*The Queen v Murdoch* [2005] NTSC 77

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| PARTIES: | THE QUEEN |
| | v |
| | MURDOCH, Bradley John (No 3) |
| 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:**

Injunction – Police Administration Act (NT) – s 145A – non-intimate procedures – taking of photographs for the purpose of further investigations – application for injunction by accused to prevent photographs being taken – application refused.

Interpretation of legislation – whether "photograph" includes taking of video images.

*Police Administration Act* 1974 (NT) s 145

*R v* Carr [1972] NSWLR 609 (p 17), *R v McPhail* (1988) 36 A Crim R 390 (p 17), *Coco v The Queen* (1994) 179 CLR 427 (p 20), *Derrick v Customs and Excise Commissioners* [1972] 2 QB 28 (p 49), applied. *Japaljarri v Cooke* (1982) 64 FLR 314 at 318 (p 29), considered.

*R v Galvin* (1983) 24 NTR 22 at 27 (p 33, 34), referred to.
*R v Franklin* (1979) 22 SASR 101 at 107 (p 32), distinguished.

**REPRESENTATION:**

*Counsel:*

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

*Solicitors:*

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| 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 77
No. 20215807

BETWEEN:

**THE QUEEN**
Plaintiff

AND:

**MURDOCH, Bradley John (No 3)**
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 15 December 2005)

**Introduction**

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

[2] The Crown proposed to lead evidence of images taken by a video camera at a Shell truck stop in Alice Springs for the purpose of establishing that the accused was in Alice Springs soon after the offences were committed. Through the Director of Public Prosecutions ("the Director"), police advised the accused of their intention to take a series of photographs of the accused

for the purpose of expert analysis and comparison with the person depicted in the truck stop video. The accused did not consent to the taking of those photographs and sought an injunction forbidding the Commissioner of Police or any member of the Northern Territory Police from dealing with the accused by taking photographs or video film of him in the exercise of powers under the Police Administration Act ("the Act"). I refused the application and expressed the opinion that the police possess the necessary powers under the Act to compel the accused to submit to the taking of photographs. I indicated that I would give reasons in due course and I now set out my reasons for that ruling.

[3] An issue also arose concerning the taking of video film of the accused at the time of the taking of further photographs and as to subsequent expert analysis of the film. Initially the Director sought the consent of the accused to that procedure, but during submissions counsel for the Director indicated that notwithstanding the lack of consent it was the Director's submission that the investigatory powers of the police extended to the taking of the video film. Following my ruling that the police possess the necessary powers to compel the accused to submit to the taking of photographs, it was agreed that the process of taking photographs would be recorded on video film. It was also agreed that no attempt would be made to provide the film to an expert for the purposes of analysis until I made a ruling as to whether the police powers extended to the taking of video film without consent for investigatory purposes.

**Facts**

[4] 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.

[5] 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.

[6] 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.

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

[8] The details of subsequent events relied upon by the Crown for the purposes of the pre-trial objections are set out in my reasons for judgment in *R v Murdoch (No 1)* [2005] NTSC 75. In substance it is the Crown case that the accused forced Ms Lees into his vehicle from where she escaped into the scrub. While Ms Lees was hiding in the scrub the accused shifted the

Kombi van and left it in the scrub on the western side of the Stuart Highway.

[9] Approximately five hours after Ms Lees escaped from the back of the utility, she 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. The driver took Ms Lees to Barrow Creek from where police were called.

[10] It is the Crown case that after shifting the Kombi van into the scrub, the accused drove to Alice Springs where, in the early hours of the morning of 15 July 2001, he stopped at the Shell truck stop and purchased fuel and other items. A video camera at the truck stop captured the image of a customer, who the Crown says was the accused, arriving at 12.38am and departing at 12.50am. When Ms Lees was shown those images on 4 August 2001, she said: “That man is too old, he’s too old.”

[11] The film taken by the video camera was subsequently enhanced. Ms Lees was shown the enhanced film during her evidence in the preliminary hearing. She said that the picture observed in August 2001 was of poorer quality than the picture shown from the enhanced film. As to the identity of the person shown in the enhanced film, Ms Lees said: “He’s somewhat of a man I described”. As to the vehicle depicted in the enhanced film, Ms Lees said that it was similar to the one she had described as belonging to the offender. She was unable to pick out any dissimilarity.

**Chronology**

[12] On 22 August 2002 the accused was arrested in South Australia on unrelated matters. In October 2002 Ms Lees accessed an article on the internet which was accompanied by a picture of the accused. According to statements and evidence at the preliminary hearing, Ms Lees immediately recognised the person in the picture as the person who had attacked her. On 18 November 2002 Ms Lees was shown a photo board containing twelve photographs, including a photograph of the accused. She indicated the photograph of the accused and said: "I think it's number 10". In a statement given on the same day, Ms Lees said that she picked the offender from the photo board and it would not matter what the person did to his appearance, she would always recognise him.

[13] The accused was extradited to the Northern Territory on 14 November 2003 and charged with the offences to which I have referred. The preliminary examination was conducted on various dates commencing 17 May 2004 and concluding on 18 August 2004 when the accused was committed to the Supreme Court for trial.

[14] On 26 November 2004 at a directions hearing before me the trial before the jury was fixed to commence on 26 April 2005. Two weeks in March 2005 were set aside for legal argument. The parties had been aware of those dates since 19 August 2004 when the dates were tentatively fixed at a pre-trial conference.

[15] Further directions hearings were held on 26 November 2004, 28 January, 18 February and 4 March 2005. On the last occasion the date for commencement of the trial before the jury was changed to 3 May 2005.

[16] On 7 March 2005 the accused was arraigned on the three charges and pleaded not guilty to each charge. Legal argument proceeded on 7 and 8 March 2005. The hearing was adjourned to 21 April 2005 for further legal argument.

[17] It is a significant part of the Crown case that the accused was in Alice Springs in the early hours of 15 July 2001. The Crown intends to lead evidence to establish that the accused travelled from Alice Springs to Broome where, on the Crown case, the accused told a friend that he had travelled from South Australia via a route which did not take him to the vicinity of Alice Springs or Barrow Creek. It is the Crown case that the false statement by the accused concerning the route followed was an attempt to establish a false alibi and is demonstrative of a consciousness of guilt.

