

THE TRIAL OF BRADLEY JOHN MURDOCH

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When Joanne Lees and her boyfriend, Peter Falconio, set off from Ti Tree for Darwin on Saturday, 14th July 2001, in their orange Kombi Van, they had no idea that their plan to drive around Australia as part of an around-the-world trip was about to come to an abrupt end. A few kilometres north of Barrow Creek, a 4-wheel drive covered utility drove alongside them as they were heading north along the Stuart Highway. A man wearing a black baseball cap and sporting a Mexican style moustache signalled to them to pull over, indicating that there was something wrong with the rear of their vehicle. They stopped, and the utility pulled up behind them. Falconio got out of the driver's seat and had a conversation with the stranger. Lees moved into the driver's seat and was asked to rev the engine. Not long afterwards, Lees heard a report which she thought sounded like the Kombi Van was back-firing. A short time later, the man came to the driver's side of the Van to where Lees had moved and threatened her with a pistol. He tied up her arms behind her back with manacles made of tape and cable ties and marched her into his vehicle. A large dog sitting in the front was left to guard her whilst he disappeared. She could hear noise like scraping gravel. Somehow, she found herself in the rear of the vehicle. Whilst he was away, she managed to escape and hide in the bushes nearby. After attempting to find her unsuccessfully, she heard a car door slam and a vehicle driving off to the south. A little while later, she heard the man moving about in the bushes again. Then the man got into a vehicle and headed off south again. She stayed hidden in the bushes for several hours until she managed to pull her arms through her legs so that they were in front of her. She tried unsuccessfully to remove the manacles. Eventually, she made her way back to the road and stopped a road train. The driver, thinking he may have run over Lees, got out to inspect his vehicle. Lees then came running up for help. The driver removed the manacles and after unsuccessfully searching for Falconio and the Kombi Van, took her back to Barrow Creek, where the police were contacted. Peter Falconio was never seen again.

At first, the police had no idea who was responsible for the attack on Miss Lees, and in the absence of a body, uncertain of what had happened to Falconio. Extensive enquiries failed to locate him, despite some witnesses in Bourke, New South Wales, claiming that he had called into their service station to refuel a vehicle about a week after his disappearance.

Nevertheless, police were convinced that Falconio had been murdered. Blood had been found on the road, which when tested, matched the DNA of Falconio. Blood had been found on the rear of Lees' T shirt, which produced a DNA result for an un-known individual. No bullet was found, despite extensive searches. There was little else at the crime scene, other than some DNA found in the vehicle which was too weak to be tested, to prove either that Falconio was dead, and if so, who was responsible.

When police first became involved, road blocks were set up to search for a vehicle of the type described by Lees, or for the VW Kombi Van, which at that stage had not been located. These produced no results. Police also attended a Shell Truck Stop in Alice Springs, looking for video footage of a person of similar description of the attacker as given by Lees, and of the covered 4 wheel drive vehicle he was driving. It was not long before police found footage of a man and a vehicle which fitted with both descriptions, but their enquiries as to who this person was, drew a blank. The footage was grainy and of poor quality. It did not show the vehicle's registration number. Importantly, it showed that the vehicle was not towing a trailer, a matter which became of some importance at the later trial. In the meantime, an artist was employed to make a sketch of the perpetrator, and of the vehicle, based on Miss Lees' descriptions. In addition, police made a comfit picture of the assailant with Lees' assistance.

In early August 2001, police released a photo taken from the Shell Truck Stop video depicting the vehicle and the person of interest to the police which was published in *The Western Australian* newspaper. Later, parts of the video were broadcast on television. This produced no further leads of significance at the time.

At the end of 2001, Miss Lees returned home to England. Enquiries continued with nothing to show who the perpetrator might have been, until later in May 2002 when information came from the Western Australian police, that a man called James Hepi claimed that an associate of his had admitted to him that he had murdered Falconio. Hepi was not interviewed by NT police until 10 September 2002. In the meantime, on 28 August 2002, Murdoch had been arrested by South Australian police in connection with charges of rape and abduction of a woman and her daughter on a block of land at Sedan in South Australia. In October 2002, Miss Lees, whilst on holidays in Sicily, was informed by a friend that there was an article about her published on the BBC's website. When she went on-line to read the article, she saw a photo of Murdoch which had been published as a suspect for the murder. She recognized Murdock as her attacker immediately. In late 2002 when Lees had returned to England, she

was shown a photoboard and immediately selected the photo of Murdoch. This photo showed Murdoch wearing a full beard and short hair, whereas the photo on the BBC website was taken at an angle and showed him clean shaven with very short hair.

After Murdoch's trial in South Australia, at which he was acquitted, Murdoch was extradited to Darwin to face trial for the murder of Falconio and the abduction of Lees. It was not until he arrived in the NT that a sample of his DNA was able to be obtained. It matched that sample on the back of Lee's T shirt.

