The Queen v Murdoch [2005] NTSC 78

PARTIES:	THE QUEEN
	v
	MURDOCH, Bradley John (No 4)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW

Murder – admissibility of expert evidence – video footage – identification evidence – facial and body mapping/photo-comparison – evidence admitted.

REPRESENTATION:

Counsel:

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

Solicitors:

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

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

The Queen v Murdoch [2005] NTSC 78
No. 20215807

BETWEEN:

THE QUEEN
Plaintiff

AND:

MURDOCH, Bradley John
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 15 December 2005)

Introduction

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

[2] The Crown sought to lead evidence of film from a security camera ("the security film") installed in a truck stop in Alice Springs for the purpose of establishing that the accused was in Alice Springs early on 15 July 2001 and, therefore, had the opportunity to commit the crimes. In addition the Crown sought to lead two categories of opinion evidence. First, evidence

was advanced from four persons who knew the accused in July 2001 that either they recognised the person depicted in the security film as the accused or the person depicted looked like the accused. Secondly, it was proposed to call a forensic anatomist, Dr Meiya Sutisno, to give expert evidence that the similarities between the person depicted in the security film and the accused were such that in her view the person in the film was the accused. The accused objected to the admission of evidence of the security film and any opinion evidence based on it. I admitted all the evidence to which objection was taken with the exception of one of the four witnesses who knew the accused. I now set out my reasons for those rulings.

Facts

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

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

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

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

[7] The details of subsequent events 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.

[8] 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 of 15 July 2001, he stopped at the Shell truck stop and purchased fuel and other items.

[9] Images from the security film 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."

[10] 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.

[11] 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.

[12] 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."

[13] The security film which the Crown seeks to place before the jury was taken by more than one camera situated at the truck stop. The cameras were motion operated. The particular footage commenced at 12.38am on 15 July 2001, apparently triggered by the movement of a Toyota Landcruiser vehicle which witnesses subsequently either positively identified as the vehicle being driven by the accused in July 2001 or said was very similar. No objection is taken to that evidence.

[14] The driver of the Toyota purchased 117 litres of diesel fuel, an iced coffee milk drink, water and two bags of ice costing $136.65. The driver is

depicted in images taken by the security cameras entering the shop and paying for the purchases. The Crown proposes to lead evidence from a forensic officer with the Australian Federal Police that the driver of the Toyota depicted in the images is of a height consistent with the height of the accused. No objection is taken to that evidence.

Security film – admissibility and discretionary exclusion

[15] As I have said, the security camera was activated at 12.38am. The relevant footage concluded at 12.50am on 15 July 2001 with the departure of the Toyota. At 9.15pm a police officer viewed the images. At 10pm police officers conveyed the proprietor of the firm that maintained the security equipment, Mr Shane Ride, to the truck stop where Mr Ride copied the relevant footage from the hard drive which recorded images captured on the security film.

[16] The images were captured in analogue format and transmitted to a computer system where they were converted into digital format recorded on the computer hard drive. Mr Ride copied the relevant footage onto a VHS video and still images were copied onto a floppy disk. Further copies were made on 17 and 18 July 2001.

[17] In discussions between police and Mr Ride on 18 July 2001, police enquired how long the recorded images would remain on the computer hard drive before being overwritten. Discussion occurred about removing the hard drive, but following concerned expressed by Mr Ride that it would cost the

truck stop operator approximately $10,000 to replace the hard drive if it was removed by the police, no attempt was made to retain that hardware. No attempt was made to download the images from the hard drive in digital format before the images were overwritten. If images had been downloaded in digital format, for present purposes the copy produced would have been an exact copy of the images stored in the hard drive. By copying the images into an analogue form, the quality of the reproduced images is less than the quality of the images stores on the hard drive.

[18] On 27 July 2001 the VHS copy of the images was enhanced by an officer of the Queensland Police ("the Queensland enhancement"). On 6 August 2001 images of the Toyota and the driver were reproduced on the front page of the West Australian newspaper.

[19] In June 2004 the VHS copy was converted by Mr David Ringrose of the Australian Federal Police into a digital format. Mr Ringrose succeeded in improving the quality of the images. In none of the images, however, is the number plate of the Toyota visible. Attempts to enhance the images sufficiently to make any part of the number plate legible have been unsuccessful.

The Objection

[20] The accused objected to the admission into evidence of the security film. In essence, counsel submitted that police had available the best evidence in the form of the digital hard drive which should have been seized or from which

images directly downloaded in digital form. In these circumstances it was unfair to the accused to admit the inferior analogue copy or the digitally enhanced version of the analogue copy. Counsel contended that if the hard drive had been retained or a digital download had occurred, the number plate of the vehicle might have been ascertainable and might have established that the Toyota was not the Toyota owned and driven by the accused in July 2001. Bearing in mind the evidence establishing at least a resemblance between the driver and vehicle depicted in the film and the accused and his vehicle, and in view of Ms Lees' evidence that the driver depicted was "somewhat of a man I described", if the number plate proved that the vehicle did not belong to the accused the film would have established the presence in Alice Springs at a relevant time of another person who could have been the offender. In this way, so the argument proceeded, the failure of the police to take possession of the hard drive or carry out a digital download before the images were overwritten might have deprived the accused of not only the opportunity of depriving the Crown of positive evidence of opportunity on the part of the accused, but of placing evidence before the jury pointing positively to the presence of another person who might have been the offender.

Image quality – the evidence

[21] Mr Ride is a locksmith. His company has been responsible for maintaining the surveillance system at the truck stop for approximately ten years. Although his company was not responsible for the original installation of the

system, his company carried out an upgrade by removing the analogue recording system and installing a Dallmeier DLS 18 digital video recorder ("DVR"). In evidence Mr Ride explained that the DVR records live video camera images onto a hard drive enabling storage from multiple video camera recordings at the same time without missing images or events.

