

CITATION: *Police v Whelan* [2002] NTMC 037

PARTIES: PETER WILLIAM HALES

v

JOHN WILLIAM WHELAN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20209334

DELIVERED ON: 20 September 2002

DELIVERED AT: Darwin

HEARING DATE(s): 17 September 2002

DECISION OF: Jenny Blokland SM

CATCHWORDS:

EVIDENCE – Admissibility of photo board identification – no court room identification directions on particular weaknesses of identification, whether more prejudicial than probative.

Alexander v R (1981) 145 CLR 395;

R v Barbaro (1993) 32 NSWLR 619;

Festa v The Queen [2001] 76 ALJR 291;.

Marks v The Queen (1998) 72 ALJR

Domican v The Queen (1992) 106 ALR 203

CRIMINAL LAW - Gross indecency in public – ss 133 and 126 *Criminal Code* – allegation that offence occurred in a car. – *AGV Huber* (1971) 2 SASR 142; *Indecency with children Act* (1960) (UK); *Colin Leslie Francis* (1989) 88 Cr App R 127; *McKenzie v Stratton* [1971] VR 848; *Mansfield v Kelly* 1972 VR 744

REPRESENTATION:

Counsel:

Informant: T Berkley

Defendant: V Lee

Solicitors:

Informant: DPP

Defendant: Withnall Maley

Judgment category classification: B
Judgment ID number: [2002] NTMC 037
Number of paragraphs: 26

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20209334

BETWEEN:

PETER WILLAIM HALES
Informant

AND:

JOHN WILLIAM WHELAN
Defendant

REASONS FOR DECISION

(Delivered 20 September 2002)

Jenny Blokland SM:

Introduction

1. The defendant, Mr Whelan is charged on information with committing an act of gross indecency in public contrary to *s 133 Criminal Code* that reads:

“133. Gross indecency in public

Any person who in public and in a public place knowingly commits any act of gross indecency is guilty of a crime and is liable to imprisonment for 2 years.

Relevant also is part of *s 126 Criminal Code* that reads:

“126. Definitions

In this Division –

"in private" means with only one other person present and not within the view of a person not a party to the act and "in public" means with more than one other person present or within the view of a person not a party to the act.”

2. The defendant has pleaded not guilty to the charge. The basis of the allegation against him is that on 29 May 2002 the principal prosecution witness, Tara Anne Maxted, 17 years of age, was waiting at the bus stop on Calytrix Road to catch a bus to Casuarina Secondary College where she attends as a year 12 student. It is alleged that the defendant approached Ms Maxted in a motor vehicle and offered her a lift to school. For various reasons described later, Ms Maxted accepted the lift and got into the passenger seat of the car. During the course of the drive, which lasted about five minutes, it is alleged the defendant spoke in a sexually suggestive way to Ms Maxted and then commenced to masturbate in front of her while he was driving the car. She told him to stop the car. He stopped the car and she got out of the car. She briefly observed him as he continued to masturbate when she was standing on the pavement about 800 metres from Casuarina Secondary College. The two primary issues that have emerged are the admissibility of a *photo identification* of the defendant and *circumstantial evidence* concerning the *description of the car* allegedly used in the commission of the offence.

The course of the evidence

Tara Anne Maxted

3. Ms Maxted was 17 years of age both at the time of the offence and when giving evidence before the Court. On Wednesday 29 May this year Ms Maxted was on her way to Casuarina Secondary College. She explained in cross examination that she starts school late each Wednesday because that is the way her classes are scheduled. She thought she had missed the bus she usually catches on Wednesdays, so she walked to another bus stop on Calytrix Road, hoping to catch the bus. Ms Maxted gave evidence that at about 10.30am, after waiting at the bus stop for some time, a man pulled up in his car and offered her a lift. In examination in chief she described the car as a Maroon Commodore with a rear spoiler and black and silver pin striping on the outside. In cross examination, when asked about further detail of the

description she added that the car was not like a four wheel drive and was lower to the ground. Further, it had wind down windows and black fluffy seat covers. She said it might have been a '95 model. In cross-examination she added that she thought it was an automatic with manual door locking.

4. The driver spoke to her from the driver's seat through the passenger side window that was down. She described him as having grey hair, either combed back or pulled back, about 45 years old, grey stubble on his face so that he *looked like he needed a shave*, grey polo neck shirt (collared), blue shorts and a beer gut. In cross-examination she said she couldn't tell if his hair was combed back. According to her his build was *wide and he had a big stomach* that she said *looked like he'd drink beer*. In cross-examination she said it didn't look like he had under wear on. She also said in cross-examination that at the early stage, neither his appearance nor his manner frightened her.

