs and turned off along the Tanami Track at about 3.30 pm. His evidence was that between midnight and 1 am on 15 July 2001 he was somewhere near to the Granite Mine on the Tanami Track about 500 kilometres from the Stuart Highway. This evidence is in contrast with the evidence of Beverley Anne Allan, Brian Charles Johnston and James Tehi Hepi discussed above. As we have indicated, the evidence of the three witnesses to the effect that the appellant bore physical characteristics similar to the man shown in the truck stop video was consistent, firm and convincing. In addition to the evidence of those witnesses there is support for the proposition that the appellant was the man in the video based upon the similarities identified by Dr Sutisno. She conducted a thorough and exhaustive comparison and identified a wide range of similarities between the images of the appellant and those of the person in the truck stop video. She described those similarities in great detail. There were no relevant dissimilarities. Her evidence was available for this Court to consider and lent significant support to the evidence of Ms Allan, Mr Hepi and Mr Johnston.

[362] In our opinion the combined force of the evidence in support of the appellant being the person shown in the truck stop video, circumstantial though it is, is convincing. We do not accept the evidence of the appellant to the contrary. This view is reinforced by our finding that the blood of the appellant was deposited on the T-shirt of Ms Lees at the time of the incident north of Barrow Creek.

[363] In relation to the evidence of the appellant that he travelled to Alice Springs and went directly to the Red Rooster store to purchase food, the submission of the Crown is that this evidence should be rejected.

[364] Daryl Phillip Cragan gave evidence of travelling from Broome to South Australia and back again with the appellant in the course of one of his drug runs. Mr Cragan said that they carried with them an Engel fridge in which they kept their provisions. During the trip they ate “from the vehicle”. In cross-examination he was asked whether the Red Rooster store was “somewhere Brad would go to get food on these trips” and he responded: “No”.

[365] Mr Johnston did three drug trips with the appellant. He described the arrangements as including an Engel fridge in which there was food and “if we’d stopped and had a barbie or something like that, a bit of a feed, yeah, so a bit of meat, margarine, tomatoes”. When asked whether there were any purchases made along the way he indicated only fuel, ice and drinks.

Mr Johnston gave evidence of stopping at fuel stops but not at any other

location such as the Red Rooster store. He was not asked any direct questions in this regard.

[366] We do not accept the evidence of the appellant that he attended at the Red Rooster store at or about 10.30 am on 14 July 2001. In our view, and as the Crown submitted, that evidence was invented by the appellant in an effort to create doubt regarding the damning scientific evidence confirming the presence of his blood on the T-shirt of Ms Lees. It was clearly a lie told with a consciousness of guilt.

### **Conclusion**

[367] The core issue in this case was the identity of the assailant. In our opinion the presence of the blood of the appellant upon the T-shirt of Ms Lees establishes beyond reasonable doubt the presence of the appellant at the time Ms Lees was attacked just north of Barrow Creek. When this evidence is considered along with the other evidence properly admitted at trial of events occurring at that location, the guilt of the appellant of the murder of Peter Falconio is established beyond reasonable doubt. The case against the appellant becomes overwhelming when the evidence of the identification of the appellant as the assailant by Ms Lees is taken into account.

[362] That is sufficient to conclude that no substantial miscarriage of justice has occurred and therefore to dispose of the appeal. However there is evidence which lends further significant force to the case against the appellant,

including the lie of the appellant as to his visit to the Red Rooster store and the evidence:

- (a) of Ms Allan, Mr Johnston, Mr Hepi and Dr Sutisno which leads to the conclusion that the appellant was the person shown in the truck stop video;
- (b) as to the similarity of the vehicle driven by the appellant to that shown in the truck stop video and, also, the similarity to the vehicle described by Ms Lees as being driven by the assailant;
- (c) as to the presence of a dog in the vehicle driven by the assailant similar in identified features to the dog owned by the appellant;
- (d) of the changes made by the appellant to his own appearance shortly after 14 July 2001 and
- (e) of the changes made by the appellant to the appearance of his vehicle after his return to Broome on 16 July 2001.

This circumstantial evidence combined to contribute to the strength of the already compelling case against the appellant. The error in admitting one aspect of the evidence of Dr Sutisno does not gainsay such a conclusion.

[368] We conclude there has been no substantial miscarriage of justice in this case. The appeal against conviction must be dismissed.

#### **Ground 15 – Non-parole period (pursuant to leave)**

[369] The final ground of appeal is in respect of the non-parole period fixed by the learned trial Judge. It asserts that the non-parole period set by the learned trial Judge is manifestly excessive in all the circumstances in so far

as, in practical terms, the appellant has a limited prospect of being released prior to his death.

