The Queen v Murdoch [2005] NTSC 75

PARTIES:	THE QUEEN
	v
	MURDOCH, Bradley John (No 1)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20215807
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JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW

Evidence – spontaneous identification of photo on internet - subsequent photographic identification – dock identification – dog identification – evidence admitted.

Alexander v The Queen (1981) 145 CLR 395 at 399, 402, 406 & 427; *Festa v The Queen* (2001) 208 CLR 593 at [51]; *R v Saxon* (1997) 92 A Crim R 188, *Jamal v The Queen* (2000) 182 ALR 307 at [45]; *R v Hallam & Karger* (1985) 42 SASR 126 at 130; *R v Bouquet* [1962] SR (NSW) 563 at 567; *R v Clune* [1982] VR 1; *R v Britten* (1988) 51 SASR 567 at 571; *Grbic v Pitkethly* (1992) 110 ALR 576; *R v Demeter* [1995] 2 Qd R 626 at 629, applied.

R v Williams [1983] 2 VR 579; *R v Gorham* (1997) 68 SASR 505 at 508; *R v Clark & Others* (1996) 91 A Crim R 46, considered.

REPRESENTATION:

Counsel:

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

Solicitors:

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

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

The Queen v Murdoch [2005] NTSC 75
No. 20215807

BETWEEN:

THE QUEEN
Plaintiff

AND:

BRADLEY JOHN MURDOCH
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 15 December 2005)

Introduction

[1] The accused is charged that on 14 July 2001, near Barrow Creek, he murdered Peter Marco Falconio. He is also charged that on the same occasion he deprived Joanne Rachael Lees of her personal liberty and that he unlawfully assaulted Ms Lees in circumstances of aggravation.

[2] Early in the evening of Thursday 14 July 2001, Ms Lees and Mr Falconio were travelling north in a Kombi van on the Stuart Highway approximately 10 kilometres north of Barrow Creek. Mr Falconio was driving. A vehicle pulled alongside and the driver gestured to Mr Falconio to pull over. It is the Crown case that the driver of the other vehicle was the accused.

[3] After Mr Falconio stopped the vehicle on the side of the highway, he walked to the rear of the Kombi van where he met the driver of the other vehicle. Ms Lees could hear the men talking about sparks coming from the exhaust. Mr Falconio returned to the driver's side door and asked Ms Lees to rev the engine. That was the last time that Ms Lees or anyone else saw Mr Falconio alive.

[4] While Ms Lees was revving the engine, she heard a loud bang. It is the Crown case that the driver of the other vehicle shot Mr Falconio.

[5] Ms Lees ceased revving the engine and turned to look out the window. She observed a male person standing at the driver's side window with a gun pointed at her.

[6] On two occasions Ms Lees has identified different photographs of the accused as depicting the offender. She also identified the accused in court during the course of the preliminary hearing.

[7] The Crown proposed to lead evidence of those acts of identification and to ask Ms Lees to identify the accused in court at the trial. The accused objected to the admission of all evidence of identification by Ms Lees. I ruled that the evidence could be led and I now set out my reasons for that ruling.

Opportunity to observe offender

[8] Ms Lees said in evidence at the preliminary hearing that at the time of the events it was "pitch black". As to what occurred after Ms Lees saw the male person pointing the gun at her, the following is a convenient overview taken from a Crown summary of facts provided to the court by way of assistance for the purposes of the pre-trial objections:

> "The offender told LEES to switch the engine off and moved inside the vehicle, pushing LEES to the passenger seat. The offender directed LEES to put her head down and arms behind her back. LEES screamed and struggled with the offender and put her feet up on the dash board. The offender placed the gun at LEES' temple. LEES acquiesced removing her feet from the dash and placing her hands behind her back. The offender placed cable ties (hand made from cable ties and electrical tape) around LEES' wrists and forced her out of the vehicle. LEES fell onto the gravel injuring her knees.
>
> The offender got out of the vehicle and lifted LEES' legs up by the ankles and attempted to put electrical tape around her ankles. LEES struggled and the offender was unable to securely tighten her ankles. The offender then punched LEES to the right side of the temple. The offender lifted LEES to her feet and placed tape around her mouth and head. LEES struggled with the offender which loosened the effect of the tape. The offender forced LEES over towards the passenger side of his vehicle and removed a canvas sack from under the canopy over the tray in the utility. He then placed the sack over LEES' head and pushed her into the front passenger side of the vehicle. During this process the sack was dislodged from LEES' head. At this time LEES observed the dog in the front driver's seat. LEES described the dog as being a medium sized, shorthaired, brown and white, blue heeler. LEES attempted to get out of the driver's side door but was blocked by the dog. The offender forced LEES over the seats into the back of the utility.
>
> Whilst LEES was in the back of the utility she screamed out to the offender,
>
> > "What do you want? Is it money? Is it the van? Just take it. Are you going to rape me?"

The offender came to an opening in the back of the utility and stated,

> "Shut up and I won't shoot you."

The offender then walked away.

LEES screamed out,

> "Have you shot my boyfriend? Have you shot Pete?"

Again, the offender came to the back of the utility and said, "No." LEES heard the offender walk down the side of the vehicle on the gravel."

[9] In evidence Ms Lees said a light was on in the offender's vehicle when she was forced into that vehicle.

Subsequent Events

[10] On the Crown case, Ms Lees then escaped from the back of the utility and hid in the surrounding scrub. She did not see the offender again.

[11] Approximately five hours later Ms Lees left her hiding spot and waved down a passing truck. The driver of the truck observed that Ms Lees was fearful and upset. Her wrists were bound by ties and she had tape around her neck and left ankle.