[22] Mr Ride said that the cameras were set up to give an overview of different areas. The cameras were set in the mid range of a "compression rate" which is a setting designed to allow longevity with certain picture quality. The mid range setting enabled seven to ten days worth of recording to occur before the hard drive became full and new images overwrote the oldest recorded information on the hard drive. In Mr Ride's view, at this setting the images would be adequate to be able to visually identify vehicles and persons.

[23] As to whether the setting would permit identification of vehicle number plates at the diesel bowsers, Mr Ride gave the following evidence:

> "Q. At that time was it set to be able to visualise number plates on vehicles that came into the diesel bowsers?
>
> A. No.
>
> Q. In your experience, has the operation of that surveillance system ever been – have you ever been able to discern number plates from the camera that operates in the diesel bowers?
>
> A. No."

[24] Mr Ride's view was not challenged in cross-examination. In addition, that view derived support from the evidence of Mr Ringrose who is employed in the audio and video laboratory of the Forensic Services section of the Australian Federal Police. There was no challenge to the qualifications and expertise of Mr Ringrose in the field of sound engineering.

[25] Mr Ringrose examined the security camera system at the truck stop in June 2004. No significant changes had occurred in that system since July 2001.

[26] It is unnecessary to canvass the evidence of Mr Ringrose in detail. He explained how the quality of the images recorded on the hard drive are affected by a number of factors, including the pixel resolution, the quality of the camera, the distance between the camera and the target object and the angle of the camera to the target object. Image quality primarily depends upon the pixel resolution. Images are limited by the number of pixels that are available to represent the object. Mr Ringrose explained that the percentage of the overall image of the driveway taken up by the vehicle is quite small. The area taken up by the number plate is even smaller again. Mr Ringrose took a measurement and found that the area of the number plate occupies approximately "a tiny 50 pixels". Mr Ringrose likened the pixels to dots and explained that it is like trying to draw a picture with a pen putting only dots on a page and being limited to representing all the detail in the number plate, including all the surface area, by only 50 dots.

Mr Ringrose added:

> "It may be possible to draw six numbers and letters with 50 dots but it is not possible to then extend that and use those dots to also represent the surface of the number plate behind the dots, let alone taking into consideration other factors that I have already discussed with the camera resolution. So we've already, if you like, we've already lost a lot of that detail by virtue of the fact that the camera itself doesn't have the resolution capabilities to pick up that sort of detail from that distance."

[27] In view of all the factors to which I have referred, and other factors of significance generally and in respect of the particular image of the vehicle at the truck stop, Mr Ringrose expressed the opinion that if a digital copy had been made directly from the hard drive:

> "At best, and this is purely speculative – but at best we may have been able to see what colour the number plate was as a whole but certainly beyond that I really don't believe we'd be getting any further details on that."

[28] During cross-examination, Mr Ringrose gave the following evidence:

> "Q. In terms of fine detail, trying to look at the number plate, either for a number digital colour, the possibility of successfully being able to do that would be enhanced if we actually had the digital hard drives. Do you agree with that?
>
> A. Not necessarily enhanced. As I say, the possibility of recovering a number plate is very difficult at the best of times, given that we have a camera that's looking at the global scene rather than specifically target to looking at number plates. Certainly in other cases where we've been asked to enhance and recover details of number plates but has really only been successful when we've got a camera that's staring right down a particular area of the driveway and front on to the vehicle where it gets a good, clean shot of the number plate and the number plate actually occupies a significant percentage of the image space."

[29] As to the possible improvement in the quality of the image of the person depicted in the security film had the digital hard drive version been kept and viewed, Mr Ringrose said:

> "A. The limiting factor which we have with the vehicle doesn't necessarily apply with the person here because the distance is a lot closer however – and it would be fair to say that there would be an increase in the – in some of the fine detail that you would see within that indoor scene but I believe that the increase in detail would be quite small and given the features that you might use for identification, I think it would still be very, very limited in what you could pick up from the original images.
>
> …
>
> Q. Certainly fine detail on the person shown inside of the shop would be more likely to be obtained if we had the original digital hard drive. Do you agree with that?
>
> A. Again, it depends on what level of detail an investigator may be interested in. It would be fair to say that there would be an increase in the detail available on the person in the shop but to what level of detail – the level of increase of detail that we have I don't expect would be significant in terms of, for example, counting hairs on somebody's head, for example."

[30] I accept the evidence of Mr Ride and Mr Ringrose. Having regard to all the circumstances affecting both the quality and detail of images captured by the camera showing the driveway and vehicle at the truck stop, including circumstances discussed in evidence that I had not previously mentioned such as the lighting conditions, in my opinion it is extremely unlikely that any useful image of the number plate could have been obtained if the hard drive had been retained and the relevant image downloaded from the hard

drive in digital format. Further, although the image of the person in the shop would have been of an improved quality, I am unable to be precise as to the extent of improvement and, in my view, it appears unlikely that the quality would have been improved to a significant degree.

[31] There is a further factor of relevance. It concerns the practical issue of either seizing the hard drive or arranging for a download of the images in digital format.

[32] It is common ground that the police could have seized the hard drive. This action would have left the truck stop without the capacity to record images from more than one camera. A VCR recorder would have been capable of recording one camera. The replacement cost of the hard drive would have been approximately $10,000.

[33] If the hard drive had been seized by police, in order to download the images in digital format it would have been necessary for the hard drive to be installed in a new machine at a cost of approximately $10,000 to $12,000. A new machine was not available in Alice Springs in mid July 2001 and it would have taken approximately 10 to 14 days to obtain such a machine in Alice Springs. Alternatively, the hard drive could have been transported to Melbourne or another capital city if an appropriate new machine was available.

[34] If the hard drive had remained in place at the truck stop, it would have been possible to record a CD through use of an upgraded digital recorder. This

would involve upgrading the existing machine at a cost of between $5,000 and $7,000. In July 2001 it would have taken approximately two weeks or possible a little longer to obtain the necessary equipment in Alice Springs. In the interim, in order to retain the recorded data it would have been necessary to shut down the security camera system at the truck stop.