[18] The Crown proposed to lead evidence from an employee of Toyota Australia identifying the vehicle seen in the truck stop film as a vehicle consistent with the vehicle driven by the accused. In addition, the Crown proposed to lead evidence from a forensic officer with the Australian Federal Police as to his calculations of the height of the person depicted and the dimensions of the vehicle. As at 8 March 2005 this evidence was known to be part of the Crown case. Although mention had been made during the directions

hearings and pre-trial argument about the truck stop film and an objection to the admissibility of that film had been notified but not argued, no mention had been made of a proposal to obtain additional expert evidence concerning the images of the male person depicted in the film.

[19] In a facsimile communication dated 11 March 2005 the Director advised the accused's solicitor of an intention to take photographs of the accused. The communication was in the following terms:

> "As part of continuing investigations, it is proposed that Detective Sergeant Chalker and forensic officers attend upon Mr Murdoch at Berrimah Prison for the purposes of taking a series of photographs pursuant to Section 146(3)(b) of the *Police Administration Act*. These photographs are to be used by an anatomist, Dr Meiya Sutisno, for analysis and comparison of the male depicted in the truck stop video.
>
> It is proposed that the procedure be carried out tomorrow, 12 March 2005. Please advise, as a matter of urgency, whether your client consents to the video-taping of the non-intimate procedure."

[20] After communication between the Director and the solicitor for the accused, the proposed taking of photographs was held in abeyance and a directions hearing was convened for 15 March 2005. During that hearing counsel for the Director advised that the purpose of taking the photographs was to enable Dr Sutisno to undertake "facial and body mapping" in relation to the appearance of the accused for comparison with the appearance of the male person depicted in the film taken at the truck stop in the early hours of 15 July 2001.

[21] Dr Sutisno conducted an initial assessment on 10 February 2005. Material relating to that assessment had previously been provided to the accused's legal representatives. The film from the truck stop camera was obtained by the Director on 3 March 2005 and, according to counsel for the Director, the substance of Dr Sutisno's examination was conducted on 3 March 2005. Counsel indicated that Dr Sutisno was of the view that additional photographs, and/or film footage, would assist in her analysis.

[22] Counsel for the accused indicated that the accused required additional time to receive advice and consider his position. The directions hearing was adjourned to 22 March 2005 on the basis that if the accused took objection a formal application would be filed to that effect. In the interim the police gave an undertaking not to attempt to take further photographs or film.

[23] The accused sought an injunction forbidding the police from dealing with the plaintiff by taking photographs or film of him. In essence it was submitted that the provisions of the Act did not empower the police to take photographs or film of the accused in the absence of his consent. After hearing argument on 22 March 2005 I refused the application to the extent that it sought an injunction forbidding the taking of photographs. I reserved my decision as to the taking of further film. Subsequently I ruled that the powers of the police extended to the taking of video film without the consent of the accused.

**Police Administration Act – Relevant Provisions**

[24] In issue is the extent of the police powers pursuant to Div 7 of the Act. In particular the argument centred on the power contained in s 145A to carry out non-intimate procedures without the consent of the person being subjected to those procedures ("the subject").

[25] It is necessary to consider the context of the relevant provisions and some of the legislative history. Division 7 is in Part VII which deals with police powers. Division 2 of Part VII is concerned with powers of search and entry while Div 2A contains special provisions relating to dangerous drugs and kava. Division 2B relates to diversion of juvenile offenders. Division 3 provides for the issuing of arrest warrants and the exercise of the power of arrest pursuant to such warrants, while Div 4 contains provisions relating to apprehension without arrest. Division 6 is concerned with the detention of persons taken into custody and bringing such persons before the court.

[26] The divisions to which I have referred are followed by divisions containing what might, in a general way, be called investigative provisions. Sections 139 - 143 of Div 6A are concerned with the recording of confessions and admissions. Division 7 is headed "Forensic Examinations" and provides the immediate context in which s 145A appears. Section 144 empowers police to search arrested persons while sections 145, 145A, 145B and 146 relate to the taking of samples and prints from, and photographs of, persons suspected of having committed crimes and arrested persons. It is appropriate to set out those sections in full:

“145. **Intimate procedures**

(1) A member of the Police Force may arrange for a medical practitioner or registered dentist to carry out an intimate procedure on a person in lawful custody on a charge of an offence if the member believes on reasonable grounds that the procedure may provide evidence relating to the offence or any other offence punishable by imprisonment.

(2) The intimate procedure may be carried out if –

(a) the person consents in writing to it being carried out; or

(b) a magistrate approves it being carried out.

(3) The member of the Police Force may apply to a magistrate for the approval –

(a) in person; or

(b) if that is not practicable – by telephone.

(4) The magistrate may approve the intimate procedure being carried out if, after hearing –

(a) the member of the Police Force; and

(b) the person to whom the application relates,

he or she is satisfied that the member has reasonable grounds for the belief referred in subsection (1).

(5) The approval is to be in writing and given to the member of the Police Force.

(6) The member of the Police Force may proceed under the approval despite not having received it if he or she is informed of it by the magistrate by telephone.

(7) A medical practitioner or registered dentist may carry out the intimate procedure in accordance with the approval given under subsection (4).

(8) A member of the Police Force –

(a) may assist a medical practitioner or registered dentist to carry out the intimate procedure; and

(b) may use reasonable force when assisting the medical practitioner or registered dentist.

(9) Before arranging for the intimate procedure to be carried out, the member of the Police Force must inquire whether the person wishes to have a medical practitioner or registered dentist of his or her own choice present when the procedure is carried out.

(10) If the person wishes to have a medical practitioner or registered dentist present, the member of the Police Force must –

(a) provide reasonable facilities to enable the person to arrange for a medical practitioner or registered dentist to be present; and

(b) unless it would be impracticable to do so – arrange for the intimate procedure to be carried out at a time when the medical practitioner or registered dentist can be present.

(11) After the intimate procedure is carried out, the person must be provided with a copy of the report of the medical practitioner or registered dentist provided in respect of the procedure if the person requests it.