[12] Ms Lees was taken to Barrow Creek. At about 6am police officers arrived at Barrow Creek and took a statement from Ms Lees. She gave a description of the offender which, speaking very generally, was not inconsistent with a description of the accused.

Identification

[13] It is the Crown case that after the events described by Ms Lees the accused travelled to Alice Springs where, in the early hours of the morning, he stopped at the Shell truck stop and purchased fuel and other items. Images captured by a security camera at the Shell truck stop were shown to Ms Lees on 4 August 2001. Indicating an image of a person who the Crown asserts was the accused, Ms Lees said: “That man is too old, he’s too old.”

[14] The security film was subsequently enhanced. In evidence given at the preliminary hearing in May 2004 Ms Lees was shown the enhanced film. She said the picture she observed in August 2001 was of poorer quality than the picture she was shown in court. She said that in August 2001 she was not able to say anything about the identification of the person depicted in the video.

[15] As to the identity of the person shown in the enhanced film, Ms Lees said: “He’s somewhat of a man I described”. Ms Lees also said that the vehicle depicted was similar to the one she had described and she was unable to pick out any dissimilarity.

[16] Ms Lees' attention was drawn to a cap on the person visible in the enhanced film. Asked whether there was anything in the cap which assisted her recollection, Ms Lees answered “Yes, it’s got a motif on the front, a motif”. As to what was significant about the motif, Ms Lees responded “The man also had a black cap and it had some kind of motif on the front.”

[17] On 22 August 2002 the accused was arrested in South Australia on unrelated matters. In early October 2002 a senior police officer involved in the investigation telephoned Ms Lees and told her that police now had a suspect and were building a circumstantial case. It is not clear from Ms Lees' statement whether the officer told her of the arrest of the accused, but Ms Lees gave evidence at the preliminary hearing that she became aware of the arrest.

[18] Shortly after becoming aware of the arrest and within a few days of the conversation with the investigating officer, Ms Lees was working in Sicily. 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.

[19] Ms Lees accessed the internet on 10 or 11 October 2002. She said she did not know there would be any images with the article. 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."

[20] 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.

[21] 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.

[22] 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, said 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."

[23] 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 percent 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!)."

[24] On 22 October 2002 police officers interviewed the accused and asked him if he wanted to participate in an identification parade. The accused replied in the negative.

[25] On 23 October 2002 the accused's solicitor wrote to an investigating officer seeking information in connection with the proposed identification parade which the solicitor said he required before being in a position to properly advise the accused. The investigators did not respond to that letter.

[26] Senior counsel for the accused did not suggest that the police acted inappropriately in subsequently showing Ms Lees a photographic "line-up".

[27] On 18 November 2002 in the United Kingdom Ms Lees was shown a photo-board containing 12 photographs, including a photograph of the accused. That process was filmed and a transcript produced. The officer conducting the exercise advised Ms Lees in the following terms:

> "What I propose to do is show you a number of photographs of persons. You should take as much time as you require and look at all the photographs before making a decision. The person involved in the incidents on 14 July 2001 may or may not be amongst these photographs. If you see a photograph of the person you should indicate to me which photograph it is by clearly pointing to it or by touching the photograph. Do you understand?"

[28] As Ms Lees was viewing the photographs she indicated a photograph of the accused and said "I think it's number 10".

[29] In her statement of 18 November 2002, at the conclusion of a paragraph to which I have referred in which Ms Lees spoke of her search of the internet

and said she did not know there was going to be a picture to view, Ms Lees said:

> "I picked him out in the photo-board today and that shows him with a full beard. It wouldn't matter what this male did to his appearance, I would always recognise him."

[30] The photograph of the accused identified by Ms Lees was taken in August 2002 shortly after the accused was arrested in South Australia on unrelated matters. The accused's hair was short, but a little longer than the hair depicted in the photograph accompanying the internet article. Unlike the latter photograph in which the accused was clean shaven, the photograph on the photo-board depicted the accused with a full beard and moustache.

[31] During the preliminary hearing in May 2004, Ms Lees identified the photograph from the photo-board. In addition she identified the accused in court in what is commonly known as a "dock identification".

[32] Against that background, while accepting that evidence of the identification of the photographs on the internet and photo-board were legally admissible, counsel for the accused submitted that in the circumstances those identifications were tainted and unreliable and, therefore, lacked probative value. Counsel contended I should exclude the evidence in the exercise of my discretion because the prejudicial value of the evidence far outweighed its minimal probative value. For the same reason, it was submitted that I should not permit the Crown to lead evidence from Ms Lees at trial in the form of a dock identification of the accused.

Principles

[33] The relevant principles are not in doubt. If the identification evidence is capable of probative value, it is legally admissible: *Alexander v The Queen* (1981) 145 CLR 395; *Festa v The Queen* (2001) 208 CLR 593. A trial Judge has a discretion to exclude the evidence. That discretion was described by Gibbs CJ in *Alexander* in the following terms (402 - 3):

> "The authorities support the conclusion that I have reached, which is that, as a matter of law, evidence of an identification made out of court by the use of photographs produced by the police is admissible. However, a trial Judge has a discretion to exclude any evidence if the strict rules of admissibility operate unfairly against the accused. It would be right to exercise that discretion in any case in which the judge was of the opinion that the evidence had little weight but was likely to be gravely prejudicial to the accused."

[34] In *Festa,* McHugh J made the following observations [51]:

> "But the weakness of relevant evidence is not a ground for its exclusion. It is only when the probative value of evidence is outweighed by its prejudicial effect that the Crown can be deprived of the use of relevant but weak evidence. And evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial only when the jury are likely to give the evidence more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task."