[35] During cross-examination of Mr Ride counsel explored the possibility of copying the contents of the hard drive by employing "an external digital hard drive upon which to copy the image". Mr Ride said he was aware of that process but added:

> "However, the manner in which the Dallmeier recorders record and in the technology they use it also creates a watermark on the recordings. And so by attempting to transfer recorded data from one machine to another can disrupt and damage the data."

[36] Mr Ride explained that this process that might damage the data would involve having to mirror image or ghost the recording to another hard drive. As to whether the equipment necessary was available in Alice Springs in July 2001, Mr Ride responded: "We didn't have and don't have access to that equipment."

Authorities cited

[37] In support of his submission that the evidence of the security film should be excluded, counsel for the accused referred to a number of authorities concerned with the destruction of evidence and subsequent stays of criminal

proceedings. Particular reliance was placed on the decision of Cox J in *Holmden v Bitar* (1987) 47 SASR 509.

[38] There is a large body of case law concerned with the remedy of a stay of proceedings by reason of the loss or destruction of evidence. *Holmden v Bitar* and the other authorities to which counsel for the accused referred are examples of the application of those principles which resulted in stays of proceedings being ordered. It must be recognised, however, that the loss or destruction of evidence does not necessarily justify a stay of proceedings. Each case must be determined according to its individual circumstances.

[39] The application of the principles governing the question of a stay of proceedings based on the loss or destruction of evidence to the issue under consideration is problematical. The issue is not whether the trial should be stayed. It is whether grounds exist for the exclusion of relevant evidence.

Probative value

[40] The security film is plainly of probative value, even when viewed without the assistance of any form of opinion evidence. If the jury accept the evidence of Ms Lees, coupled with the evidence of the truck driver who Ms Lees flagged down and forensic evidence concerning the finding of blood containing DNA matching that of the deceased on the roadside, it would be open to the jury to find that the offender moved the Kombi van to a position North of the scene of the killing and then drove South in his own vehicle in the direction of Alice Springs. The security film is taken at a time when the

offender could have been in Alice Springs. It depicts a vehicle very similar to that driven by the accused in July 2001 and a person of similar height and general appearance to the accused.

[41] The evidence of the security film is a piece of circumstantial evidence to be considered in conjunction with the evidence to which I have referred and other circumstantial evidence concerning the accused's movements on 15 and 16 July 2001. The film considered in conjunction with other circumstantial evidence is capable of proving that the accused possessed the opportunity to commit the crime. In the context of the remote location where the crime was committed and the likely issues at trial, proof of opportunity is a significant part of the Crown case.

Principles

[42] The evidence was lawfully obtained. There is no suggestion of any unlawful or improper conduct on the part of the police. At best from the point of view of the appellant, the police were less than diligent in their investigations. They obtained an inferior copy of the security film and failed to secure the film in its original format by seizing the hard drive or taking other action to ensure that the relevant images were not overwritten before they were down loaded from the hard drive in digital format.

[43] As the evidence of the security film is not the product of unfair or unlawful conduct on the part of the investigating authorities, there is no occasion for the operation of the public policy discretion. That discretion has its origins

in the judgment of Barwick CJ in *R v Ireland* (1970) 126 CLR 321 and is the discretion in respect of which the judgments in *Bunning v Cross* (1978) 141 CLR 54 are usually cited.

[44] I am concerned with the broader discretion that empowers a Judge to exclude evidence "if the strict rules of admissibility would operate unfairly against the accused": *Driscoll v The Queen* (1977) 137 CLR 517 at 541; *Alexander v The Queen* (1981) 145 CLR 395 at 402; *Rozenes v Beljajev* [1995] 1 VR 533 at 549; *R v Lobban* (2000) 77 SASR 24. The nature of that discretion and its relationship to the discretion commonly referred to as "the *Christie* discretion" are discussed in *Lobban* and it is unnecessary to repeat that discussion. Similarly, it is unnecessary to discuss whether the discretion to exclude real evidence if the strict rules of admissibility would operate unfairly against the accused has been overtaken by the approach adopted by the majority of Judges in *R v Swaffield* (1998) 192 CLR 159 at 194-195 as applying to confessional material. Whatever approach is taken to the discretion, I am of the opinion that the evidence should be admitted.

Facts - Findings

[45] I have not heard evidence from the officers involved in the investigation. I do not know whether they were aware that the copies obtained by Mr Ride would be of a quality inferior to the quality of the original images on the hard drive. Notwithstanding that I have not heard from those officers, however, it appears highly likely that a conscious decision was made not to

remove the hard drive because it would have left the truck stop without any security vision and a cost of approximately $10,000 would have been incurred in order to replace the hard drive. I have no evidence as to whether consideration was given to endeavouring to obtain equipment for the purposes of copying the images from the hard drive in digital format or to removing the hard drive on a temporary basis with a view to arranging for such copying.

[46] Police in Alice Springs became involved in the early hours of 15 July 2001. The images were viewed by a police officer at 9.15pm that day. At 10pm or shortly thereafter copies were made by Mr Ride at the request of the police. Further copies were made on 17 and 18 July 2001. It was early in the investigation, but I assume that the investigating officers realised that the evidence was, potentially, very significant.

[47] The evidence of the security film is reliable in the sense that it reliably depicts a vehicle and driver at the premises in the early hours of 15 July 2001. There is no suggestion that the copying process has adversely affected the reliability of the evidence. Sufficient detail appears in the enhanced images to support a conclusion that the vehicle depicted is very similar to the vehicle being driven by the accused in July 2001. The images are also capable of leading to a conclusion that the person seen entering the shop is of very similar height and general appearance to the height and general appearance of the accused. Unaided by any form of opinion evidence, these limited conclusions could be drawn by a jury.

[48] Views will differ as to whether the conduct of the investigating police officers was reasonable or otherwise. At the least, it was understandable. The relevant evidence was retained, albeit in an inferior format, and there is no suggestion that the investigating officers made anything other than a bona fide decision in determining to obtain copies rather than seize the hard drive.