(12) No action or proceeding, civil or criminal, can be commenced against a medical practitioner or registered dentist in respect of anything reasonably done by him or her in carrying out an intimate procedure under this section.

(13) Nothing in this section prevents a medical practitioner or registered dentist from examining a person in lawful custody at the request of the person or treating the person for an illness or injury.

(14) In this section, "registered dentist" means a dentist or dental specialist registered under the *Dental Act*.

145A. **Non-intimate procedures**

(1) Subject to any general orders or directions issued or given from time to time by the Commissioner of Police, a member of the Police Force holding the rank of Superintendent or a higher rank may carry out or cause to be carried out a non-intimate procedure on a person –

(a) whom the member reasonably suspects has committed a crime; or

(b) who is in lawful custody charged with an offence punishable by imprisonment.

(2) A member of the Police Force authorised by a member holding the rank of Superintendent or a higher rank may cause a sample by buccal swab of a person to be taken by directing the person to provide the sample.

(3) A person is not to be taken to have provided a sample unless the sample is sufficient to enable an analysis of it to be carried out.

(4) A member of the Police Force may use reasonable force when exercising his or her powers under this section.

145B. **Voluntary non-intimate procedures**

(1) Subject to any general orders or directions issued or given from time to time by the Commissioner of Police, a member of the Police Force holding the rank of Superintendent or a higher rank may carry out or cause to be carried out a non-intimate procedure on a person who consents to the non-intimate procedure being carried out.

(2) The person's consent is to be in writing.

(3) If the person is a juvenile within the meaning of the *Juvenile Justice Act*, the consent in writing of a parent or guardian of the

person is also required before the non-intimate procedure may be carried out.

(4) If a person consents to a non-intimate procedure being carried out for the purposes of the investigation of an offence, the information obtained from the procedure is inadmissible as evidence in any proceedings other than in proceedings in respect of the offence.

(5) Subsection (4) does not apply if the offence is a crime punishable by a term of imprisonment of 14 years or more.

146. **Certain non-intimate procedures on persons in custody**

(1) Subject to any general orders or directions issued or given from time to time by the Commissioner of Police, a member of the Police Force holding the rank of Sergeant or a higher rank, or for the time being in charge of a police station may, in respect of a person in lawful custody –

(a) on a charge of an offence; or

(b) in relation to a warrant issued in accordance with any law in force in the Territory,

carry out or cause to be carried out an identifying non-intimate procedure.

(2) In exercising his powers under subsection (1) a member of the Police Force may, for that purpose, use such force and may call upon such assistance as may be necessary.

(3) In this section, "identifying non-intimate procedure" means taking –

(a) prints of the hands, fingers, feet or toes; or

(b) photographs.”

[27] Section 145 applies to “intimate procedures”. That expression is defined in s 4 in the following terms:

> "intimate procedure" includes the following procedures:
>
> (a) examining the body, either internally or externally;
> (b) taking from the body a substance on or in the body;
> (c) taking a sample of a substance on or in the body;
> (d) taking a sample of blood (other than by a swab or washing from an external part of the body);
> (e) taking a sample of pubic hair;
> (f) taking a sample from the external genital or anal area or the buttocks by swab or washing;
> (g) taking a sample from the external genital or anal area or the buttocks by vacuum suction, scraping or lifting by tape;
> (h) taking a dental impression or an impression of a bite mark;
> (j) taking a photograph, or an impression or cast, of a wound to the genital or anal area or the buttocks;
> (k) taking an X ray;
> (m) taking a sample of urine;
> (n) in the case of a female –
>  (i) examining the breasts;
>  (ii) taking a sample from the breasts by swab or washing;
>  (iii) taking a sample from the breasts by vacuum suction, scraping or lifting by tape; and
>  (iv) taking a photograph, or an impression or cast, of a wound to the breast;”

[28] Sections 145A and 145B concern “non-intimate procedures”. The definition of that expression found in s 4 is as follows:

> "non-intimate procedure" includes the following procedures:

(a) taking a sample of saliva or a sample by buccal swab;

(b) examining a part of the body other than the genital or anal area or the buttocks or, in the case of a female, the breasts;

(c) taking a sample of hair other than pubic hair;

(d) taking a sample by swab or washing from any external part of the body other than the genital or anal area or the buttocks or, in the case of a female, the breasts;

(e) taking a sample by vacuum suction, scraping or lifting by tape from any external part of the body other than the genital or anal area or the buttocks or, in the case of a female, the breasts;

(f) taking a hand print, fingerprint, footprint or toe print;

(g) taking a photograph of, or an impression or cast of a wound to, a part of the body other than the genital or anal area or the buttocks or, in the case of a female, the breasts;

(h) taking a photograph of a person;"

[29] Although the letter of the Director to which I have referred stated that it was proposed the police would take a series of photographs pursuant to s 146(3)(b), counsel for the Director disavowed any reliance upon s 146 and submitted that the power to take photographs is found in s 145A. Counsel contended that the conditions identified in s 145A were satisfied and the definition of "non-intimate procedure" includes the taking of a photograph.

**Section 146**

[30] Counsel for the accused submitted that s 145A had no application because the specific power to take photographs is found in s 146 which is a power that may only be exercised when the subject is in the lawful custody of the officer in charge of a police station. Alternatively, if s 145A applied, that

power may only be exercised while the subject is in police custody and before custody results from an order of a court. In support of these propositions counsel urged that as the legislation authorises an intrusion into the privacy of an individual, it should be construed strictly against the police.

[31] The Director did not contest the proposition that the power contained in s 146 may only be exercised when the subject is in lawful custody of the officer in charge of a police station. This view arises from the wording of s 146(1) which empowers "a member of the police force holding the rank of Sergeant or a higher rank, or for the time being in charge of a police station …" to carry out or cause to be carried out an identifying non-intimate procedure in respect of a person in lawful custody on charge of an offence. The inclusion of an officer who is in charge of a police station is a clear indication that the section is intended to apply when the subject is in the lawful custody of the officer in charge of a police station.