Internet identification

[35] The identification by Ms Lees of the accused in the photograph found during her search of the internet occurred in less than ideal circumstances. Ms Lees was aware that the accused was a suspect against whom the police were building a circumstantial case. The article stated that although police would not rely on DNA evidence to prosecute the accused, DNA tests linked

the accused to the crime through a blood sample taken from the scene. The article conveyed to Ms Lees that the accused had been arrested in connection with the abduction and rape of a 12 year old girl and her mother.

[36] Numerous authorities recognise 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. Not infrequently evidence of identification that follows is regarded as of little or no value and is excluded either because it is legally inadmissible or, more commonly, in the exercise of the discretion.

[37] An example is found in the decision of the South Australian Court of Criminal Appeal in *R v Hallam & Karger* (1985) 42 SASR 126. A taxi driver who had been assaulted was summoned by police a short time later to a shopping centre where, on his arrival, the only persons present were the police officers and the two accused. The taxi driver was asked whether the accused were the assailants and he gave a positive response.

[38] King CJ observed that there was no element of selection. There was a strong element of suggestion that the two men in the company of the police were the assailants. In that context King CJ emphasised that the proper method of identification is by an identification parade and that identification by selection of photographs should only be used were unavoidable. His Honour noted that if photographic identification is used, "it must be recognised as the inferior form of identification which it is, for the reasons

emphasised by the High Court in *Alexander's* case". His Honour continued (130):

> "Identification by confronting the victim with the suspect in circumstances which tend to suggest to the victim that the suspect is under suspicion is a virtually valueless form of identification which should be resorted to only in the most exceptional situations."

[39] King CJ added that he would not be prepared to condemn the actions of the police without an investigation as to the circumstances in which they called the taxi driver to the shopping centre. His Honour added, however, that whatever the reason for such action, "the result is that identification obtained in such circumstances had virtually no evidentiary value."

[40] The circumstances under consideration were significantly different from those that existed in *Hallam* and like cases. 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.

[41] 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.

[42] A spontaneous identification by a witness not expecting to see a suspect was considered by the Full Court of Victoria in *R v Williams* [1983] 2 VR 579. The appellant had been convicted of a number of counts of armed robbery. In respect of one of the counts, the offender was wearing a Collingwood Football Club beanie that concealed his face. A witness who had been a customer inside the bank was waiting outside the court to give evidence at the trial. She was sitting alone and had not been asked to keep a look out for any person. She saw the appellant being taken into court in handcuffs and immediately remembered that she had seen him sitting in a motor vehicle outside the bank shortly before the robbery. She recalled that he was then wearing a Collingwood Football Club beanie. In evidence the following day the witness identified the appellant in the dock and described how she had seen him being brought to the court on the previous day.

[43] In a judgment with which Young CJ and Anderson J agreed, Gobbo J made the following observations (582):

> "If the basis most favourable to the applicant is adopted, namely that the identification evidence given by Miss Hunt stood alone, the central question is then whether that evidence was no better or worse than a dock identification. In my view, the identification evidence in question was of a quite different nature to the type of evidence that drew criticism in *Davies and Cody v R* (1937), 57 CLR 170 and *R v Burchielli*, [1981] VR 611. This was not a case of the applicant being presented to the witness, either directly or in like circumstances, such as presence in the dock. Here, unlike the situation in *R v Burchielli*, there was no presentation of the applicant

> at all. *There was a wholly spontaneous identification by the witness, who was simply sitting alone, not looking for anyone in particular nor responding to any invitation from the police, or indeed anyone else, to look for a suspect.* It is true that her memory was apparently revived when she saw the applicant being conducted towards the Court in handcuffs. But that was a matter of weight that the jury was properly and repeatedly urged to take into account, along with criticisms of the witness for not having, until such a late point, reported her observations of the man in the Valiant car outside the bank. These were merely features of her evidence that properly attracted comment. *More significant was the spontaneous manner in which she identified the suspect as the man who was wearing a Collingwood beanie and was outside the bank, and whose presence she had not previously associated with the robbery.* The character of the evidence given by Miss Hunt was of a superior kind to that typified by a dock identification of a person not familiar with the identifying witness.
>
> It follows that it has not been shown that there was a wrongful failure to exclude the evidence in question." (my emphasis).

[44] In *Festa,* Kirby J noted that the identification in issue "lacked the spontaneity that can sometimes repair the deficiency of such circumstances of identification" (640). His Honour cited the decision in *Williams*.

[45] 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.

[46] In my view, the potential for unfair prejudice does not outweigh the probative value. It would not be unfair to admit the evidence which is legally admissible. I decline to exclude the internet identification in the exercise of my discretion.

[47] 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 website looking for information about herself. She was not looking for information about a suspect or the accused. Ms Lees said she did not expect to see a photograph of a suspect or a man who might be the person who attacked her.

[48] Asked what she thought when she saw the picture, Ms Lees said:

> "That that's the man."

[49] During cross-examination when it was 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, Ms Lees gave the following evidence:

> "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.

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."

[50] Having heard the evidence of Ms Lees, I remained of the view that the evidence was admissible and should not be excluded in the exercise of the discretion.

Photo-board identification

[51] Numerous authorities have recognised the dangers associated with identification that occurs after a witness has seen a photograph of a person unknown to the witness, but known to the witness as the accused or a suspect. This danger applies regardless of whether the identification that follows seeing the photograph is an identification by way of photo-board, identification parade or dock identification. Frequent reference is made to the "displacement" effect. There is also the potential problem of the "rogues gallery" effect because the photograph or group of photographs might convey to the jury that the accused has a criminal history. In

addition, many authorities recognise the deficiencies of photo-board identification regardless of whether the witness has previously seen a photograph of the suspect or accused.