[49] Finally, as I have said, in my opinion it is extremely unlikely that any useful image of the number plate could have been obtained if the hard drive had been retained. Further, although the image of the person in the shop would have been of an improved quality if the hard drive had been retained, it appears unlikely that the quality would have been improved to a significant degree.

[50] In the light of the evidence and my findings, the best that can be said in support of the appellant's case for the exclusion of the evidence is that a lack of diligence by investigating officers, brought about by concerns for the security of the truck stop business and the expense of the alternative course of action, has resulted in the availability of evidence of a quality inferior to the evidence which was available from the original hard drive. In this way the accused has been deprived of the remote possibility that the evidence in its best form would have pointed or tended to point in the direction of a person and vehicle other than the accused and his vehicle being at the truck stop in the early hours of 15 July 2001.

[51] It is not unusual in a criminal trial for evidence to be lost by reason of the death of a witness or the loss or destruction of documents. It is not uncommon for investigating authorities to conduct investigations that are less than ideal. In such circumstances it does not necessarily follow from the unavailability of the evidence that the trial will be unfair to an accused or that the admission of alternative forms of evidence will be unfair to an accused.

[52] In the circumstances under consideration, even without reference to the proposed opinion evidence, I am satisfied that the admission of the security film into evidence will not be unfair to the accused in the relevant sense. For these reasons I decline to exercise my discretion to exclude it.

[53] The above reasons for admitting the truck stop video are based upon the material before me at the time the objection was taken. As I have said, there was no suggestion that the copying process had adversely affected the reliability of the film in the sense that the film reliably depicted a vehicle and driver.

[54] During the trial before the jury, the accused called Professor Gale Spring, an Associate Professor of Scientific Photography. In brief, Professor Spring gave evidence about the loss of data that occurs in each copying process and of the reinterpretation feature built into computer software programs. In the opinion of Professor Spring, on the assumption of a number of copying processes and enhancements, the images produced are not reliable for

analytical purposes. The enhancement process built into the software may create artefacts which do not exist.

[55] Although the objection to the admissibility of the evidence was not renewed following the evidence of Professor Spring, I gave further consideration to the question of admissibility and discretionary exclusion. Following that further consideration I remained of the view that the evidence was admissible and should not be excluded in the exercise of my discretion. Ultimately the question of the weight to be given to the evidence in view of the opinions of Dr Spring was a matter for the jury.

Non-Expert Opinion Evidence

[56] The four witnesses from whom the Crown sought to lead identification evidence based upon a viewing of an image taken from the security film are Ms Beverly Allan, Mr James Hepi, Mr Brian Johnston and Ms Julie-Anne McPhail.

[57] Ms Allan has lived in Broome since 1997. She met the accused as a customer of her employer. From about October 2000 their relationship became closer.

[58] In August 2001, as a result of a telephone call to Ms Allan's place of employment, Ms Allan went to the home of the accused in Broome and advised him of the call about the Falconio case and that "they were looking for somebody". In her evidence at the preliminary examination Ms Allan said that when she arrived at the accused's home, he brought to her attention

the front page of the West Australian newspaper of 7 August 2001 which contained photographs taken from the security film. The images were of the Toyota on the driveway of the truck stop and of the driver entering the shop before making the purchases.

[59] Ms Allan said that the accused showed her the page containing the images and she and the accused had a discussion. Ms Allan was "pretty convinced" that it was the accused and his vehicle on the front page, "but he sat me down and continued to point out all the differences of the vehicle, which I couldn't tell you exactly, but a few different parts on the tray." The accused told Ms Allan that he was towing a camper trailer so it could not have been him.

[60] In her evidence Ms Allan said that the picture of the person concerned her "because it just looked like him". Asked what made her think that it looked like him, Ms Allan said:

> "Just the way – I just remember the way he walked, the way he sought of held himself, you know, his body posture, yeah."

[61] Mr Hepi met the accused in Broome in about 1998. Subsequently he formed a business association with the accused.

[62] In August 2001 Mr Hepi saw the same newspaper seen by Ms Allan. He said the images on the front page of the newspaper were discussed between him and Mr Murdoch:

> "Q. What was said about it?

A. He said that it couldn't have been his, that photo there is not very good, but in the photograph on the paper you could see things jutting out from the roof of the landcruiser, which were like support racks – looked like support racks. We had them cut off at my place in South Australia before that car left and Brad had said, "Well it can't be my car, it has the roof supports on it".

Q. Did you subsequently see another picture of the truck?

A. Yes, when the vehicle moves on and they're part of fuel bowsers, they're not part of the car at all.

Q. Well, you I assume accepted what Mr Murdoch said it wasn't his vehicle because of those … ?

A. Yes.

Q. … thing. What about the picture of the man?

A. Yes. Brad claimed that was a picture of him, but …

Q. What was your view about it, when you saw it?

A. "Nothing to do with it", he said and I said "Well, that's a picture of you isn't it?" and "yes, I had nothing to do with it".

Q. "Nothing to do with" what?

A. Whatever, the murder."

[63] Mr Hepi was shown the same image of the driver entering the truck stop shop taken from the Queensland enhanced security film. Asked if he recognised the man in the picture, Mr Hepi responded in the affirmative that it was the accused. Asked how he recognised him, Mr Hepi said:

> "By the stance, by the look, the moustache, that's not a very clear photo there at the time. We also had glasses that we would wear or Brad would wear as part of his disguise, round and square glasses, but that's Brad Murdoch going through the doors at that service station."

[64] It is also appropriate to refer to the statement given by Mr Hepi to the police in September 2002. As to his reaction to his photograph in the newspaper, Mr Hepi said:

> "When I looked at the photo in the paper I thought to myself that it could be Brad in the picture. I thought this based on the way that the guy in the picture walked, the stance he held at the counter, the look of him and also Brad being in that area at that time.
>
> I have seen the picture of the landcruiser at the service station and I have no doubt that this is Brad's vehicle. …
>
> Brad never spoke about the service station footage when it first came out. Brad did not tell me it was him at the service station until much later. …
>
> I put it on Brad later on when I asked him if it was him, Brad told me it was him in the service station video but then said he did not kill anybody. …"

[65] Mr Johnston gave evidence that he met the accused in Broome some time in 2000. For the next year he saw the accused on average once a week. They also travelled on journeys together.