[32] The purpose for which the power in s 146 may be exercised supports this view. The power conferred is to carry out "an identifying non-intimate procedure" which is defined in s 146(3) as meaning the taking of prints of the hands, fingers, feet or toes ("prints") or the taking of photographs. The Legislature plainly had in mind procedures to be undertaken when a person is in lawful custody at a police station on a charge of an offence for the purposes of identification of the person.

[33] In *R v* Carr [1972] 1 NSWLR 609, the New South Wales Court of Criminal Appeal observed that a similar section providing for the taking of particulars, including photographs and finger prints, "for the identification" of the person in custody is concerned not with identification to the police, but with identification to the court.

[34] The New South Wales Court of Criminal Appeal had occasion to consider that State's provision again in *R v McPhail* (1988) 36 A Crim R 390. The Court confirmed the views expressed in *Carr* and pointed out that the section gave the officer in charge of the police station a very wide discretion as to when particulars of identification could be taken. The Court added (399):

> "The power of the police officer under the section is not limited to cases where he might suspect that identification will be in dispute at the trial but is available in every case where it is considered by him to be necessary for the identification of the accused in court in whatever circumstances that may arise. Nor are the police restricted to *using* photographs taken of a person in custody after arrest only for the purpose of identifying him at the trial of the offence for which he has been arrested."

[35] Notwithstanding the different wording of s 146, in my opinion the purpose of the section is the same as the New South Wales provision. It is to empower the specified persons, including an officer in charge of a police station where the subject is held in custody on charge of an offence, to take prints and photographs for the purposes of identifying the subject to the court. In other words, although prints and photographs lawfully obtained pursuant to s 146 may subsequently be used for other purposes, the power

conferred by s 146 is a power conferred for a specific purpose, namely, identification of the subject to the court. It is not a power conferred for investigative purposes. In my opinion, the existence of the power in s 146 to take prints and photographs for identification purposes does not in any way operate as a restriction on the investigative powers contained in other sections. Nor does it support the contention that it is a specific power which ousts the operation of the more general investigative power found in s 145A.

[36] The power conferred by s 145A is conferred on a Superintendent of Police or an officer of higher rank. This is to be contrasted with the power in s 146 which is conferred upon an officer holding the rank of Sergeant or higher or a member of the police force for the time being in charge of a police station (which may be a member holding a rank less than that of Sergeant). In the case of an intimate procedure, s 145 provides that only a medical practitioner or registered dentist may carry out an intimate procedure and only if either the subject consents in writing to it being carried out or a Magistrate approves the procedure being carried out. These differences reflect a legislative recognition of the respective seriousness and intimacy of the intrusions upon the privacy of the individual authorised by the different sections.

**Principal Contentions**

[37] Counsel for the accused submitted that although s 145A does not expressly limit its operation to that period when the subject is in police custody, or in

custody by virtue of a warrant issued by a Justice or Magistrate pursuant to s 112 of the Justices Act and before custody occurs as a consequence of an order of the Supreme Court, nevertheless that temporal restriction is to be inferred on a proper construction of the section. To the extent that s 145A(1)(a) provides that the power may be exercised on the basis of reasonable suspicion that the subject has committed a crime, this is a reference to reasonable suspicion held as a "precursor to the charge" and does not permit the procedure to be conducted at a later time which would not otherwise be authorised by ss (1)(b).

[38] As to the power in ss (1)(b) to authorise the procedure on a subject "who is in lawful custody charged with an offence", counsel contended that this condition is also limited to the initial stages of police custody and is inapplicable from the moment custody is authorised by an order of the Supreme Court. For the purposes of s 145A, a person is no longer "charged with an offence" after committal for trial and the filing of an Indictment by the Director. This followed, so it was said, because after arraignment an accused is remanded by order of the Supreme Court and "is no longer held in lawful custody by warrant pursuant to s 112 of the Justices Act".

[39] In essence, according to the second limb of the accused's argument, for the purposes of both s 145A and s 146 a person in custody who is before the Supreme Court on Indictment is not "in lawful custody on a charge of an offence" or "in lawful custody charged with an offence".

**Principles of Construction**

[40] Against the background that s 146 is concerned with police powers at the initial stage of investigation and during custody at a police station, counsel submitted that Div 7 should be read consistently with this context. In addressing whether the operation of Div 7 extended beyond such period, counsel emphasised that Div 7 contains powers which infringe upon an individual's fundamental rights to privacy of the subject and against self incrimination. As has been made plain in numerous authorities, including the High Court in *Coco v The Queen* (1994) 179 CLR 427, such infringements must be clearly expressed by the legislature in unambiguous language. In a joint judgment in *Coco*, Mason CJ, Brennan, Gaudron and McHugh JJ said (437):

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."

[41] Division 7 contains a number of provisions which, by "unmistakeable and unambiguous language", infringe upon the fundamental rights of privacy and immunity. At issue is the time at which, or times during which, the authorised authorities are empowered to infringe upon those rights. In

addressing this issue, it is necessary to have regard to the purpose of the legislation and the context in which the powers are conferred as well as some of the history of the legislation. It will also be necessary to compare the circumstances in which the powers conferred by the different provisions may be exercised.

**Legislative History**

[42] In its current form, Div 7 was introduced to the Act by the Police Administration Act Amendment Bill 1998 which came into effect in February 1999 ("the 1998 amendments"). Prior to the 1998 amendments, Div 7 was headed "Forensic Examinations" and was comprised of ss 144-147. Section 144 was in identical terms to the current s 144. Investigatory techniques by way of medical examination and the taking of samples were dealt with in s 145, while s 146 specifically authorised the taking of prints and photographs by a member of the Police Force holding the rank of Sergeant or higher or for the time being in charge of a police station. Neither section made reference to intimate or non-intimate procedures.

[43] In substance the power conferred by s 146 was not altered by the 1998 amendments. The amendments deleted specific reference to prints or photographs and replaced it with reference to carrying out or causing to be carried out "an identifying non-intimate procedure". Sub-section (3) was added to define "identifying non-intimate procedure" as meaning the taking of prints and photographs.