[52] Notwithstanding these deficiencies, if the evidence is capable of probative value, albeit weak probative value, the evidence is legally admissible, but a Judge must carefully consider whether the evidence should be excluded in the exercise of the discretion.

[53] 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.

[54] In these circumstances, in my opinion the evidence possesses probative value. It is a fact relevant to an assessment of the reliability of the identification that shortly after seeing the photograph on the internet, Ms Lees positively identified a significantly different photograph of the accused. The weaknesses inherent in such evidence by reason of the previous viewing of a photograph on the internet can be explored in the

presence of the jury and appropriate directions emphasising those weaknesses and the dangers associated with such evidence can be given. In my view, given appropriate directions, it is highly unlikely that a jury would misuse such evidence. The weaknesses and dangers can readily be understood. The probative value is not outweighed by the potential for unfair prejudice.

[55] I have given anxious consideration to the potential for the evidence of the photo-board identification to convey to the jury that the accused has a criminal history. In this context I have borne in mind that evidence will be led that the accused was a regular user of amphetamines and engaged in the selling of cannabis. In this way evidence of the use and selling of illegal drugs will be before the jury.

[56] I have also had regard to the existence of extensive publicity in the Northern Territory during 2002 and 2003 about the arrest of the accused and trial in South Australia on unrelated matters. The accused was charged with serious sexual assault offences, but was acquitted by a jury. The essential allegations underlying those charges and the fact of the acquittals were the subject of extensive publicity in the Northern Territory in 2002 and 2003. The publicity identified the accused as the suspect wanted by the Northern Territory authorities in relation to the murder of Mr Falconio. In my view it is likely that a member or members of the jury will recall that the accused was charged and acquitted in South Australia thereby identifying a source for the photograph on the photo-board.

[57] After I had reached the view I have expressed about the previous charges and trial in South Australia, I discussed with counsel whether the proceedings in South Australia should remain unmentioned or should be the subject of a specific direction. Counsel for the accused submitted that it is highly unlikely that no juror will recall the publicity or link the accused to the South Australian charges and trial. Both counsel agreed that I should give a specific direction about those proceedings. I agreed with their assessment. At the outset of the trial before the jury and prior to the Crown opening I gave the following directions:

> "The importance of your role means that it is absolutely critical that you give full attention to the evidence and that your decisions are based only upon what you hear in this Court. You must ignore anything that you have already seen or heard or anything that you might see or hear outside the court as the trial progresses.
>
> In this particular trial, this aspect is very important. As I am sure you will appreciate, there has been an enormous amount of publicity about this matter and about the accused. No doubt the nature of the case and the intense media interest has resulted in much discussion within the community. I cannot emphasise enough that whatever you might have seen or heard in the past outside this courtroom or whatever you might hear in the future outside the courtroom must be put aside and ignored.
>
> In particular, you may have read or heard of the accused being involved in previous court proceedings outside of the Northern Territory. Whatever you may have seen or heard about such proceedings must be put aside and totally ignored. It would be quite unfair to the accused for you to have regard to previous proceedings in any way whatsoever. Even more so in the case of this accused because in connection with the previous proceedings about which you may have heard, the accused was acquitted. You will quickly appreciate how unfair it would be to have regard in any way to a previous matter in respect of which the accused was acquitted.

> Your oath as jurors requires that you put aside and ignore anything you have seen or heard outside of this courtroom and that your decisions be based only upon the evidence that you hear in this Court."

[58] Regardless of the photo-board identification, appropriate directions will be required in connection with the use of amphetamines and the selling of cannabis to ensure that the jury make proper use of evidence and not engage in an impermissible line of reasoning. The admission into evidence of the photograph on the photo-board adds nothing to those circumstances in terms of the potential prejudice and necessary directions. In addition, from the perspective of the jury the involvement of the accused in illegal activities related to drugs and the previous proceedings outside of the Northern Territory provide potential sources for the photograph on the photo-board.

[59] There is a further factor of relevance. The accused is charged with a particularly serious crime. The circumstances alleged by the Crown and evidence at committal have attracted very extensive publicity and speculation. The jury will be given strong directions as to their duty to put aside anything they have read or heard and to determine the accused's guilt or otherwise only on the evidence given in the court. If the jury speculate that the accused might have a criminal history that led to a photograph, such speculation will pale into insignificance in the particular circumstances under consideration. There is no reason to doubt that the jury will obey the directions to put aside speculation and anything heard or read outside the Court.

[60] In all the circumstances, I am satisfied that the probative value of the evidence far outweighs the prejudicial effect. In my view the admission of the evidence is not unfair. I decline to exclude the evidence of the photo-board identification in the exercise of my discretion.

[61] As with identification of the photograph seen on the internet, I reached the view that the evidence of the photo-board identification should be admitted prior to Ms Lees giving evidence at trial and for the reasons I have discussed. At trial, the video film of the process during which Ms Lees was shown the photo-board and picked a photograph of the accused was played to the jury. 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”.

[62] During cross-examination when asked whether her identification of photograph number 10 was influenced by having seen the image on the internet, Ms Lees responded “No”. She also responded “No” when asked whether she might be mistaken in identifying photograph number 10.

[63] Having heard the evidence of Ms Lees, I remained of the view that the evidence should be admitted.

Dock Identification

[64] Against the background of two photographic identifications, the dock identification of the accused is essentially a formality. Nevertheless, numerous authorities approve of the process of dock identification in such circumstances.

[65] In *R v Bouquet* [1962] SR (NSW) 563 the appellant was convicted of robbery. The substantial issue raised on appeal concerned the sufficiency of the identification of the appellant as one of the offenders and the adequacy of the directions given by the trial Judge concerning the issue of identity. The robbery occurred at night and the victim's evidence was somewhat confused. The victim was not invited to endeavour to identify the offender in an identification parade. Some days after the arrest of the appellant the victim was shown a number of photographs and picked the appellant's photograph as that of one of his attackers. During the committal proceedings and at trial the victim made a dock-identification of the appellant as one of the men who had robbed him.