[66] In evidence at the preliminary examination Mr Johnston was shown a digital copy of the security film before it was enhanced in Queensland. He said he had previously seen the footage on TV. Mr Johnston gave the following evidence:

"Q. The man with the cap, Mr Johnston, that's shown in that footage, do you recognise him?

A. It looks like Brad.

Q. Is that how he looked around the time when you last saw him in July 2001?

A. Yep.

Q. The way that he carried himself, with a slightly stooped manner?

A. Yep.

Q. Did you ever see him walk like that?

A. I wouldn't say stooped but, yeah, it just depends, yeah."

[67] Asked about the vehicle in the footage, Mr Johnston said "It looks like Brad's yeah".

[68] During cross-examination when it was put to him that it was his evidence that the accused did not walk with a stooped posture, Mr Johnston responded "Well, not that I noticed, yeah." Asked whether it would be fair to say that the accused carried himself in quite an erect manner, Mr Johnston answered "Well, yeah, normal. I don't know about erect, but, yeah."

[69] Mr Johnston gave a statement to police in March 2003. In that statement he said he was in Noosa when he first saw pictures in the newspaper of the man at the service station. The statement reads as follows:

"I thought that it looked like Brad. As soon as I saw the pictures in the paper I thought, fuck that is Brad. I thought this as it looked like Brad with the Pennzoil cap, the glasses, the face, the build, the woollen grey felt top and the way in which he was standing. It was Brad the way he stands and susses things out, it was in the way he holds himself."

[70] Ms McPhail first met the accused during a trip from Perth to Adelaide in June 2001, approximately one month before the events that are the subject of this trial. She and the accused happened to meet during the journey after the accused had overtaken Ms McPhail. They stopped on a couple of occasions and chatted and spent a night at the same stop, each sleeping in their own vehicle. Ms McPhail and the accused went their separate ways at Port Augusta.

[71] Ms McPhail was shown the photograph taken from the Queensland enhanced video. She gave the following evidence:

"Q. What are you able to say about that?

A. That looks very familiar to the person that I met on the side of the road. That looked like Brad to me.

Q. Is there anything particular about it which makes you think that?

A. The same stance, he had slightly rolled forward shoulders and he was – he kind of I – he had like he was nervous or something I suppose because he quite often played with like – had his thumb in his jeans or in his belt like there."

Principles

[72] The principles pursuant to which the admissibility of this type of non-expert opinion evidence is to be determined were discussed by the High Court in *Smith v The Queen* (2001) 206 CLR 650. The accused was presented on a charge of robbery of a bank. Film from the bank's security cameras showed the offender. Two police officers gave evidence identifying the appellant as the offender depicted in the security camera footage. The only basis for their conclusion was knowledge gained of the appellant's physical appearance during previous encounters when compared with features revealed when looking at the photographs from the security film.

[73] In a joint judgment, Gleeson CJ and Gaudron, Gummow and Hayne JJ held that the evidence was inadmissible because it was irrelevant. Significantly, there was no suggestion that the physical appearance of the appellant had changed materially between the time of the offence and the time of trial or that by reason of their previous observations of the appellant the police possessed an advantage in recognising the persons in the security film. In the joint judgment, their Honours observed that the police were "in no better position to make a comparison between the appellant and the person in the photographs than the jurors … ". It was in those circumstances that their Honours held that the assertion by a police officer that he recognised the appellant was "not evidence that could rationally affect the assessment by the jury" of the question in issue. Their Honours continued (655):

> "The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury."

[74] In the joint judgment their Honours recognised that there are cases in which evidence of the type under consideration is relevant and, therefore, admissible (656):

> "[15] In other cases, the evidence of identification will be relevant because it goes to an issue about the presence or absence of some identifying feature other than one apparent from observing the accused on trial and the photograph which is said to depict the accused. Thus, if it is suggested that the appearance of the accused, at trial, differs in some significant way from the accused's appearance at the time of the offence, evidence from someone who knew how the accused looked at the time of the offence, that the picture depicted the accused as he or she appeared at *that* time, would not be irrelevant. Or if it is suggested that there is some distinctive feature revealed by the photographs (as, for example, a manner of walking) which would not be apparent to the jury in court, evidence both of that fact and the witness's conclusion of identity would not be irrelevant." (citations omitted).

Application of principles

[75] In my opinion, the evidence of Ms Allan is admissible. She knew the accused well. Ms Allan does not give positive identification evidence that the image on the security film is an image of the accused. She said "it just looked like him": *Festa v The Queen* (2001) 208 CLR 593. In addition, Ms Allan relied upon her recollection of the way the accused walked and held himself and of his body posture. These are features which, by necessity, cannot be made apparent to the jury. Although the jury will see

additional film of the appellant walking in the context of expert opinion evidence discussed later in these reasons, in my opinion that limited opportunity does not provide an adequate opportunity for the jury to identify the relevant distinctive features about which Ms Allan speaks. There is a vast difference between observing films of the accused walking and moving around in the confines of the custodial environment and the opportunities possessed by Ms Allan to view and recall the appellant's body posture and manner of walking and holding himself.

[76] Similarly, in my opinion the evidence of Mr Hepi is admissible. His evidence is not simply of a comparison between the images. He had a discussion with the accused about the image depicted in the newspaper. In addition, in making a positive identification Mr Hepi relied upon the stance, the look and the moustache. Mr Hepi has had the opportunity and advantage of seeing the moustache which is not available to the jury. In my opinion the evidence of Mr Hepi is admissible.