[44] As to the investigatory powers contained in the repealed s 145, noticeable change was brought about by the 1998 amendments. For present purposes the relevant parts of the repealed s 145 were as follows:

> "145. Medical Examinations
>
> (1) A member of the Police Force may arrange for a registered medical practitioner or a registered dentist to examine the body of the person in lawful custody on a charge of an offence if he has reasonable grounds for believing that the examination may provide evidence relating to the offence or to any other offence punishable by imprisonment and -
>
> (a) the person has given his consent in writing; or
>
> (b) a magistrate has approved the examination under subsection (6).
>
> (2) An examination conducted pursuant to subsection (1) may include the taking of X-rays and other photographs, salivary and other tests and dental impressions or bitemarks of the person examined.
>
> (3) A member of the Police Force may arrange for a registered medical practitioner or a registered dentist to take a specimen from a person in lawful custody on a charge of an offence for the purpose of having the specimen analysed or otherwise examined if the member has reasonable grounds for believing that an analysis or other examination of the specimen may provide evidence relating to the offence or to any other offence punishable by imprisonment, and –
>
> (a) the person has given his consent in writing; or
>
> (b) the magistrate has authorized the taking of the specimen under subsection (6).
>
> (4) A registered medical practitioner or a registered dentist may examine the person of a person and take a specimen from a person in the circumstances described in subsection (1) or (3), as the case may be, and for this purpose may call upon the assistance of a member of the Police Force, who may use such reasonable force as may be necessary for the purpose of conducting the examination or taking the specimen.
>
> … "

[45] The balance of the repealed s 145 was concerned with the procedure for obtaining the approval of a Magistrate, the criteria for the Magistrate and other matters which were of an effect similar to ss 3-14 of the current s 145.

[46] Similarities exist between the repealed s 145 and its replacement. First, examination or procedures approved under both sections can only be carried out by a medical practitioner or registered dentist. Secondly, a member of the Police Force may arrange for the examination or procedure only if the subject is in lawful custody on a charge of an offence and only if the member believes on reasonable grounds that the examination or procedure may provide evidence in relation to the offence charged or to any other offence punishable by imprisonment.

[47] There were two aspects to the repealed s 145. First, ss (1) authorised the examination of the subject and ss (2) provided that the examination could include "the taking of X-rays and other photographs, salivary and other tests and dental impressions or bite marks of the person examined". Secondly, subject to the same conditions that applied to examinations pursuant to ss (1), ss (3) authorised the taking of a specimen from the subject "for the purpose of having the specimen analysed or otherwise examined".

[48] Section 145 as amended, provides for the carrying out of an "intimate procedure". The two aspects of the repealed s 145 are encompassed within the definition of "intimate procedure" which was introduced to the Act by the 1998 amendments. That definition is set out in paragraph [26] of these

reasons. While the ambit of the meaning of “salivary and other tests” and “specimen” in the repealed s 145 could give rise to an interesting debate, by providing a detailed definition in s 4 as to what is included within the expression "intimate procedure" the legislature has made it plain that a very wide range of procedures by way of forensic investigation is authorised by s 145.

[49] Independently of s 145, through the enactment of s 145A the 1998 amendments significantly enlarged the circumstances in which appropriate authorities may intrude upon the fundamental right of privacy and immunity. While the limited power contained in s 146 continued to exist, s 145A introduced an investigatory power into the hands of members of the Police Force enabling specified officers to undertake wide ranging forensic procedures involving intrusion upon the fundamental rights of members of the community.

[50] Whereas s 146 was, and is, limited to circumstances where the subject is in lawful custody on charge of an offence or in relation to a warrant, s 145A also applies where a member of the Police Force “reasonably suspects” the subject of having committed a crime. Unlike s 146, which was and is limited to the taking of prints and photographs, s 145A authorises a police officer of an appropriate rank to carry out, or cause to be carried out, a number of forensic procedures for investigatory purposes which include procedures of a significantly intrusive and intimate nature. While the range of procedures authorised by s 145A is not as wide as the intimate procedures

authorised by s 145, nevertheless s 145A confers a very significant power of intrusion for investigative purposes on a member of the Police Force holding the rank of Superintendent or higher.

[51] A number of differences exist between s 145 and s 145A. First, pursuant to s 145, before a member of the Police Force may arrange for an intimate procedure, the subject must be "in lawful custody on a charge of an offence." While the similar requirement that the subject be "in lawful custody charged with an offence punishable by imprisonment" is a requirement found in s 145A(1)(b), under the alternative in subsection (1)(a) the procedure may be carried out on a subject who a member of the Police Force reasonably suspects has committed a "crime". Section 145(1)(a) does not require that the subject be in lawful custody.

[52] Secondly, pursuant to s 145, the procedure may only be sought if a member of the Police Force believes on reasonable grounds that the procedure may provide evidence relating to the offence charged or any other offence punishable by imprisonment. Section 116(6) of the Act provides that for the purposes of Part VII, which includes ss 145-146, unless the contrary intention appears a reference to an "offence" shall "… include a reference to a crime, a felony, a misdemeanour and any offence triable summarily and shall include an offence against the law of the Commonwealth or of the Territory".

[53] By way of contrast, the power in s 145A is not hedged with a requirement that the member of the Police Force believe that the procedure may provide evidence of an offence. Subsection (1)(a) of s 145A requires that the member of the Police Force reasonably suspect that the subject has committed a "crime", but it is not a specific requirement that the member believe the carrying out of the non-intimate procedure might provide evidence relating to the crime that the member reasonably suspects the subject has committed. Whether such a limitation should be implied is an issue which need not be discussed.

[54] Viewed in their entirety, the 1998 amendments expanded the investigatory powers of the police. In particular, subject to rank, a new power was conferred upon police to undertake investigatory forensic procedures without the involvement of a medical practitioner or a Magistrate. The additional power is not dependent upon the subject being in lawful custody charged with an offence. It is enlivened if a member of the Police Force of or above the defined rank reasonably suspects that the subject has committed a crime.

[55] There is nothing in the Second Reading Speech introducing the 1998 amendments to suggest that the power contained in s 145A was intended to be limited in the manner for which the accused contended. While the issue is not canvassed specifically, the Second Reading Speech conveys an intention to enhance police powers of investigation in order to improve prospects of apprehending offenders. While extensive reference was made

to accompanying amendments relating to DNA and DNA databank information, the overall tenor of the Second Reading Speech is plainly concerned with increasing police powers of investigation.