[66] In dealing with the submission that the trial Judge should have excluded the evidence of both the photographic and dock identifications, Sugerman J said (567):

> "However, as was said by *Ferguson J.*, for this Court in *R v Fannon* [(1922) 22 SR (NSW) 427 at 430], where there had been a similar selection by witnesses of a photograph of the accused from amongst a number of photographs shown to them by the police: "the considerations applicable to the admissibility of evidence of personal identification seemed to apply equally to the identification of

> photographs, and it is hard to see upon what grounds a different rule could be applied." The use of photographs in this way, in lieu of a personal identification parade, goes to the weight and sufficiency of the evidence rather than to its admissibility and may be specially significant when there is no other evidence identifying the accused. It is a matter for the discretion of the Judge in each case whether to give a direction on the possible effect of the showing of the photographs on the reliability of the identifying witness."

[67] In *Alexander*, Gibbs CJ said (399):

> "Evidence given by a witness identifying an accused as the person whom he saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused."

[68] Later in his judgment when discussing the value of photographic identification and the effect of the absence of an identification parade, Gibbs CJ discussed *Bouquet* and, in particular, the remarks of Sugerman J without any hint of disapproval.

[69] After summarising the problems relating to identification evidence, Mason J made the following observations (426 and 427):

> "Before I examine the questions which relate to the evidence of Beale and Williams there is another basic point to which I should refer, obvious though it is. Traditionally it has been accepted that a witness identifies the accused at the trial as the person whom he observed at the scene of, or in connexion with, the crime. This "in court" identification, sometimes described as primary evidence, is of little probative value when made by a witness who has no prior knowledge of the accused, because at the trial circumstances conspire to compel the witness to identify the accused in the dock. It has been the practice to reinforce this "in court" identification by proving that the witness had earlier identified the accused out of court in a line-up or by selecting his photograph from a collection of photographs (*R v*

Fannon and Walsh; *R v Bouquet*; *R v Doyle*) though the propriety of proving the photographs has been challenged by the applicant.

> The admission of evidence of this kind has been justified by reference to analogy with the doctrine of recent contrivance (*Wigmore on Evidence*, 3rd ed. (1940), Volume IV, s.1130). In *Di Carlo v United States*, Judge Learned Hand held that, even if it be thought to be contrary to the hearsay rule, that rule must yield to commonsense. For my part, I see no violation of the hearsay rule, nor do I think it necessary to resort to the doctrine of recent contrivance to sustain the admission of the evidence. In my opinion an identification made out of court by a person qualified to make it is admissible in evidence, subject to qualifications later to be mentioned. This is because an identification out of court, being earlier in time and made under circumstances which involve a selection in the absence of any compulsion, is more likely to be reliable than an identification made in court. I note that the Devlon Report on Evidence of Identification in Criminal Cases draws attention to the deficiencies of dock identification and recommends that restrictions be placed upon it (see pars 4.89-4.109). (Some citations omitted).

[70] In *Fannon* the New South Wales Court of Appeal upheld the admission of photograph identification. In delivering the judgment of the Court, Ferguson J observed that "the most trustworthy evidence of identification" is the evidence given in the witness box by a witness who identifies the accused on oath. In *Doyle* the Full Court of Victoria upheld the admission of photographic identification which had been followed at trial by one witness declining to identify the accused positively and two other witnesses failing to identify him.

[71] Later in his judgment Mason J again referred to *Fannon, Bouquet* and *Doyle* and commented that evidence of photographic and subsequent dock

identification were admitted without adverse comment. His Honour did not suggest that the dock identifications were inadmissible.

[72] In *R v Clune* [1982] VR 1, the Full Court of Victoria upheld the admission of dock identification notwithstanding that previous photographic identification had occurred.

[73] The next authority in chronological sequence is significant. In *R v Britten* (1988) 51 SASR 567, the South Australian Court of Criminal Appeal was concerned with an identification made by a witness who had developed the habit of closely observing activities at a particular address. The witness identified a photographic slide of the appellant as one of the persons whom she had seen at the address. After rejecting the ground of appeal that the trial Judge should have excluded the evidence of photographic identification, and having referred to the unsatisfactory nature of photographic identification because the slides gave no real indication of height, King CJ said (571 and 572):

> "One would have felt more confidence in the identification evidence if the identification by slides had been followed up, after the appellant's arrest, by an identification parade. There seems to be a tendency on the part of police officers to suppose that, because judgments of courts have pointed out that the value of identification by means of a line-up is impaired by prior identification from photographs, there ought not to be an identification parade following identification by means of photographs. That is not so. The value of such identification may be impaired, but it still possesses value. An identification parade would give an honest and careful identifying witness an opportunity to correct a mistake in the identification from photographs. Evidence of identification at an identification parade following identification from photographs is clearly admissible and probative although the probative force might be thought by a jury to

> be weakened by the fact that the witness had previously seen a photograph: *R v Doyle* [1967] VR 698 esp at 701. An identification parade held in an early stage would have given Mrs Sauer an opportunity to pick out the appellant in the flesh and would have removed some of the misgivings which one must feel in consequence of the disparity between the appellant's height and that estimated by Mrs Sauer to the police. *I might add at this point that it appears that counsel for the prosecution did not ask Mrs Sauer to identify the appellant in court. I think that it is apparent from the course of her evidence that she implicitly identified the man in the dock as the man of whom she was speaking, but it is unfortunate that she was not asked to say so explicitly. It is not to be thought that because courts have stated that dock identification is of little value where the accused is not previously known to the witness, the witness should therefore not be asked whether he can see the person in court. This should be done in every case depending upon identification notwithstanding that the evidence principally relied upon by the prosecution is the out of court identification.*" (my emphasis).