At the trial before Martin CJ, the prosecution team was Rex Wild QC, with Tony Elliott and Anne Barnett. The accused was represented by Grant Algie and Mark Twiggs from the Adelaide bar. Algie had represented Murdoch successfully on the rape and abduction charges.

The main issues at the trial were: can the Crown prove that Falconio is dead? If so, can the Crown also prove that he was murdered by Murdoch?

The trial commenced in Darwin on 25 October 2005 and lasted until 13th December. The Crown called 81 witnesses. The accused gave evidence denying any involvement in what took place. He asserted that at the time of the attack on Miss Lees, he was well on his way along the Tanami Track. The accused also called 5 other witnesses. Both sides called expert evidence. The accused was found guilty and sentenced to life for murder, 4 years for deprivation of liberty and 2 years for aggravated assault. A non-parole period of 28 years was imposed.

The case almost entirely relied upon circumstantial evidence.

The trial had a number of complications which counsel had to deal with:

- There was no body found. Therefore, how could the Crown prove that he had been killed?
- Even if the Crown could prove that Falconio was missing, and almost certainly no longer alive, how did he die?
- No murder weapon was found.
- The Crown theory was that Falconio had been shot in the head by a .22 pistol but no bullet, spent cartridge, brain matter or powder from the propellant was found at the scene or on the back of the VW Kombi Van.
- There was no eye-witness who saw what happened to Falconio after he went to the rear of the Van, and Miss Lees had not seen his body.

- Could the jury be satisfied that he had been killed at the scene in the light of the evidence of witnesses from the Burke Roadhouse who claimed that he had filled his vehicle there a week later?
- Was Lees' identification evidence admissible, or should it be excluded in the exercise of the Court's discretion given that Miss Lees had seen the photo on the BBC website?
- Even if the Court admitted Lees' evidence, would the jury accept her identification of him in all the circumstances given that Murdoch was a total stranger to her and the abduction had taken place at night-time?
- Hepi was an unreliable witness who had a motive to lie because he claimed that he and Murdoch had been involved in the transportation of cannabis from Sedan to Broome, the preferred route being via the Tanami Track.
- If Murdoch was involved in transporting cannabis from Sedan to Broome, why would he not take the turn-off to the Tanami Track rather than travel almost 300 kilometres north past Barrow Creek before turning west?
- Was the person and the vehicle shown in the Truck Stop video that of the accused and his vehicle?
- Given that the Crown could prove that Murdoch arrived in Broome at about 4 am on the following morning, was it possible that he could have travelled from Barrow Creek back to Alice Springs and then across the Tanami Track and arrived in Broome in that time, given the distances he would have had to travel, and the conditions of the unsealed road for much of the way?
- When the police obtained access to his vehicle, it had a canopy closed in with mesh for security purposes. If that canopy had been on the vehicle at the time, Lees could not have escaped from it by sliding out the back of the vehicle as she asserted. Could the Crown prove that the closed in section of the canopy had been added after the murder?
- There were also differences in the bull-bar on the vehicle than that shown in the Truck Stop video. Could these differences be explained?

There were other issues of importance, such as issues going to the reliability of the DNA evidence, issues relevant to the Crown case that Murdoch shot Falconio with his silver pistol, as well as several others. It would take a lot longer than the time allotted to me to discuss, even briefly, the details of these issues, so but I am going to concentrate for the

purposes of this paper, on an issue about facial and body mapping which assumed significance in the trial as going to the identification of Murdoch as the person seen in the Truck Stop video. For those interested in reading about how the Crown overcame these problems, I suggest you read my book, *R v Murdoch, The Falconio Case*, which is available on line as well as in paperback from Lexis Nexis.

The way the trial was fought, if the Crown could not prove that Murdoch was the person shown in the Truck Stop video, this, at the very least, would weaken the Crown case that Murdoch was the killer. The Crown relied upon a number of witnesses who knew Murdoch, and who had seen the Truck Stop video, who, from the footage, were able to say there were similarities with him in various ways based on their intimate knowledge of him. To shore this up, the Crown called Dr. Meiya Sutisno, as an expert witness in facial and body mapping. Her evidence was that the person in the video was the accused.

Subsequent to his conviction, Murdoch appealed. The appeal was heard by Angel ACJ, Riley J and Olsson AJ, reported at (2007) 167 A Crim R 329. One of the grounds of the appeal challenged the trial judge's decision to admit the evidence of Dr. Sutsino, reported at (2005) 195 FLR 421 at [82]-[118].

Dr. Sutsino graduated in 1993 with a BSc with Honours in Forensic Anatomy, which involved identification of individuals from their anatomical parts. She completed her PhD in facial reconstruction, recognition and identification. She had lectured and worked in this area identifying people from their remains or from surveillance images.