5. Ms Maxted gave evidence that a conversation occurred something like the following:

H/S "Did you miss your bus to school?" He asked her where she attended school and she told him "Casuarina". He offered her a lift and told her he had a daughter attending school there. She accepted the lift she says because she'd been sitting at the bus stop for 15 minutes and really needed to get to school. In cross-examination she explained that she needed to sit a biology test at 11.20 am; that she had missed the test the day before and therefore wanted to get to school. She got into the front seat on the passenger's side. When she got into the car she said, "my name is Tara". H/S "My name is Philip". Then he started to drive.

6. The car proceeded down Calytrix Road and turned into Mueller Road when the driver started to comment upon her appearance and other personal matters. H/S "Do you have a boyfriend?" and she replied "yes, I do have a boyfriend". H/S "how old are you?" and she answered, "17". H/S "You're

legal then.” In evidence Ms Maxted told the Court that at this point she felt *uncomfortable* and that *it kind of freaked me out*. She told the Court he commented on what she was wearing by saying things like “very nice little shorts” and that he said she had *nice legs*. He also told her that her boyfriend was *a very lucky boy*. Ms Maxstead told the Court that she answered his questions. He twice said to her words to the effect that she “seemed like a broadminded girl”. She agreed with defence counsel that at around this point she began to feel *a bit creeped*. After Mueller Road he turned left into Vanderlin Drive and Ms Maxstead said the comments continued. She said that she was a bit uncomfortable; she didn’t look at him and looked out of the window. In cross examination she said he asked her if she was offended and she told the Court she was starting to feel a little uneasy about his comments. In relation to his comments about her appearance, she told the Court that she responded to him by saying words like “You’re only complementing me.” She noticed as she was starting to feel uneasy that he was scratching his genitals on his right hand side while his left hand was on the steering wheel. She then observed him masturbating and he told her he was *about to come*. She said “you can stop the car now”, to which he replied, “can you wait until I come?” and he continued to drive. He drove past the traffic lights at Hibiscus Shopping Centre and he stopped the car. According to Ms Maxstead, he was still *pulling his penis in his hand*. When they had gone past the traffic lights he stopped the car and said, “can you wait until I come?” At about this point, Ms Maxstead said his hand came over to her side of the car and his arm was around the head- rest. Ms Maxstead said she grabbed her bag, opened the car door and got out. She said she felt sick and disgusted as she’d seen his penis on his hand. His penis was erect. After she got out of the car and shut the door he still had his hand on his penis, *still pulling back and forth*. She says that when she got out of the car she was standing approximately 800 metres from the Casuarina Secondary College. She said she did not consent to this behaviour on the part of man who gave her the lift. She said he drove off, straight

through the roundabout. She said she hadn't seen this man before the events of 29 May 2002. She was asked if she could see him in Court and told the Court, that she could not see him. My recollection of the composition of the people in the Court on the day Ms Maxstead gave this evidence was that the only male persons present in the Court were Mr Berkley, (counsel for the prosecution), a male Police Officer or Auxiliary in police uniform and the defendant.

7. Ms Maxstead said in cross-examination that she told two of her school friends about the incident when she arrived at school. Those students were not called. She also told her mother about it and her mother reported the matter to police. Ms Maxstead did not want to report the matter to police as she was embarrassed about the fact that she had been taught at school never to get into a car with a stranger, but she took the risk on this occasion. It was Ms Maxstead's mother, Carolyn Maxstead who reported the matter to police. Never the less, police did attend briefly to Ms Maxstead on the day and told her to write everything down about the incident that she could remember. Ms Maxstead made a formal statement to police on the second of June. She could not attend earlier than that date through a mixture of her own part time work commitments and those of her mothers. Her mother needed to accompany her to the police- station, as Ms Maxstead is a juvenile. She also gave evidence that she was shown a photo board by police contained in two sheets of paper and was asked to identify the man she got into the car with. On 18 June at 4.34 pm (see exhibit P2), she identified photo number six on exhibit 1. Through the course of the evidence, it becomes clear that the person in phot number six is the defendant, Mr Whelan. Curiously, Ms Maxstead referred to a two- page document when clearly, that document is only one page. That the photo board is in fact only one page is confirmed by evidence of police investigators.
8. The photo identification was not made for two and a half weeks after the alleged offence. In the mean time, Ms Maxstead said she had been advised