[74] The other members of the court did not comment on this aspect.

[75] The Federal Court had occasion to consider dock identification in *Grbic v Pitkethly* (1992) 110 ALR 576. The appellant had been convicted by a Magistrate of inflicting grievous bodily harm. The principal issue at trial was one of identification. An identification parade had not been conducted. Some of the witnesses identified the appellant in the foyer of the court. A number of witnesses identified the appellant in court.

[76] Sheppard J considered that, subject to questions of discretion, the principles governing the admission of the evidence in issue were the same as the principles to be applied in a trial by jury. In his Honour's view the evidence was admissible and the principal question was whether the Magistrate should have been satisfied beyond reasonable doubt of the accuracy of the identification. In the course of his Honour's judgment he cited the remarks

of King CJ in *Britten* to which I have referred and then made the observation that a dock identification of a person previously identified was evidence of recognition of a person earlier identified rather than of identification for the first time.

[77] In *R v Demeter* [1995] 2 Qd R 626, the Queensland Court of Appeal was concerned with an in court identification where there had not been an earlier out of court identification. The trial Judge directed the jury that the dock identifications amounted to something which had no more value than statements that he was similar to the offender or not dissimilar. The case against the appellant could only succeed on the basis of the circumstantial evidence demonstrating that the appellant had an exclusive opportunity to commit the crime. In that context Macrossan CJ said (629):

> "In a case of this kind, it could not be said to have been an error to permit a dock identification accompanied subsequently by full warnings against the danger in attributing significant positive value to it. Considerations to be taken into account in cases of this kind emerge from discussion in other cases including particularly by King CJ in *Britten* … ".

[78] Pincus JA accepted that evidence of dock identification should not always be permitted. His Honour noted, however, that it seemed clear that in some circumstances there is a discretion to admit evidence of this kind. His Honour cited the remarks of King CJ in *Britten* to which I have referred and observed that King CJ did not say, or mean, that dock identification should be undertaken only where the Crown relies on out of court identification. His Honour rejected the proposition that such identification should not be

allowed unless there has been an out of court identification. Pincus JA then said (632):

> "In my view there is a discretion to allow a dock identification, at least where there is, as there was here, strong evidence apart from dock identification that the person accused was the offender. Where dock identification is permitted, there must be an appropriate direction to the jury with respect to its value … .
>
> I am of the opinion that in the particular circumstances of this case it was a permissible and indeed a sound course to allow the Crown to attempt to make that identification explicit. There is always the possibility that that process will unearth a mistake, or the manner of dock identification might engender some doubt about the correctness of the principal identification evidence; if the attempted dock identification is successful, it is unlikely that any injustice will be done to the accused as long as the right directions are given."

[79] Mackenzie J agreed with the reasons of Pincus JA concerning the complaint about the admissibility of the court identification.

[80] In *R v Gorham* (1997) 68 SASR 505, the appellant had been convicted of a number of offences of violence. The prosecution case depended upon evidence of identification by two of the alleged victims. The appellant had declined to take part in an identification parade and investigators had not attempted a photographic identification. The two victims identified the appellant in the dock. Both witnesses also gave evidence that prior to the dock identification they had seen the appellant in the vicinity of the court. Details of the circumstances in which the witnesses observed the appellant in the vicinity of the court were sketchy. Duggan J, with whom Lander and

Bleby JJ agreed, observed that the evidence on the topic was left in a most unsatisfactory state.

[81] The trial Judge directed the jury that the dock identifications were "of negligible probative value". The Judge said nothing about the out of court identifications which, in the view of Duggan J, were crucial to a proper consideration of the case by the jury. In his Honour's view it was the trial Judge who was required to warn the jury of the dangers associated with identifications made in such circumstances.

[82] Against that background, Duggan J observed (508):

> "Where there is an out-of-court identification of an accused person the subsequent identification of that person in court is usually carried out to confirm that the person previously identified is, in fact, the person before the court: *Grbic v Pitkethly* (1992) 38 FCR 95 at 104. In most cases where the dock identification is employed for this limited purpose it is little more than a formality. It is the out-of-court identification which is the critical matter for the jury's consideration. That this is so is reflected in the use which is made of physical and photographic identification procedures and the care which is required in conducting them. The manner in which identification procedures are conducted or the circumstances in which less formal identification takes place may lead to unreliable evidence and it is an important function of a trial judge to give careful directions to the jury on any risks associated with the circumstances of identification in the particular case … ."

[83] In *R v Clark & Others* (1996) 91 A Crim R 46 the appellants had been convicted of aggravated assault. The issue at trial was identification. The victims of the assault identified the appellants from a book of photographs prepared by the police and also identified the appellants in the dock at trial.

[84] Cox J, with whom Perry and Lander JJ agreed on the issue of identification, confirmed the fundamental principle that evidence of photographic identification of an accused person is relevant and admissible. After referring to *Alexander* and the discretion to exclude relevant and admissible evidence, his Honour dealt with the dock identification (51 and 52):

> "At the trial the learned judge, over a defence objection, permitted the victims to identify in the dock those appellants whom they had already identified in the photographs. Such a procedure is often followed in this State; indeed, in *Britten* (1988) 51 SASR 567 King CJ said (at 572) that a witness who has identified an accused person out of court should always be asked at the trial whether he or she can identify the accused in court. It gives an honest witness an opportunity of reconsidering the matter and it may also stop the jury from inferring wrongly from the absence of a dock identification that the witness is unable to make one. Of course, these are negative aspects of such evidence. Probably the second identification will add very little, if anything, to the first. (It may, conceivably – the witness may perceive in court some significant feature of the accused that was not observable in the photograph). There was also, as the learned trial judge observed, some value in a dock identification for the jury, in a case involving multiple accused, in understanding which accused was alleged to have done what. Any risk that the jury's common sense does not guarantee that a dock identification does not generally prejudice the accused will be removed by the usual direction in the summing up. If there are cases in which it would be wrong to permit a supplementary dock identification, the present case was not one of them."