[56] The proposed construction would deprive the police of power to obtain evidence from the body of the subject after the subject is presented before the Supreme Court charged on indictment. It is not difficult to envisage circumstances in which police may not determine until after the subject is presented on indictment that an intimate or non-intimate procedure is necessary for the purposes of obtaining evidence relating to the crime with which the subject is charged.

[57] As I have said, s 145A(1)(a) authorises the non-intimate procedure on a subject whom the member of the Police Force of the appropriate rank reasonably suspects has committed a crime. There is nothing in s 145A to limit the time during which the procedure may be undertaken to a period before the subject is presented before the Supreme Court on indictment. Nevertheless counsel submitted that in the context of s 145A and the provisions of Div 7 generally, that limitation should be implied. In addition counsel contended that the suspicion must relate to the commission of a crime that is not already the subject of the indictment. Counsel recognised that if the reasonable suspicion relates to a crime which is not the subject of the indictment, the temporal restriction for which the accused contended would not apply. In my view, this concession highlights the strained nature

of the proposed construction and the inconsistent consequences of that construction.

[58] The concept of reasonable suspicion is a concept which is well known to the criminal law. Debate about reasonable suspicion usually arises in the context of powers exercised before or at about the time of the arrest of a suspected offender. Speaking generally, however, reasonable suspicion does not cease to exist merely because the suspected offender has been charged with an offence either on information or, subsequently, on indictment after committal for trial. The critical question is whether the ordinary and natural meaning of the words of s 145A or the context in which the power based on reasonable suspicion is conferred elucidate an intention that in respect of an offence that is the subject of an indictment, the power ceases upon the filing of the indictment while the power continues to exist if the reasonable suspicion relates to a crime other than the crime charged on the indictment.

[59] I turn to the issue of when, for the purposes of ss 145 and 145A, the subject is in lawful custody “on a charge of an offence” or “charged with an offence”. As mentioned, counsel for the accused contended that the subject ceases to be in that category once the subject has been presented before the Supreme Court on indictment and has been remanded in custody by order of that Court.

[60] The expressions must take their meaning from the terms and context of the legislation. In the context of criminal offending, it is capable of meaning an

accusation or imputation of something culpable: the Oxford English Dictionary, 2nd Edition. It is also capable of applying to the moment when a citizen is brought before a court and the accusation of a crime is formally brought against the citizen. As Toohey J pointed out in *Japaljarri v Cooke* (1982) 64 FLR 314, at 318:

> "The expression "charged" is not one of precision. Sometimes it has been taken to mean "the solemn act of calling before a magistrate an accused person and stating, in his hearing, in order that he may defend himself, what is the accusation against him." … But it has been recognized as capable of a wider meaning than that. In *Arnell v Harris* [1945] KB 60, at p 63, Humphreys J. said: "it may include the case of a person who has been arrested on a charge, as he might be in a case of felony, or that of a person who has been arrested on a warrant granted by a magistrate, or even that of a person who has been summoned, that being another form of bringing a person before a court to appear and answer a charge …". Again, in *R v Norfolk Quarter Sessions, Ex parte Brunson* [1953] 1 QB 503, at p 510, Pearson J said: "A prisoner may be, in a sense, charged at the moment when the policeman arrests him without warrant on suspicion of felony, and there is some obligation to inform the arrested person for what he is being arrested. That might be in some sense described as putting him on charge. Then there may be further action taken by the police at the police station in accordance with the ordinary usages of the police.""

[61] Toohey J observed that the term "charged" must take its meaning from the context in which it appears. His Honour undertook a review of provisions in the Act, which have subsequently been amended, including s 136(1) which imposed an obligation on a member of the police force "who arrests or charges a person with an offence" to bring the person before a Justice forthwith to be dealt with according to law. His Honour concluded that for those purposes the Act recognised that a person could be charged with an offence before the person appeared before a Justice. Section 136 was

subsequently repealed. Section 137 now speaks of the requirement to bring persons before a Justice or a Court of Competent Jurisdiction where such persons have been "taken into custody". There is no mention of either arrest or charge. Significantly, pursuant to s 137 a member of the Police Force may hold a person taken into lawful custody for a reasonable period to enable the person to be questioned or investigations to be carried out. Section 137(2) provides that in such circumstances the person shall not be granted bail whether or not the person "has been charged with an offence". Section 137 plainly contemplates persons being held in custody without being charged.

[62] The issue as to when a person is first "charged" is answered by reference to s 116(9) which is the first section in Part VII:

> "(9) For the purposes of this Part, a person shall not be taken to have been charged with an offence unless –
>
> (a) subject to paragraph (b), particulars of the charge have been entered in a Police Station charge book; or
>
> (b) where it is not practicable to comply with the requirements of paragraph (a), a person is held in custody following his arrest and has been advised by a member that he will be charged with an offence."

[63] Subject to the exception in s 116(9)(b) which only applies where it is not practicable for particulars of a charge to be entered in a Police Station charge book, for the purposes of ss 145 and 145A a person is not in lawful custody "on a charge of an offence" or "charged with an offence" unless the

particulars of the charge have been entered in a Police Station charge book. Plainly the Legislature contemplates that for the purposes of ss 145, 145A and 146 the subject may be charged before being brought before a Justice or a Court. In addition, to the extent that the powers in ss 145 and 145A are enlivened if a person is in lawful custody and charged with an offence, the powers are enlivened only after the charge has been entered in a Police Station charge book. For example, the powers are not enlivened when the subject is in lawful custody, but held pursuant to s 137 without charge for questioning and further investigation. In that period, however, the power to carry out a non-intimate procedure found in s 145A(1)(a) would be enlivened if a member of the Police Force reasonably suspects that the subject has committed a crime.

[64] It is in this total context that the issue of when the subject ceases to be in lawful custody on a charge of or charged with an offence for the purposes of the investigative procedures authorised by ss 145 and 145A must be determined.