by police to look for a car in the same general area that fitted the same description as the one she had been given the lift in. It appears police wanted her to participate in this part of the investigation, as they believed it would help them narrow their inquiry. She subsequently told police and gave evidence before the Court that she saw the same Commodore in a driveway at 58 Mueller Road. She told the Court she noted the number-plate and gave it to police as she was *about 98% certain* it was the car. It was not until after the identification of the car that she was shown the photo-board and picked photo number six, the defendant. She was clear she had not seen this person before the incident on 29 May 2002 and had not been to the premises of 58 Mueller Road before that date. In evidence she told the Court that her ease of recognition was due to recognising the eyes of the suspect. She said the person in photo number six was the only person she recognized out of the photos and although the stubble was not as defined in the photo, she could identify him because of his eyes. (It perhaps needs to be flagged at this point that the person in photo number six had a very definite moustache rather than stubble).

9. Although this was primarily an identification case, it was suggested to Ms Maxstead that she had been to the premises at 58 Mueller Road previously, or that she, her friends or her boyfriend had been in that house. Ms Maxstead spontaneously answered in cross-examination that she wasn't aware that 58 Mueller Road was the offender's place when she identified the car. She had merely retraced the journey and noted relevant names, times and distances. She does say that a police officer, (and it was not established which one), gave her the addresses of new Commodores in the Leanyer / Malak area so that she could talk to police about what model the car was. She told the Court that these were only white and green cars and the car at 58 Mueller Road was not one of the cars she had been advised to look at. In response to this part of the cross examination she said police had told her

that they had done a search of registered owners of Commodores and no-one named Phillip had come up.

Constable Jamie Cairncross

10. The investigation of the complaint was allocated to Constable Jamie Cairncross on 29 May 2002. He confirmed he was not able to take a statement from Ms Maxstead until the second of June due to her mother's work commitments. I will summarise his evidence by way of a brief chronology of those parts of the investigation that were revealed in the proceedings:
 - 29 May 2002 – PROMIS job allocated. The description of the vehicle given at this time by Ms Maxstead was of a Maroon Commodore with a rear spoiler, mag wheels, charcoal coloured seats, automatic transmission and silver pin stripes up the side.
 - It was acknowledged that Ms Maxstead was unable to give a model type. He said he obtained a list of Commodore Sedans from the MVR in Darwin but did not pass this information onto Ms Maxstead.
 - 2 June 2002 – statement taken from Ms Maxstead.
 - 14 June 2002 – further conversation with Ms Maxstead. She advised of the presence of a motor vehicle at an address – it was noted the description was consistent with the original description given by Ms Maxstead on 29 May 2002. She gave the registration number. Constable Cairncross did a search and found the registered owner. As a consequence of that search, he attended 58 Mueller Road and ascertained by speaking to Mrs Whelan that the registered owner was interstate and was due to return the next day.
 - 15 June 2002 – Constable Cairncross again attended at 58 Mueller Road and spoke to Mr Whelan. Mr Whelan was asked if he would participate in

a formal record of conversation. At first he agreed but then declined as he was feeling tired. He asked Mr Whelan if he would consent to a photo being taken of himself. He declined to consent. Constable Cairncross advised him that in any event he had approval to take the photograph, (Exhibit P3), approval dated 15 June 2002. When he was queried in cross examination about why he asked for consent when he already had permission, Constable Cairncross stated that in his experience it was better to ask suspects to participate. A photograph was taken of Mr Whelan and an arrangement was made to meet him at Peter McCauley Centre on 16 June 2002. Mr Whelan attended the Peter McCauley Centre voluntarily. After receiving the information about the car, Mr Whelan was considered a prime suspect. In cross examination Constable Cairncross was asked why he took the photo on this date. Constable Cairncross said he believed Mr Whelan may change his appearance as he flew to Queensland two days after the offence. In answer to defence counsel he said he was told Mr Whelan was on holidays and nothing had been said of an ill relative.