[77] Mr Johnston also knew the appellant well. He did not give positive evidence of identification. He said that the person in the image "looks like" the accused. In particular, according to Mr Johnston's statement, he relied upon a number of features obvious to the jury, but also the "way in which [the accused] was standing". In the words of the statement:

> "It was Brad the way he stands and susses things out, it was in the way he holds himself."

[78] Mr Johnston possesses a clear advantage not available to the jury. In my opinion his evidence is admissible.

[79] Ms McPhail did not know the accused well. She spoke of the person in the image as "very familiar" to the person she met on the side of the road. She relied upon the slightly rolled forward shoulders and her observations over a short time that the accused had a habit of holding his thumb in his jeans or belt. In my opinion, given Ms McPhail's limited opportunities of observation, her evidence would not be of assistance to the jury and is, therefore, inadmissible.

[80] I have considered whether the evidence should be excluded in the exercise of my discretion. I am satisfied that the evidence of the three witnesses to whom I have referred is probative and that, given appropriate directions, the risk of the jury giving the evidence undue weight is minimal. The jury is perfectly capable of understanding the limitations of this type of evidence.

[81] My rulings and above reasons were prepared on the basis of statements to the police by the witnesses and their evidence at the preliminary examination. Each of the witnesses gave evidence before the jury. Having heard that evidence, I remained of the same view.

Dr Sutisno

[82] Dr Sutisno is a consultant forensic anatomist. She graduated with a Bachelor of Science from the University of Sydney in 1993. In 1994 Dr Sutisno obtained her Honours Degree in Forensic Anatomy. In her

Honours year she was based at the Institute of Forensic Medicine and engaged in work on behalf of the New South Wales Police Department identifying persons from remains or surveillance images. She gained anthropological experience with exhumations, basically looking at the whole human anatomy. In 2003 she obtained a Doctor of Philosophy in Medicine.

[83] Dr Sutisno's area of study was facial identification involving facial reconstruction, recognition and identification. She explained that forensic anatomy is concerned mainly with the identification of persons from their anatomical parts, whether from remains or images, by looking at the whole anatomy.

[84] Since 1993 Dr Sutisno has been extensively involved in the identification of human remains and facial reconstruction of skulls for the purposes of identification. From 1997 or 1998 she has accepted retainers from the New South Wales police in respect of identification of offenders whose images have been captured on security films. She has given evidence in the New South Wales District and Juvenile Courts.

[85] In a report dated 17 May 2005 and evidence given in the absence of the jury, Dr Sutisno explained that facial and body mapping is a process of identification based on the principle that no two individuals are the same in morphology and habits. Morphology is the shape, structure, character and form of the face and body. Morphology analysis is a feature by feature analytical approach to evaluating faces, heads and bodies. The comparison

of images involves subdividing the face, head and body into components to obtain a qualitative analysis and to determine visual similarities or differences. In her report Dr Sutisno states that it is an accepted fact that no two skulls are alike. In effect, no two faces are alike or identical in their entirety.

[86] Dr Sutisno stated that through the use of the feature by feature approach to identification, two faces of similar appearance can be differentiated as being of different individuals. Dr Sutisno's report states:

> "33. Individual uniqueness is the result of hereditary traits, intrauterine development or conditions under which the foetus develops with the uterus, environmental factors and habits. Unlike other bones, the skull of human beings show marked differences (*Edmunds* 1964) such as distinct sexual dimorphism, asymmetry, pathology, racial characteristics and aging.
>
> 34. In "face and body mapping" it is the combination of different elements such as morphology, relative proportions, posture, gait, racial traits, distinguishing features or unique identifiers, and habitual characteristics and enables a complete assessment to individualise a person.
>
> 35. The application of face and body mapping in forensic identification evolved in the late 1980s. Following the proliferation of surveillance video cameras used to deter crime, it has since been widely employed to identifying offenders in the United States, United Kingdom, Japan, Malaysia and Australia … ."

[87] In her report Dr Sutisno identified numerous features examined from different angles as part of the morphological analysis process. In addition, Dr Sutisno applied photograph superimposition which is a process of

overlaying two comparably enlarged images to demonstrate the alignments of matched morphological features or areas of marked differences.

[88] In her evidence, Dr Sutisno stated that facial mapping is a recognised field of scientific expertise which is frequently exercised in the United Kingdom and the United States of America. The methodology is generally accepted in the scientific community. Work in the United Kingdom and the United States is based upon examinations of the skull and face, but Dr Sutisno has incorporated that science into examinations of the entire body as well as the face and skull. The only other person who incorporates the whole body into this science is Professor Hashimoto in Japan with whom Dr Sutisno has communicated.

[89] Although Dr Sutisno has not published any works in connection with body mapping, she has made presentations at various conferences and seminars. She teaches and supervises research students in this area. According to Dr Sutisno, her presentations have been accepted as well founded in the science, at least to some extent. In her extensive teaching of forensic scientists she has experienced reactions that the scientists are amazed they did not think of this process previously.

[90] Given that facial mapping has existed for some years, as to whether body mapping is a new technique or merely an extension of the same techniques to the remainder of the body, Dr Sutisno gave the following answer (**p 119**):

> "Essentially an extension. It's like people have done that – it's been conducted on identifying remains or skeletons and so on but I've just extended it on to being able to conduct that on CCTV images."

[91] The expertise of Dr Sutisno and the scientific basis upon which she works, in respect of both facial and body mapping, were not challenged in cross-examination. No evidence was called to contradict Dr Sutisno.

[92] Despite the fact that this type of evidence has been admitted in the United Kingdom, counsel for the accused submitted that such a field of science should not be recognised in Australia and the evidence should not be admitted. Counsel contended that the evidence of Dr Sutisno is no more than a statement of her opinion and the jury are in as good a position as Dr Sutisno to make a comparison between the features upon which Dr Sutisno relied. Alternatively, De Sutisno's evidence should be limited to the comparison of features and she should not be permitted to express an opinion as to whether the accused is the person in the image extracted from the security film.