[65] Counsel for the accused relied upon the decision of the South Australian Court of Criminal Appeal in *R v Franklin* (1979) 22 SASR 101. The Court was concerned with the admissibility of evidence of a blood sample taken from the appellant following his arrest and over his objection. The relevant provision of the Police Offences Act 1953 (SA) provided for an examination by a legally qualified medical practitioner acting at the request of "… any member of the police force in charge of a police station, of or above the

rank of sergeant …". A later subsection of the same section provided for the taking from a person in custody of such particulars as any member of the Police Force in charge of a police station or of or above the rank of Sergeant might deem necessary for the identification of the person, including the taking of photographs and fingerprints.

[66] In that context the Court held that the taking of specimens of blood and hair formed part of the authorised examination. Having reached that conclusion, Wells J, with whom King CJ and Legoe J agreed, concluded that the examination had to be carried out while the prisoner was in custody at the police station. His Honour said (107):

> "The important group of sections – ss 78 to 81 – stand alongside the writ of *habeas corpus* in giving guarantees against arbitrary and unjust interference with the liberty of the subject. The structure of the sections embody the principle that a person under arrest must be conducted forthwith to a police station and placed in the custody of the officer in charge, where he will be further dealt with according to law. Section 81, both in its place in the Act and in the projected process of law governed by ss 78 to 81, carries, in my judgment, the clear implication that everything done pursuant to its terms must be done while the law enforcement authorities are acting within the framework of the procedures laid down by statute. It seems to me to follow that what s 81 describes as an examination must be begun, conducted, and completed, while the prisoner is in lawful custody of the officer in charge of the police station to which he has been lawfully conveyed."

[67] It is immediately apparent that Wells J was influenced by the structure of the relevant provisions and the fact that they were concerned with the manner of dealing with arrested persons when placed in custody of the officer in charge of a police station. The particular power of examination

under consideration could be exercised at the request of any member of the Police Force in charge of a police station. The context and specific wording of the relevant provisions were critical to the construction. Similarly, as discussed earlier in these reasons, the fact that the power in s 146 of the Act may be exercised by an officer in charge of a police station was of importance to the construction of that section.

[68] By way of contrast, in *R v Galvin* (1983) 24 NTR 22, Muirhead J considered the legislative scheme in Div 7 of the Act and, in particular, in s 145. His Honour expressed the view that the section was "clearly enacted in aid of the investigation of criminal matters". After referring to the relevant principles of construction of penal statutes which "cut across the ordinary common law principle against self-incrimination" and require strict construction, his Honour said (24):

> "I accept the principles implicit in these authorities as correct. The right of a magistrate to empower the withdrawal of blood from a person, without his consent, is clearly beyond power if there is upon construction any doubt that the statute authorizes such an infringement of basic rights. We live in an age where the complexity and volume of crime and its nature and the advances of scientific investigation have resulted in legislation which widely departs from traditional concepts. This is to be found in contemporary legislation relating not only to criminal offences in the strict sense, but in legislation designed to combat the introduction and distribution of drugs, and to cope with the "drinking driver" and the like.
>
> Section 145 contains a legislative scheme, in which I find no ambiguity."

[69] At the conclusion of his judgment, Muirhead J noted that although the issue had not been argued, it may not be lawful to take the subject to a hospital or

a medical practitioner's rooms for the purposes of an authorised examination without the consent of the subject. In addressing that question, his Honour made the following observation (27):

> "The second matter I refer to has not been argued before me. The powers of examination and the taking of specimens relate to persons in lawful custody, albeit in a police station following arrest *or in lawful custody in a prison*. It may not be lawful under this section, without the consent of the person, to take him to a hospital or medial practitioner's rooms for the purposes of an authorised examination or taking of a specimen …" (my emphasis).

[70] Not surprisingly, counsel for the Director relied upon this passage and, in particular, on the words I have emphasised. It must be said, however, that the issue was not the subject of contention or submissions before Muirhead J.

[71] The accused's contentions with respect to when custody on a charge ends for the purposes of ss 145 and 145A necessarily involve the following propositions. First, that for the purposes of these sections custody by order of a Justice or Magistrate prior to and after committal for trial amounts to lawful custody on a charge. Secondly, lawful custody on a charge for these purposes ceases when the Justice or Magistrate's warrant ceases to have effect and the order of the Supreme Court takes effect. Thirdly, this "point of change" is not expressly identified in the legislation. It must be inferred from the context of ss 145 and 145A.

[72] Counsel for the accused conceded that in the absence of power being conferred on an officer in charge of a police station, and in the light of the

wording of ss 145 and 145A, those sections are capable of being viewed as of wider effect than s 146 and as authorising the procedures to be undertaken at a time subsequent to the initial custody at a police station. This led counsel to accept that while the subject is in lawful custody charged with an offence by order of a Justice or Magistrate, the powers contained in ss 145 and 145A are enlivened. In essence, counsel submitted that the point of change for which he contended should be inferred because Div 7 is concerned generally with police powers at the initial stages of investigation and custody and the period during which the subject is in custody by order of a Justice or Magistrate may properly be viewed as within such initial stages. However, once an indictment has been filed and the subject is in custody by order of the Supreme Court, for the purposes of ss 145 and 145A those initial stages have passed.

[73] The proposed construction relies entirely upon two inferences said to arise from the context of the relevant provisions. First, that the powers contained in ss 145 and 145A were intended to be limited to the initial stages of investigation and custody. Secondly, that those initial stages cease with the laying of an indictment rather than with the passing of a particular period of time.

[74] I am unable to accept the proposed construction. There is nothing in the wording of the sections or their context which would support that construction. The ordinary and natural meaning of the words “in lawful custody on charge of an offence” or “in lawful custody charged with an

offence" does not lend itself to the arbitrary division of time for which the accused contended. A person charged on information before a Justice or Magistrate is committed for trial in the Supreme Court. The provisions of the Criminal Code assume that a person committed for trial is a person "charged" with a crime who remains charged after the filing of an indictment. Section 298(1) provides:

> "(1) When a person charged with a crime has been committed for trial and it is intended to put him on his trial for the crime the charge is to be reduced to writing in a document that is called an indictment".

[75] Section 299 of the Code provides that "when a person charged with a crime has been committed for trial", if the person responsible for the preparation of the indictment is of the opinion that the accused "ought to be charged with some further or other offence", the person may present an indictment "charging such further or other offence". Sections 301 and 302 refer to "the charge" in an indictment. Section 303 directs that except as otherwise provided, an indictment "must charge" one offence against one person. Section 305 provides that an indictment shall contain a statement of offence "charged" together with such particular as may be necessary to give reasonable information "as to the nature of the charge".