- 16 June 2002 – at about 3.00pm Mr Whelan attended Peter McCauley Centre with his lawyer. He participated in a record of conversation from 3.18 pm – 4.39 pm in which no admissions were made. He was asked if he would participate in an identification parade and he informed police he would not until he sought further legal advice.
- 17 June 2002 – application made for a search warrant that was issued to enable the Maroon Commodore to be seized for forensic examination. The vehicle was seized for forensic testing but no forensic evidence was found. Emailed Senior Constable Warden of the police forensic unit a photo of the defendant that had been taken on 15 June 2002. Senior Constable Warden was requested to generate a photo board. This photo was generated as photo six on the eventual photo board.

- 18 June 2002 – Constable Cairncross received further information about the photo board and as a result of that information attended 58 Mueller Road and arrested Mr Whelan shortly before 8.00pm. He waited for Mr Whelan to have his dinner at home and then commenced a formal Record of Conversation with him at 8.45- 9.37 pm. No admissions were made. Office work was completed for a Senior Officer to charge him.

Senior Constable Warden

11. Part of Senior Constable Warden's training qualifies her in the construction of photo boards. She explained the procedure she follows. In this case she was forwarded a photo of the defendant (at that time a suspect) and proceeded to construct a photo board using a collection from folders. She constructed the photo board from persons who had some similarities with the defendant. She placed the defendant's photo at number six. My using the computer templates, she added earrings to all of the other photos and moustaches. There are five variants of moustaches in the template, thus all photos on the board have moustaches. Nothing was added or changed to photo number six, nor can it be. Photo number six therefore has a real moustache.

Wendy Lee Clayton

12. This witness works with Mr Whelan at Francis Bay Truck Rentals. Mr Whelan's time book was tendered through her. She told the Court that Mr Whelan fills in his own time book and that she checks it. There is a practice at Francis Bay Truck Rentals that staff such as Mr Whelan sign on at 8.00am, although they start at 7.45 am. They then add 15 minutes at the end of the day. Mr Whelan's time book (Ex P6) reveals that on the date of the alleged offence he signed on at 8.00am, (therefore commenced work at 7.45am) and signed off at 10.15 am, (therefore finished work at 10.00 am). It would appear the point of this evidence is to indicate that he was not at this work place at the time of the offence. Ms Clayton said she had checked

the time book entry on that day as Wednesday is the day she processes the time books for pay. On 30 May 2002 (the day after the offence), she gave evidence that she had a conversation with Mr Whelan. She said she knew he was to go on holidays on June the first. She told the Court she said to him that he *hadn't had a shave, that he was growing a salt a pepper beard as well as a moustache*. She said his moustache wasn't as thick as it usually is. It was *droopy*.

Samuel Vowles

13. Samuel Vowles was Tara Maxstead's girlfriend at the time of the offence. He told the Court he didn't know John Whelan and had never been to his premises save for Tara telling him some things about the incident and she pointed out the car to him when they were driving in the area. He said he saw the man in his driveway closing the gates as he was driving. At the most he may have slowed down but he denied ever going to the house or meeting Mr Whelan.

Carolyn Anne Maxstead

14. Carolyn Maxstead is Tara's mother. During the hearing of this matter I indicated to counsel for the prosecution that I did not consider Carolyn Maxstead's proposed evidence to be that of first or recent complaint given that it had come out in the proceedings that Tara had spoken to friends at school about the incident just after it occurred. The evidence was not however objected to and I initially thought it might be led as evidence of distress. Carolyn Maxstead confirmed that Tara told her about the incident on the 29 May and that she insisted on the matter being reported to police. She confirmed that through work commitments she could not attend the police station on the day. She gave evidence of Tara being upset, distressed and embarrassed. It appears to me that this is not evidence of distress in the corroborative sense as Tara was clearly experiencing a diverse range of emotions, some attributable to the offence but attributable to her

embarrassment at breaking the rules she has been taught to obey, namely, not getting into cars with strangers.

15. The defendant did not call any evidence. Counsel for the prosecution submitted there was no defence case. I reject that submission. Mr Whelan is entitled to put the Crown to proof and has clearly raised the issue of identification. That is the defence case and the question is whether that matter has been proven beyond reasonable doubt. Although there were some side issues raised in cross examination that pointed to an issue of consent and an issue of whether Ms Maxstead and her friends had been to the accused's house at some stage prior to the offence or its investigation, those issues were raised so tangentially that I think it safer in the circumstances to disregard them. Counsel for the prosecution said that those matters that were put to various witnesses must have come from instructions. That is not clear to me and since the overwhelming evidence readily negatives those matters beyond reasonable doubt in any event, I will not deal with them further. They are matters that would seem to be inconsistent with the bulk of the defence case as I understand it and it is safer to put them aside. I don't regard them as live issues.