[93] Counsel advanced the proposition that the jury have no means of weighting or evaluating the evidence because Dr Sutisno is unable to say how frequently any of the features upon which she relied are expected to be seen in particular sections of the population. In this context counsel relied upon the decision of the Victorian Court of Appeal in *R v Juric* [2002] 4 VR 411 at 426 where the Court said:

> "In a criminal trial where the Crown proposes to lead expert opinion evidence which, if accepted, is of critical importance to the case which it is making, the jury must be able to evaluate the strength of that evidence by reference to its factual or scientific basis. Whether it can properly do so is a matter initially for the judge in determining whether that evidence is admissible."

[94] In her statement, Dr Sutisno identified the levels of identification that she adopts in the following terms:

"**1.Unable to determine:**	Features not visible due to poor quality images for comparison or incorrect perspectives for comparison
2. Not the same person:	No features match
3. Inconclusive:	Incomplete or limited features for comparison with the lack of characterising or recognisable features, distinctive unique identifiers, or habitual characteristics
4. The same person:	Multiple number of features match such As the most noticeable or recognisable features, distinctive unique identifiers, habitual characteristics and/or racial traits"

[95] Dr Sutisno was an impressive witness. She is highly qualified and experienced in her field. She compared and analysed features gleaned from the image captured by the security film with features apparent from images of the accused visible in media footage, photographs of the accused and surveillance video footage recorded at the Berrimah Correctional Facility. Applying both morphological analysis and photographic superimposition, Dr Sutisno concluded that the person depicted in the image taken from the security film was the accused. She was unable to identify any differences of

significance. Dr Sutisno's conclusions in this regard were not challenged in cross-examination and no evidence was called to contradict them.

Principles

[96] The principles are not in doubt. They are discussed in my reasons concerning the admissibility of DNA evidence in *R v Murdoch (No 2)* [2005] NTSC 76.

[97] Counsel have been unable to refer me to any authority in Australia in which the admissibility of evidence of facial or body mapping has been discussed. However, evidence of facial mapping has been accepted in the United Kingdom since at least the early 1990s.

[98] In *R v Stockwell* (1993) 97 Cr App R 260 the appellant had been convicted of armed robbery. An expert working in the field of medicine and life science at the University of Manchester had been permitted to compare facial proportions of the offender displayed in photographs taken by security cameras with those in photographs of the appellant. It appears that the witness used the process of photograph superimposition. The witness expressed the view that he could demonstrate no difference between the facial proportions and gave the following opinion:

> "My conclusion on count 1 is that the photos strongly support the view that the suspect and the robber are the same man."

[99] In respect of a second count, the witness stated:

> "There is limited information, but I think the exhibits reveal that there is support for the view that the robber and the suspect are the same man on count 2, but it is not anything like as strong as the support on count 1."

[100] The Court of Appeal held that the Judge correctly admitted the evidence. In response to a submission that the jury was capable of deciding from their own observations whether the photograph was that of the appellant, and after referring to the well known passage in the judgment of Lawton LJ in *R v Turner* [1975] QB 834, the Court said (263):

> "It is to be noted that Lawton LJ there referred to a jury forming their own conclusions "without help". Where, for example, there is a clear photograph and no suggestion that the subject has changed his appearance, a jury could usually reach a conclusion without help. Where, as here, however, it is admitted that the appellant had grown a beard shortly before his arrest, and it is suggested further that the robber may have been wearing clear spectacles and a wig for disguise, a comparison of photograph and defendant may not be straightforward. In such circumstances we can see no reason why expert evidence, if it can provide the jury with information and assistance they would otherwise lack, should not be given. In each case it must be for the Judge to decide whether the issue is one on which the jury could be assisted by expert evidence, and whether the expert tendered has the expertise to provide such evidence."

[101] As to permitting the witness to express opinions rather than limiting the evidence to a comparison of the facial proportions, the Court referred to the issue whether an expert can give an opinion on what has been called the ultimate issue as a "vexed question". The Court noted that if such a principle exists preventing the opinion being given, it has "long been more honoured in the breach than the observance". The Court concluded (265):

> "The rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be, as the authors of the last work [Tristoam and Hodkinson – expert evidence law and practice] referred to say, a matter of form rather than substance.
>
> In our view an expert is called to give his opinion and he should be allowed to do so. It is, however, important that the Judge should make clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide."

[102] The Court also made observations about the view of the Judge that the evidence of "facial mapping" was "breaking new ground" (264):

> "In fact such evidence was admitted in *Ryan* (unreported – January 18, 1991. It consisted of evidence from Mr Neave and others called before the Appeal Court. Although the evidence does not appear to have been challenged, its reception seems to have been treated as admissible by this Court.
>
> We agree with what the trial Judge said in giving his ruling on this matter. He said:
>
> > "One should not set one's face against fresh developments, provided they have a proper foundation … It is plain from Professor Neave's statement that he does have a good deal of experience in close textured examination of photographs, and it seems to me that a jury would be assisted by hearing the evidence of type which he appears to be in a position to give … in my judgment it would be proper, provided when he comes to the court he lays the foundation of his expertise, to allow this evidence before the jury."

[103] *Stockwell* was applied by the Court of Appeal in *R v Clarke* [1995] 2 Cr App R 425 in the context of facial mapping by video superimposition. The

process of superimposition was identified to by the Court as a "new scientific technique". In the course of the judgment the Court said (429):

> "It is essential that our criminal justice system should take into account modern methods of crime detection. It is no surprise, therefore, that tape recordings, photographs and films are regularly placed before juries. Sometimes that is done without expert evidence, but, of course, if that real evidence is not sufficiently intelligible to the jury without expert evidence, it has always been accepted that it is possible to place before the jury the opinion of an expert in order to assist them in their interpretation of the real evidence. The leading case on that point is *Turner* [1975] QB 834. We would add this. There are no closed categories where such evidence may be placed before a jury. It would be entirely wrong to deny the law of evidence the advantages to be gained from new techniques and new advances in science."