[370] Having sentenced the appellant to life imprisonment for the crime of murder, the learned trial Judge imposed a sentence of four years imprisonment in respect of the offence of deprivation of liberty and a sentence of two years imprisonment in respect of the offence of aggravated unlawful assault. All sentences were directed to be served concurrently.

[371] As to the question of the non-parole period the learned trial Judge said:

“ ... I bear in mind that you are not entitled to the benefit of a plea of guilty. Just as you are not to be punished for the manner in which your defence was conducted, similarly you are not to be punished for the failure to plead guilty. However, you are not entitled to any benefit to which you would have been entitled if you had pleaded guilty.

Also relevant to the question of your non-parole period is the issue of general deterrence. It is a very significant factor in your case. The need to deter others from committing offences of this type is obvious.

As I have said, you have not shown any hint of remorse. I am satisfied that there is a complete lack of any remorse. Given that you must spend at least the next 20 years in jail, it is impossible to predict with any confidence how you are likely to respond to such a lengthy period of imprisonment. History is full of occasions when offenders apparently incapable of rehabilitation have, after lengthy periods of imprisonment and a process of maturing, turned the corner and been truly rehabilitated. Whilst recognising that possibility, I am driven to the conclusion that your prospects of rehabilitation are minimal.

The nature of your crime, your personal history, including your prior offending, your obvious aggression and complete lack of remorse for the commission of the crimes or for the devastating impacts upon

others, coupled with your maturity, paint a bleak picture of your prospects of rehabilitation.

The criteria relevant to the fixing of a non-parole period longer than 20 years must be viewed in the context of the statement in s 53A(2) that the standard non-parole period of 20 years represents the non-parole period for an offence in the middle of the range of objective seriousness for crimes of murder. Your crime is not in the middle of the range of objective seriousness for crimes of murder. While it is not at the top of that range, it falls within the upper end of that range.

I am satisfied that by reason of the objective and subjective factors affecting the relative seriousness of your crime, a longer non-parole period than 20 years is warranted. In that situation the legislation provides that I may fix a longer non-parole period. In other words, my discretion to fix a longer non-parole period is enlivened. All the factors to which I have referred must be weighed in determining whether to fix a longer non-parole period. In arriving at a period, I have borne in mind the advanced age at which you will become eligible for parole and the real prospect that you will die in gaol.”

[372] The learned trial Judge thereupon fixed a non-parole period of 28 years, commencing on 10 November 2003.

[373] The appellant argued that the legislation provides for a minimum term of 20 years where the murder is not sexually linked and is not multiple.

Neither of those considerations apply in the present case. In the result, it is said that the period of 28 years for a man of the appellant’s age gives a very limited prospect of any parole at all.

[374] There have not been a large number of sentences imposed since the advent of mandatory non-parole periods as stipulated by s 53A of the Sentencing Act and it cannot be said that any particular standards have as yet emerged.

[375] In the present case the following factors are of importance:

- (a) The killing was cold blooded and premeditated;
- (b) The appellant has not demonstrated any remorse and the body of the victim has not been found. As the Crown put it there can be no closure for those grieving for the victim as the appellant has chosen not to reveal what he did;
- (c) As to the other offences each was of an inherently serious nature that subjected Ms Lees to a terrifying ordeal in circumstances in which she had every reason to anticipate at least sexual violation and at worst eventual death herself;
- (d) There were no factors to mitigate the appellant's conduct which was cruel, remorseless and completely unprovoked.

[376] The separate offences against Ms Lees coupled with the circumstances attendant on the murder itself plainly called for a non-parole period substantially in excess of the standard statutory term. The learned sentencing Judge specifically addressed the issue of the age of the appellant and the fact that he might well die in prison. However, he concluded that the gravity of the offending and the lack of mitigating circumstances demanded the imposition of the non-parole period actually fixed.

[377] Individual minds might well differ as to what was an appropriate period above the statutory standard, but we are unable to conclude that the period arrived at by the learned sentencing Judge was manifestly outside of a

reasonable range of sentencing outcomes in the circumstances. There is no basis on which this Court might properly interfere with the exercise of the sentencing discretion.

[378] The appeal against sentence should also be dismissed.

**Orders:**

- 1) Application for extension of time and leave to argue grounds 6 and 7 allowed.
- 2) All other applications for extension of time and leave to argue grounds of appeal against convictions are dismissed.
- 3) Appeal against convictions dismissed.
- 4) Appeal against sentence dismissed.

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