[76] Within the scheme of the legislation found in the Justices Act and the Code for dealing with persons charged with crimes that are to be dealt with in the Supreme Court, the defendant is charged first on information and subsequently on indictment. If remanded in custody, according to the

ordinary meaning of the words the defendant is in lawful custody on a charge of an offence or in lawful custody charged with an offence regardless of whether the order was made by a Justice or Magistrate or by a Judge after the filing of the indictment.

[77] The construction advanced by the accused requires that for the purposes of ss 145 and 145A the ordinary and natural meaning of the words and the wider context of the scheme of the Justices Act and Code are to be ignored.

[78] Bearing in mind the investigatory purpose of ss 145 and 145A, and the direction in the legislation that the subject is not to be regarded as in lawful custody on a charge until particulars of the charge have been entered in a Police Station charge book, the Legislature cannot have intended that the powers enlivened when the subject is in lawful custody on a charge would only exist while the subject is in the custody of the police and would cease to exist once custody is the result of an order by a Justice or a Magistrate. Counsel for the accused did not contend for such a limitation. Once it is accepted that neither the words of the relevant provisions nor their context can justify such a restrictive interpretation, a difficulty is immediately created for the position proposed by the accused. The legislation does not identify a time when custody on a charge ceases. The proposition that the legislature intended it relate only to the initial stages of police investigations and custody is beset with a number of difficulties. First, it is difficult to envisage how such an inference can be drawn from the context of the legislation. Secondly, such a construction would tend to frustrate the

evident purposes of the provisions. Thirdly, the concept of "initial stages" is so vague as to be incapable of the degree of precision which should accompany intrusions of the type authorised by the legislation. Finally, the suggestion that "initial stages" can be determined by reference to the filing of the indictment introduces a criteria totally unrelated to any concept of "initial stages" of custody and investigation. The filing of the indictment may not occur for many months after the subject is charged and at a time well beyond any reasonable view of the "initial stages" of investigation and custody.

[79] In the context of the Act and the scheme of the Justices Act and Code to which I have referred, it is not surprising that the Legislature would recognise that investigations continue notwithstanding the filing of an indictment. The ordinary and natural meaning of the words in their context leads inexorably to the conclusion that the subject remains charged for the purposes of ss 145 and 145A while the accusation remains outstanding and unresolved. As a matter of fact, when the subject is remanded in custody by order of the Supreme Court following the filing of an indictment, the subject is in lawful custody. As a matter of fact the subject is charged with an offence or on charge of an offence. When the charge is resolved by verdict of a jury or plea, the subject is no longer charged with an offence or on charge of an offence.

[80] For these reasons, in my opinion the temporal restriction for which the accused contended cannot be sustained. In the particular circumstances,

s 145A(1)(b) empowered a member of the Police Force holding the rank of Superintendent or higher to carry out or cause to be carried out the taking of photographs of the accused without the consent of the accused.

[81] In addition, I reject the submission that s 145A(1)(a) has ceased to have effect because the accused is charged on indictment before the Supreme Court. In my view if a member of the Police Force of appropriate rank now reasonably suspects the accused of having committed the crime of murder, such officer is empowered by s 145A(1)(a) to carry out or cause to be carried out the taking of photographs of the accused without the consent of the accused.

**Video Film**

[82] I turn to the Director's submission that police have the power to take a moving film of the accused without his consent. In essence, the Director submitted that the taking of a film is a "non-intimate procedure" for the purposes of s 145A because, for those purposes, the word "photograph" in the definition of "non-intimate procedure" includes moving film.

[83] As I have said, the evident purpose of the 1998 amendments was to enhance the investigatory powers of the police. The taking of photographs and films of a suspect are well recognised techniques of investigation. There is no reason readily apparent why the Legislature would not have intended to include the taking of a moving film of a suspect as an authorised investigatory technique. In my view, the purpose of the legislation and the

context in which the word “photograph” is used support the view that the Legislature intended to include the taking of a moving film of a suspect.

[84] The purpose of the legislation was a factor of influence in the decision of the Court of Appeal in *Derrick v Customs and Excise Commissioners* [1972] 2 QB 28. The Court was concerned with the seizure of cinematograph films on the ground that they were “indecent or obscene articles” for the purposes of the Customs Consolidation Act 1876. The prohibited articles were defined by the relevant section in the following terms:

> “Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles.”

[85] Lord Widgery CJ with whom Ashforth and Griffiths JJ agreed, observed that the section was a “very important means of preventing indecent films from ever reaching the country”. In that context His Lordship held that the film fell within the phrase “any other indecent or obscene articles”. His Lordship added (32-33):

> “It follows that any article which is indecent may be forfeited under this procedure, and had it been necessary, I would certainly have been prepared to hold that these films are photographs despite the limitations upon their use to which I have already referred.”

[86] A still photograph is a still picture of an image seen by a camera. The image is captured on material commonly called a “film” and production of the picture is achieved by a chemical process applied to that material.

[87] The definition of “film” in the Oxford English Dictionary (2nd Edition) contains reference to “photography”, the definition of which includes the following:

> “… a thin, flexible, transparent material consisting essentially of a plastic base or support (formally of celluloid, now commonly of cellulose acetate) coated on one side with one or more layers of emulsion and sold as a rolled strip and as separate sheets; also, a single role of this material, allowing a small number of exposures for use in still photography *or a large number for use in cinematography*.” (my emphasis)

[88] “Cinematography” is defined as the art of taking and reproducing films. Cinematograph is defined as a device “by which a series of instantaneous photographs of moving objects taken in rapid succession are projected on a screen in similarly rapid and intermittent succession so as to produce the illusion of a single moving scene.”

[89] In my opinion, bearing in mind the ordinary and natural meaning of the word “photograph” and the context in which it appears, for the purposes of investigations authorised by the Act and the definition of “non-intimate procedure”, the expression in subpar (h) “taking a photograph of a person” includes the taking of a moving film by means of a video camera or other similar device.

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