[104] After referring to *Stockwell*, the judgment continued (430):

> "There are, of course, differences between the case of *Stockwell* and the more developed technique used here. But for our part we regard those differences as raising no issue of principle whatever. Indeed, what is involved here is simply an extension of the technique used in *Stockwell*. We are far from saying that such evidence may not be flawed. It is, of course, essential that expert evidence, going to the issues of identity, should be carefully scrutinised. Such evidence could be flawed. It could be flawed just as much as the evidence of a fingerprint expert could be flawed. But it does not seem to us that there is any objection in principle."

[105] The Court in *Clarke* also rejected the submission that the jurors could make the comparison for themselves. They observed that, like *Stockwell*, "the comparison was not an entirely straightforward one."

[106] In *R v Hookway* [1999] Crim LR the Court of Appeal upheld a conviction based solely upon expert evidence of facial mapping. *Stockwell*, *Clarke* and

Hookway were all applied by the Court of Appeal in *Attorney-General's Reference (No 2 of 2002)* [2003] 1 Cr App R 321. The Court said (327):

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

Findings and conclusions

[107] The image of the person entering the shop at the truck shop taken from the security film is far from clear. This is not a case of comparing clear photographs where it could be said with considerable force that the jury could reach its own conclusion without help. In addition, there is evidence that the accused has changed his appearance since July 2001. The comparison between the image from the security film and photographs of the accused is far from straightforward and, in my opinion, the jury would be assisted by the evidence of Dr Sutisno.

[108] Further, in my view, it is not appropriate to limit the assistance to merely identifying the relevant characteristics. When regard is had to the nature and detail of the characteristics and the methodology employed by Dr Sutisno, it is readily apparent that her knowledge and expertise in the area of anatomy give Dr Sutisno a significant advantage in the assessment of the significance of the features of comparison both individually and in their combination. Dr Sutisno possesses scientific knowledge, expertise and experience outside the ordinary knowledge, expertise and experience of the

jury. This is not a case in which the jury, having been informed of the relevant features, would not be assisted by the expert evidence of Dr Sutisno as to her opinion of the significance of the features individually and in their combination.

[109] In my view, applying the language of King CJ in *R v* Bonython (1984) 38 SASR 45, facial mapping "forms part of a body of knowledge or experience which is sufficiently organised or recognised to be acceptable as a reliable body of knowledge or experience". Further, by study and experience, Dr Sutisno posses a sufficient knowledge of the subject matter to render her opinion of value in resolving the issues before the Court.

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

[111] As is apparent, I have reached the view that the evidence is admissible in accordance with the principles enunciated by King CJ in *Bonython*. In addition, if the alternative approach based on reliability as adopted by the United States Court of Appeals, Second Circuit, in *United States v Williams* (1978) 583 F (2d) 1194 is used, I would be satisfied that the evidence is

both admissible and should be admitted. Dr Sutisno impressed me as a careful and reliable witness. The criteria of reliability identified in *United States v Williams* are satisfied.

[112] In addition to the strict question of admissibility, I have considered whether the evidence should be excluded or limited because of the risk that the jury will be overawed or misled into giving the evidence undue weight without appropriate critical evaluation. In my opinion, there is no such risk. The principles underlying the work of Dr Sutisno can be readily understood. In addition, with appropriate assistance from visual materials used by Dr Sutisno in the course of her evidence, it will not be difficult for the jury to understand Dr Sutisno's evidence as to her comparison of individual features which will enable the jury to critically evaluate her opinion.

[113] For these reasons I admitted the evidence of Dr Sutisno.

[114] My decision with respect to the admission of the evidence of Dr Sutisno was based upon both her report and evidence given in the absence of the jury. In evidence before the jury, Dr Sutisno provided greater detail of the work she undertook in arriving at her opinion. In particular, the evidence demonstrated the significance of Dr Sutisno's expertise and experience in assessing the existence and significance of various characteristics both individually and in their combination. Having heard Dr Sutisno give evidence before the jury, I remained of the view that her evidence was admissible and should not be excluded in the exercise of my discretion.

[115] Subsequently the accused called Professor Henneberg who is a particularly experienced scientist in the field of anthropological and comparative anatomy. Professor Henneberg commenced learning how to identify individuals from the analysis of their anatomical features in the 1970s. Since the mid 1980s on many occasions he has undertaken analyses of the images of persons depicted in security CCTV systems or photographs for the purposes of anatomical comparison with suspects.

[116] Professor Henneberg referred to the process as photo comparison. He agreed that although Dr Sutisno spoke of facial and body mapping, she was undertaking the same process which he had been doing for close to 30 years. Asked if Dr Sutisno undertook the process in the same way, Professor Henneberg gave the following answer:

> "She, in her description – I haven't seen her performing analysis – in her description, she uses the same basic principle approach of comparing images, feature by feature, the images from some CCTV footage and images of suspects. To that extent, it's the same procedure".

[117] In my opinion, the evidence of Professor Henneberg confirmed that the evidence of Dr Sutisno is admissible. As to exclusion in the exercise of the discretion, although Professor Henneberg disagreed with the conclusions of Dr Sutisno and expressed the view that comparisons could not safely be undertaken because of the poor quality of the images, in my view the resolution of that issue was a question for the jury. I remained of the view that the evidence should not be excluded in the exercise of my discretion.

[118] In arriving at my view following the evidence of Professor Henneberg, I took into account the decision of Chief Judge Blanch of the District Court of New South Wales in *R v M* (unreported, delivered 14 September 2005). His Honour allowed an appeal against a conviction for aggravated robbery in which the entire prosecution case had depended upon the evidence of Dr Sutisno. It appears that evidence had been given that Dr Sutisno had developed a new progression of a prior field of expertise and, significantly, that Dr Sutisno was not prepared to disclose the protocols upon which she relied. In those circumstances it is not surprising that his Honour reached the view that the evidence was inadmissible. The difficulty facing Chief Judge Blanch does not exist with respect to the evidence under consideration. Dr Sutisno explained in considerable detail the factual basis upon which she relied and the methodology she adopted.