[85] In *R v Saxon* (1997) 92 A Crim R 188, the Victorian Court of Criminal Appeal noted that there have been many cases where dock identification has been permitted. There is nothing in the judgment to suggest that the court disapproved of the admission of dock identification.

[86] The Full Court of the Federal Court again considered the question of dock identification in *Jamal v R* (2000) 182 ALR 307. Photographic

identification of the accused by two witnesses had occurred and, over objection, the witnesses were permitted to make dock identifications. After referring to the dangers of dock identification and the observation of Mason J to which I have referred that dock identification has little probative value, the Court observed [45]:

> "Once evidence has been led of the out-of-court identification, a dock identification is then usually permitted although it is understood that the primary evidence of identification which is relied upon is the out-of-court identification, not that which occurs in court.

[87] The court then referred to *Britten*, *Goran* and other authorities which I have discussed. Having done so, the Court concluded that the dock identifications were "supplementary" to the out-of-court identifications and, in those circumstances, the admission of the evidence was not unfair.

[88] In *Festa* the High Court discussed both visual and voice identification. Some of the evidence fell short of positive identification. Photographic identification occurred and some witnesses were asked to attend at a courthouse and advise investigators if they saw the offender.

[89] In the course of his judgment, Gleeson CJ referred to the decision of *Bouquet* and then made the following observations [18]:

> "Of all forms of identification evidence, one of the most notoriously dangerous is in court identification, which is usually performed in circumstances that strongly suggest the answer that is ultimately given. Even here, however, there is no absolute rule requiring rejection of such evidence; and there may be circumstances in which it is appropriate to allow it. In *Alexander*, Mason J discussed in court identification, which he said was "of little probative value", in

> terms that accepted its admissibility. He went on to say: "It has been the practice to reinforce this 'in court' identification by proving that the witness had earlier identified the accused out of court in a line-up or by selecting his photograph from a collection of photographs.""

[90] The evidence of the dock identification is admissible. In the circumstances under consideration, it will be plain to the jury that Ms Lees is pointing out a person previously identified and that her dock identification at trial is little more than a formality. For the reasons discussed in the authorities to which I have referred, however, in my opinion the dock identification should occur. Given an understanding of the background and proper directions, the risk of unfair prejudice is negligible. In my view the admission of the evidence is not unfair.

[91] In arriving at my view as to the admission of all three forms of identification evidence I have not overlooked the submissions based upon the artist's drawings of the suspect created in consultation with Ms Lees. These drawings have been referred to as comfits. In my opinion, however, the comfits are not significant in considering the admissibility of the forms of identification evidence in issue. No doubt both counsel will have points to make to the jury about the impact of the comfits just as points will be made about the comparison between the accused's known appearance at the time and the descriptions given to the police by Ms Lees. These are matters for the jury, but in the circumstances the comfits are of no assistance in determining whether any or all of the impugned identification evidence should be admitted.

[92] As with the internet and photo-board identifications, my rulings were made prior to Ms Lees giving evidence before the jury. At trial, Ms Lees was very positive and emphatic in identifying the accused in the dock as the person who had attacked her. Evidence was led that Ms Lees had also made the same dock identification during the preliminary examination and that the accused had been present in the dock when Ms Lees gave evidence over a few days.

[93] Having heard the evidence of Ms Lees at trial, I remained of the view that the evidence of dock identification should be admitted.

Dog identification

[94] According to Ms Lees, she saw a dog in the vehicle of the offender. The Crown sought to lead evidence that the accused owned a dog which regularly accompanied him when the accused travelled from South Australia to Broome. The Crown also proposed to lead evidence from Ms Lees that when shown a photograph of the accused's dog she described it as "very similar to the dog the man had". The accused objected to the evidence of Ms Lees on the basis that by reason of preceding events it is demonstrably unreliable and lacking in any probative value.

[95] As I have 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 1.50am 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.

[96] In her first statement to the police on 15 July 2001, Ms Lees described the dog in the offender's vehicle as "medium size, brown and white, short haired". In her statement of 16 July 2001, Ms Lees gave the following description:

> "The dog is medium sized, it's a Blue Heeler, brown and white, short haired. I don't notice if it's wearing a collar."

[97] 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. He was brown – brown and white."

[98] 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 as 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."

[99] 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."

[100] In a 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".

[101] 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 shown him fully grown. According to Ms Curley the photographs show the same colouring as at July 2001.

[102] Tex is a black and white Blue Heeler. He has a pointed noise 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 cheekbones. The remainder of the body is a dappled black and white/grey colouring.

[103] On the Crown case the accused's dog was a Dalmatian/Blue Heeler cross. Whether the witness who it is intended will give such evidence is qualified to do so remains to be seen. However, from a photograph of the accused's dog, it is readily apparent that the dog is predominately Dalmatian in appearance. The underlying and predominate body colour is white, but the body is covered with many black or dark brown spots. The face gives the appearance that the dog is unlikely to be a pure-bred Dalmatian.