She explained that facial and body mapping is a process of identification based on the principal that no two individuals are the same in morphology and habits. Morphology is the shape, structure, character and form of the face and body. Analysis involves a feature by feature analytical process of 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.

The first step taken was to send the video footage to Dr. Sutsino to see if the footage was clear enough to be useful for comparison purposes. Once this was accepted, a number of other photos of the accused were sent which included media footage, photographs of the accused and surveillance footage recorded at Berrimah prison whilst Murdoch was on remand. These images were used for comparative purposes. A control mechanism was used to evaluate the degree of clarity and the level of distortion from the security video by

conducting the same comparative process with two other people who had also been present on the night and shown in the truck stop video. The results of the morphological analysis were reduced to tabular form and were available for comparison with the source material. At the trial she produced 18 photo-boards bearing some images from the truck stop video and some images filmed from other sources. These were produced using computer programmes and specific technology developed for this purpose. She explained what she saw as similarities and differences between them. She also conducted demonstrations of the process of superimposition which she said was a visual display of the results found on the analysis. This involved overlaying two comparably enlarged images to demonstrate the alignment of matched morphological features or areas of difference. The opinion so expressed did not rely only on facial mapping, but on a combination of body mapping and facial mapping. She said that in her opinion the person in the truck stop video was Murdoch. The Court of Criminal Appeal said that to this extent, this was not a bare ipse dixit; the jury was able to make a critical evaluation of the opinion expressed by Dr. Sutisno. The jury was able to see the material and to follow the reasoning processes.

There was no challenge in the *voir dire* as to the existence of a body of expertise in these areas. On appeal, the evidence was challenged on the basis that there was no evidence that body mapping, face and body mapping or posture comparison were recognised fields of specialized knowledge; nor was it established that Dr. Sutisno was an expert in any identified aspects of a field of specialized knowledge relevant to her evidence.

The Court accepted that facial mapping is an accepted body of scientific knowledge, and having reviewed the English and Australian authorities on the subject, apparently concluded that if she could have identified similarities which were not readily apparent to the jury from their observations of the accused in court, she could express an opinion that the accused was the person in the truck stop video based on facial mapping alone, because the photos upon which her opinion was based were made available to the jury, following the decision of the Court of Appeal in *R v Gardiner* [2004] EWCA Crim 1639. I say *apparently* concluded, because it is not entirely clear on reading the judgment whether the Court went so far as to hold that she could have expressed that opinion if it had been based on facial mapping alone, because that question did not arise. That was because Dr. Sutisno had not based her opinion of facial mapping, but on a combination of facial and body mapping.

In relation to facial and body mapping, and to body mapping per se, the Court found that there was no evidence that this was an area of expert scientific knowledge which was accepted by the scientific community. However, the Court also held that it would have been open to the witness to draw attention to similarities and differences relating to the body and movements of the person shown in the truck stop video, but not admissible to positively identify the accused.

Notwithstanding that this ground of appeal was upheld, the Court applied the proviso and dismissed the appeal, finding that the identification evidence overall, particularly the evidence relating to the accused's blood on the back of Miss Lees' T shirt was compelling. On the application for special leave to appeal to the High Court, leave was refused, the Court observing that it could see no error in the reasoning of the Court of Criminal Appeal, and that the proposed grounds had insufficient prospects of success to warrant the granting of leave.

To complete the picture of what happened at the trial, I should mention that the defence called Professor Henneberg, an expert in facial recognition, who expressed the opinion that the photo images from the truck stop video were inadequate to make any assessment of the anatomical detail that Dr. Sutisno had described in her report.

Dr. Sutisno and Professor Henneberg have given evidence in other cases about similarities between suspects and a person captured on CCTV images. In *Honeysett v R* (2014) 253 CLR 122 the High Court heard an appeal from the Court of Criminal Appeal of New South Wales following a conviction where identity was in issue at which both experts had given evidence. Professor Henneberg, who held the Wood Jones Chair of Anthropological and Comparative Anatomy at Adelaide University and was head of the Department of Anatomical Science there, gave evidence of similarities based on CCTV footage between images of an armed robber holding up a hotel and images of the suspect whilst in a holding cell. The CCTV footage showed the offender wearing a covering of white material, which shrouded the head and face apart from a slip showing the eyes, dark clothing covering the rest of the body, and gloves. There was a small area of skin visible between the gloves and the end of the cuff of the sleeve. Henneberg made a physical comparison between the offender and the suspect and concluded that there was a high degree of anatomical similarity between them, and that there were no discernible dissimilarities. The evidence was objected to but admitted at the trial. Dr. Sutisno was

called by the defence to rebut this evidence. On appeal, the Crown conceded that it would have been open to the jury to make the same comparisons as Henneberg had made. The High Court unanimously allowed the appeal, observing that Henneberg's opinion was not based wholly or substantially on his expertise as an anatomist, and his evidence gave the unwarranted appearance of science to the prosecution case that the appellant and the offender was the same person. The High Court quoted with approval the decisions of *Tang* and *Morgan* which dealt with the admissibility of expert evidence based on facial and body mapping.