Photographic Identification

16. During the course of the hearing counsel for the defendant submitted that I should rule the photo board identification inadmissible. A short voir dire was conducted and I ruled the evidence of the phot board identification admissible and said I would visit the question of weight. Now that all of the evidence is completed and the dates on which various events occurred are clearer, I have considered the matter of admissibility afresh and confirm my decision that the evidence is admissible.
17. In line with the many authorities on the point, I accept dock identification is the weakest of the forms of identification: (*Alexander v R (1981) 145 CLR 395 per Gibbs CJ at 399*), however dock or courtroom identification is not

the primary issue here. Ms Maxstead said she could not see the man in the Court. Neither is this a case where the danger lies in the witness seeing a photo of the accused prior to identifying the person in court and thus enhancing the *displacement* effect: (*R v Barbaro (1993) 32 NSWLR 619* and Stephen J in *Alexander v the Queen* at 409. This involves the use of photo identification from a photo board. In *Alexander v The Queen*, the High Court outlined the dangers of photo identification. First, the accused is not present and cannot view how certain the witness was. Second is the possibility of a potential jury considering that an accused is part of the *rogues gallery* and therefore undue prejudice may flow. Third is the *displacement effect*. These are also noted in *Festa v The Queen [2001] 76 ALJR 291*. In this case, although the accused was not present for the identification, Ms Maxstead, the full procedure that occurred is set out in exhibit P2 and witnessed by a police officer who was not called. Ms Maxstead also alluded to the procedure being taped. There has been no suggestion of unfairness in the actual process of the identification. As I mentioned in my ruling during the hearing, the circumstances of the taking of the photo indicate quite the opposite to anything that might suggest the defendant has had previous dealings with police. This was a photo taken for the purpose of this investigation. Despite the difficulties associated with photo identification, *Alexander v The Queen* stands for the proposition that such evidence is admissible subject to the discretion to exclude such evidence if, in the circumstances, its admission would be unfair to the accused and subject also to the trial judge giving a warning to the jury on the use of such evidence if it is admitted.

18. One of the objections to admissibility of the photo identification in this case is that it is unfair to admit the photo identification because the preferable procedure of an identification parade should have been followed. I accept that a properly conducted identification parade is *the safest and most satisfactory way of ensuring that a witness makes an accurate*

identification... to pick out from the group the person whom he saw on the occasion relevant to the crime: (Alexander at 399-400). As he is entitled to do, the defendant in this case refused to participate in an identification parade on 16 June 2002 until he sought *further legal advice*. A photograph had already been taken of him on 15 June 2002, however, the identification via the photo board did not take place until 4.34 pm on 18 June 2002. I have already mentioned that Constable Cairncross believed he needed a photo early because he believed that Mr Whelan may change his appearance. Although I draw no inference against the defendant because of this, it appears Constable Cairncross had reason to be concerned. From the account of Wendy Clayton, he still had his moustache on the day after the offence but it was droopier than usual. She said he had the start of a salt and pepper beard as well. By the time his photo was taken by police, he had a definite moustache as evident in the exhibit. By the time of these proceedings, he had cropped hair and a beard. In these circumstances, there being no indication that Mr Whelan would participate in a formal identification parade, it is hardly surprising that police opted to move to the photo identification to progress the investigation.

19. Regardless of that matter, if there is anything that would render the photo identification more prejudicial than probative, it must be rejected. One of the matters pointed out to me by defence counsel and which Senior Constable Warden was cross examined about was whether photograph number six, that Ms Maxstead identified was so different to the other photos in the expression on the suspect's face, the back ground of the photograph, the type of moustache, the lighting that it in effect cried out to be identified. As I mentioned in my ruling during the trial, this may be a matter of perspective. Counsel for the defence cross examined Senior Constable Warden about these matters, but ultimately it is a matter for the Court. There is a difference in photograph six that the background does not have a patterned effect. There are variations between a number of the photos on

matters such as light and expression. The strongest variation I have noted is that photo six appears to be the only photo with a non-computer generated moustache, however, none of these matters are so striking as to make the process unfair. What would be unfair to the defendant is if none of the other photographs on the board had moustaches placed on them. By comparison, in *Marks v The Queen (1998) 72 ALJR* the High Court held that the discretion of the trial judge did not miscarry in accepting police evidence that a name identifying a person photographed which had been included but blacked out was unable to be read on a particular day and therefore could not be read by the identifying witness. In all of the circumstances the process of this identification is not prejudicial in the sense that it is put in *Festa v the Queen at 296*, that is, ...*Prejudice does not arise simply from the tendency of admissible evidence to implicate an accused. It is unfair prejudice that is in question.*