[104] The accused's dog is plainly a different breed from Ms Curley's dog. In my view, however, there are similarities in appearance. Given the circumstances in which Ms Lees observed the offender's dog, evidence that she identified Ms Curley's dog as similar in appearance to the accused's dog is capable of probative value and is, therefore, admissible. The weight of the evidence is a matter for the jury. In addition, the evidence is not accompanied by a significant risk of unfair prejudice. There is no risk of misuse. It is straightforward evidence that when Ms Lees observed Ms Curley's dog at Barrow Creek, she formed the view that the dog was similar to the offender's dog. It is a piece of circumstantial evidence and the weight of this piece of evidence is a matter for the jury.

[105] The challenged evidence arises out of events of 12 May 2004 when 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.

[106] Ms Lees told the Director that she now knows 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.

[107] Following those conversations the Director showed Ms Lees a photograph of the accused's dog. 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 accused'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.

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

[109] Counsel for the accused objected to the admission of evidence that Ms Lees observed a photograph of the accused's dog and described it as very similar to the dog in the offender's vehicle. Although Ms Lees was not told that it

was a dog belonging to the accused, 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 I now turn.

[110] As mentioned, Ms Lees gave descriptions of the dog in the offender's vehicle in her statements of 15 and 16 July 2001. On 15 July 2001 she saw Ms Curley's dog at Barrow Creek which she was told was a Blue Heeler.

[111] On 18 November 2002 Ms Lees was shown a book titled "Dog a Log" which contains images of approximately 400 different breeds of dog. In her statement of 18 November 2002 Ms Lees stated as follows:

> "I have looked through all of these dogs and the closest I can recognise as being like to (sic) the dog which was with the offender and his vehicle on the night this all happened was an Australian Cattle Dog which is shown on page 310 of the book."

[112] The dog picked by Ms Lees is described in the text of the book as an "Australian Cattle Dog". The text states that it closely resembles an old dockyard breed, namely "the now-extinct Blue Heeler". The picture depicts what would commonly be regarded in Australia as a Blue Heeler, but a Blue Heeler of different appearance from the Blue Heeler seen by Ms Lees at the Barrow Creek hotel. The cattle dog depicted is a different colour and of significantly different overall appearance from the colour and appearance of the accused's dog.

[113] The book also contained a picture of a Dalmatian. While there are obvious similarities between the Dalmatian pictured in the book and the appearance of the accused's dog in the photograph, nevertheless the appearances are noticeably different, particularly in the facial area.

[114] 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 did you saw 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."

[115] Ms Lees was cross-examined about this issue. She said she knew what a Dalmatian was and agreed it was a white spotty dog. Ms Lees agreed with the proposition that the Australian Cattle dog she picked out is strikingly similar to the Blue Heeler she picked out at the Barrow Creek hotel. To my eye, while there are distinct similarities, I would not describe the appearances as "strikingly similar".

[116] When it was put to Ms Lees in cross-examination 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."

[117] In summary, on 15 July 2001 Ms Lees described the dog in the offender's vehicle as "medium size, brown and white, short haired". On 15 July 2001 at Barrow Creek Ms Lees expressed the view that Ms Curley's Blue Heeler dog was similar to the offender's dog. In November 2002 Ms Lees picked from a book a dog identified as an "Australian Cattle Dog", which would be commonly regarded in Australia as a Blue Heeler, as similar in width, build, shape of face and ears to the offender's dog. In May 2004 when shown for the first time a photograph of the accused's dog. Ms Lees said the build, body shape and ears were very similar to the offender's dog. In evidence in May 2004 Ms Lees said the accused's dog as shown in the photograph was "very similar" to the offender's dog.

[118] Counsel for the accused submitted that Ms Lees should not be permitted to give evidence that the accused's dog as depicted in the photograph she was shown is similar in particular respects to the offender's dog. The evidence should be restricted to the comparison with Ms Curley's dog and the selection of the cattle dog from the book.

[119] The challenged evidence is not evidence of a positive identification of the accused's dog as the dog seen in the offender's vehicle. Nor is it evidence that the accused's dog is of the same breed or possesses features that are identical to the offender's dog. At best it will be evidence that it was "very similar" in build, shape of face and ears.

[120] In my opinion the evidence is capable of probative value as a piece of circumstantial evidence. It is far removed from a positive identification of a suspect in circumstances such as those that existed in *Hallam* and other similar authorities. 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.

[121] 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.

[122] For these reasons, I ruled that the evidence was admissible and I declined to exclude it in the exercise of my discretion.

[123] 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 accused's dog, I reconsidered my ruling. Shown the photograph of the accused'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.

[124] Ms Lees said that on the occasion she was first shown the photograph of the accused'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 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.

[125] As to whether her knowledge that the dog in the photograph belonged to the accused influenced her assessment of whether the dog in the photograph appeared to be similar to the dog in the four wheel drive, Ms Lees said she was never asked to make such an assessment. She was just presented with the two photographs and asked if they looked similar and looked alike. She agreed she has since been asked to say whether the dog she now knows belongs to the accused 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 accused 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 hasn't influenced my decision. Both dogs are clearly similar, the accused's dog and the dog at Barrow Creek."

[126] In my view, the jury is perfectly capable of understanding the risk that Ms Lees' assessment of similarities or dissimilarities was affected by her knowledge that the dog depicted belonged to the accused.

[127] The evidence of Ms Lees before the jury has not altered my view as to the admissibility of the evidence. Nor has it altered my view that the evidence should not be excluded in the exercise of my discretion. Ms Lees did not

purport to identify the accused's dog as the dog she saw in the vehicle of the offender. She has described similarities between the dog accompanying the offender and the dog depicted in the photograph.

[128] For these reasons, after hearing the evidence of Ms Lees given to the jury, I remained of the view that the evidence was admissible and should not be excluded in the exercise of my discretion.