In *R v Tang* [2006] NSWCCA 167; (2006) 65 NSWLR 681 the Court of Criminal Appeal also rejected evidence based on body mapping but held that evidence of similarities of facial features given by Dr. Sutisno were admissible. In *R v Morgan* [2011] NSWCCA 257; (2011) 215 A Crim R 33, the Court held that Professor Henneberg's evidence that there was a high level of anatomical similarity between the accused and CCTV footage of the perpetrator was wrongly admitted because the Court could not see how he was able to do that, when the suspect's body was entirely covered with clothing and was wearing a balaclava. This was never satisfactorily explained, and therefore did not meet the test of admissibility because it was not based on his knowledge of anatomy.

The other point which needs to be made is that the principles which apply to the admissibility of opinion evidence discussed in these cases is not limited to facial mapping or body mapping but are generally applicable to expert evidence generally. In the recent case of *Meade v The Queen*, [2015] VSCA 171, the Victorian Court of Appeal dealt with evidence given by an expert witness as to whether the boots which were being worn by the suspect as shown in the CCTV footage were of a particular brand which the Crown was able to prove were in the possession of the accused. The witness, a Mr. Cloros, was the marketing manager of the Redback Boot Company Pty Ltd, a position he had occupied since 1990. He had been employed in the Australian footwear industry since 1979. First, Mr Cloros was called to identify footprints left at the crime scene as having come from a Redback boot. Secondly, he was asked to give an opinion on whether the boots worn by the accused shown in CCTV footage were also Redback boots. No objection was taken to his opinion in relation to the footprints, but objection was taken to his evidence relating to the CCTV footage. His opinion given at the trial was that there were 9 points of similarity between the boot in the footage and a Redback boot, and that one point of similarity was unique to Redback boots. His opinion was that the boots

shown in the footage were consistent with being Redback boots, subject to two qualifications which related to the quality of the footage and the fact that the boots appeared to be well-worn. During the voir dire, he had been asked about whether the boots in the footage could have been a number of other brands of which he was shown photographs. His evidence was to the effect that the boots were not those shown to him by defence counsel, but they could have been a different boot made by the same manufacturer for reasons which he outlined. The Court of Appeal, after reviewing *Tang, Murdoch, Honeysett and Morgan*, held that the evidence was admissible because the witness did not stray beyond his field of expertise, and that without his expert assistance, the jury would not have been able to decide the issue for themselves.

Although *Murdoch* was decided before the *Evidence (National Uniform Legislation) Act* came into force in the Northern Territory, it is submitted that the principles of admissibility of expert evidence are no different under the Act than is the case at common law. Nevertheless, when considering the admissibility of expert evidence, it is important to begin with s.79 (1) of the Act, which has two limbs:

- The person claiming to be an expert must have specialised knowledge based on the person's training, study or experience; and
- The opinion of the expert must be based either wholly or substantially on that knowledge.

What *Murdoch* also demonstrates is that whilst experts must not stray out of their field of expertise, they may become so called *ad hoc* experts in certain circumstances. Thus, although there is no recognized field of expertise so far as body mapping, or facial and body mapping, is concerned, enabling an expert to give an opinion on whether or not Murdoch was the suspect shown in the video footage, she did have sufficient knowledge and expertise, based on her detailed study of the video and other footage and photographs and her general training and skill, to be qualified as an *ad hoc* expert, which enabled her to identify similarities that would not be readily apparent to a jury from their observations of the accused in court. Thus, she could give evidence of the points of similarity, and for that matter, the absence of any points of dissimilarity, but could not express an opinion that the suspect was in fact the accused, and this, it is submitted, is notwithstanding the abolition of the rule precluding an opinion going to the ultimate issue has been abolished by s.80 of the Act.

As *Murdoch* and other cases emphasize, what must be remembered is what the evidence is seeking to prove. It may have been, for example, permissible for Dr. Sutisno to have given evidence that the person in the video was *not* Murdoch, if there had been some anatomical basis for that conclusion, such as the absence of some identifying feature not apparent from observing the accused at the trial.

Facial recognition technology now seems to have become relatively common place. We all know how it is used whenever we go through immigration at the international airports in Australia. It is hardly surprising that it has been accepted as a field of expertise about which a suitably qualified expert can be called to give evidence. So far, the technology and expertise for body mapping seems to be still a long way off.