20. I am obliged to warn myself both of the general dangers inherent in photo identification evidence (as discussed above) and of the matters of weakness in this particular to this case: *Domican v The Queen (1992) 106 ALR 203*. I confirm that I accept there are dangers inherent in such identification. I accept that even honest and well meaning witnesses (and here I have no doubt Ms Maxstead is that), can be mistaken in identification. In this particular case I have considered that the man in the car was not known to Ms Maxstead, the original encounter with him was brief when she was under some stress, not only about the actions of the man but also that she felt she had done something wrong in getting into the car, that she did not note a moustache on the man in the car, the fact that at the time she was under some pressure at school and that she could not identify before the Court. In assessing the weight that I give to the identification evidence however I note that although a brief encounter, it was longer than in many cases where the identification is truly fleeting, that she gave a detailed description to police of the man , that although she didn't describe a moustache on the man in the

car, she would have seen him primarily from side on and her description of his facial hair is similar to that given by Wendy Clayton and that she was able to say she recognised the man in the photo from his eyes. I give the identification evidence significant weight.

Identification of the Car

21. I have already detailed the description Ms Maxstead gave of the car to police. It is a maroon Commodore but does appear to have significant distinguishing features beyond that which I have already detailed and don't appear to be challenged in any way. She looked for and found the car that led to police being able to trace the registered owner, the defendant. Ms Maxstead struck me as a brave and honest young woman, not at all wanting to conceal any matter. There is simply no reason to doubt her credibility on this matter.

Other issues of evidence

22. It was suggested to me in final submissions that the two friends who Ms Maxstead spoke to about the matter should have been called. It is difficult to see what they could have added although they may have been able to provide evidence of fresh complaint. I do not think it counts against the prosecution case that they were not called. Once it was revealed in cross examination that she had spoken to her friends about the matter if it was of significance to the defence case, an adjournment could have been applied for to see if the prosecution could call them. The evidence given by Wendy Clayton concerning the defendant's time books I consider to have some, but only slight probative value. On the whole I find the prosecution case irresistibly strong and the material facts proven beyond reasonable doubt.

Gross indecency in public

23. I accept that gross indecency means that the act is plainly or obviously indecent. Indecency is that which offends against currently accepted

standards of decency: *AG v Huber* (1971) 2 SASR 142. In a different context, namely the *Indecency with Children Act* (1960)(UK), masturbation in front of children, provided it was directed to the children was capable of amounting to *gross indecency with or towards a child*: (*Colin Leslie Francis*, (1989) 88 Cr App R 127). I have no doubt that masturbation in front of a young woman in these circumstances accompanied by discussion directed to her such as “wait until I come” is gross indecency. The act must be done in public and in a public place as defined in s 126 *Criminal Code*. I disagree with counsel for the prosecution that this conduct comes within the first limb of the definition of *public place*. In my view that submission stretches the interpretation too wide for a penal statute. The second limb of that definition is relevant and applicable here, that is, *within the view of a person not a party to the act*. I do not think in this situation that it matters that the acts took place in a car. A variety of street offences that contain an element of the offence to be in a public place have been held to be capable of occurring in cars: (eg *McKenzie v Stratton* [1971]VR 848; *Mansfield v Kelly* [1972] VR 744). It depends on the circumstances. In this case all of the roads were open to and used by the public and when Ms Maxstead got out of the car she could still see the defendant masturbating from the side of Vanderlin Drive.

24. At the commencement of the hearing I allowed the prosecution to amend the information to reflect that the offence occurred on Calytrix Road, Mueller Road and Vanderlin Drive. In fact, as the evidence came out, the offence clearly occurred on Vanderlin Drive but it is not clear it occurred earlier in the journey. For those reasons I will delete Calytrix and Mueller Road from the information, leaving Vanderlin Drive.
25. For those reasons I find beyond reasonable doubt the defendant guilty of in public and in a public place, namely Vanderlin Drive, knowingly committed an act of gross indecency.

26. I will hear submissions on sentence.

Dated this 20th day of September 2002.

J BLOKLAND
STIPENDIARY MAGISTRATE