

CITATION: *Andreou v Martin* [2016] NTMC 006

PARTIES: Andreas ANDREOU  
v  
Henry Thomas MARTIN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 21602031

DELIVERED ON: 8 April 2016

DELIVERED AT: Darwin

HEARING DATE(s): 4 & 8 April 2016

JUDGMENT OF: Elisabeth Armitage SM

**CATCHWORDS:**

Criminal Law- Evidence- Identification- Relevance- by Aboriginal Community Police Officer of the defendant from CCTV footage- Officer in no better position than the tribunal of fact to compare appearance of the defendant with photographs and footage- evidence not admitted

Criminal law- Evidence- Identification- Opinion evidence

Implied powers of the Court of Summary Jurisdiction- power to refuse to admit evidence where there has been prejudicial non-disclosure

Evidence (National Uniform Legislation) Act (NT) ss 55, 76

*Smith v R* (2001) 206 CLR 650

*R v Stamp* [2012] NTSC 18

*R v Murdoch* (2005) 195 FLR 421

*O'Neill v Rankine* [2015] NTCA 3

Uniform Evidence Law, Stephen Odgers SC, Eleventh Edition, 2014, Lawbook Co.

**REPRESENTATION:**

*Counsel:*

Prosecutor:

Mr Rowbottam

Defendant: Mr Pettit

*Solicitors:*

Plaintiff: DPP

Defendant: NAAJA

Judgment category classification: B

Judgment ID number: 006

Number of paragraphs: 24

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

No. 21602031

BETWEEN:

**Andreas ANDREOU**  
Plaintiff

AND:

**Henry Thomas MARTIN**  
Defendant

REASONS FOR JUDGMENT

(Delivered 8 April 2016)

SM: E. Armitage

1. Mr Martin was charged with stealing and being armed with an offensive weapon at night. The matter was listed for hearing on 4 April 2016. There was no question as to the offences having been committed because the incident was captured on CCTV footage. The issue was whether Mr Martin was the offender.
2. The witnesses present at the time of the incident barely saw the offender and were unable to provide any identification evidence other than a very general and somewhat generic description. Accordingly, I understood the prosecution relied on the CCTV in two ways to prove the offender was Mr Martin. Firstly, that the CCTV image was clear enough for me to be satisfied that the image was Mr Martin or at least similar to Mr Martin such that he was not

excluded from being the offender. Secondly, the prosecutor sought to lead evidence of identification from Mr Martin's uncle, Aboriginal Community Police Officer (ACPO) Mark Casey. ACPO Casey was not at McDonalds during the incident but in an effort to identify the suspect, investigating police had internally circulated three still photographs of the offender taken from the CCTV. ACPO Casey saw those photos and gave evidence that he recognised the person as his nephew, Mr Martin. Later, on the day of the hearing, ACPO Casey saw the CCTV footage and maintained it depicted Mr Martin.

3. Defence counsel objected to the admissibility of ACPO Casey's identification evidence. Relying on *Smith v R*<sup>1</sup> the defence submitted: firstly, that ACPO Casey's evidence was not relevant because he was in no better position than the court to compare Mr Martin to the images of the of offender on the CCTV footage; and secondly, that ACPO Casey's evidence was inadmissible opinion evidence and did not fall within any of the exceptions to that rule. In addition the defence submitted that ACPO Casey's evidence should be excluded in the exercise of the court's discretion because it had not been disclosed in a timely fashion to the defence.
4. The significant issues to be resolved in the trial were:
  - (i) Was the CCTV footage of sufficient quality to permit the court to come to its own finding as to identity?
  - (ii) Was ACPO Casey's evidence relevant?
  - (iii) Was ACPO Casey's evidence inadmissible opinion evidence?

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<sup>1</sup> (2001) 206 CLR 650

- (iv) Should ACPO Casey's evidence be excluded in the exercise of a discretion?

**Was the CCTV footage of sufficient quality to permit the court to come to its own finding as to identity?**

5. The events took place at McDonalds in Ludmilla on 10 January 2016. As already noted, the prosecution case relied heavily on a few minutes of CCTV footage. From left to right, the CCTV footage showed the back view of a lady sitting at a table with friends. The lady's handbag was sitting up on the table, just to the right of her elbow. A street entrance to McDonalds was shown to the right of the table. The offender entered McDonalds through the street entrance holding an upside down golf club in his right hand, like a walking stick. The offender walked casually from right to left across the screen, behind the lady and her handbag. The offender walked off screen to the left. Seconds later the offender re-entered the CCTV footage from the left. He was no longer carrying the golf club. He walked behind the lady, grabbed her bag off the table, and took off running, exiting through the street entrance.
6. The CCTV was of average quality. The general setting in which the offending took place was clear and it was possible to get a reasonable impression of the offender. The camera was located above head height and the images were taken at an angle from above. As the offender entered McDonalds the CCTV captured his general body type and movement. At this point the offender was walking with the upside down golf club in his right hand. As he walked closer to the camera, the image captured his face in profile on the downwards angle. When the offender reappeared without the

golf club, the image was of his back. He can be seen taking a few walking steps, snatching the bag and running away.

7. From viewing the CCTV footage I considered that the offender was an aboriginal male who appeared to be in about his twenties. He was of slender to medium build. He was barefoot and wearing black shorts and a blue, singlet style top. The top had two smallish, mismatched motifs on both the left and right side of the chest and some white on the shoulders, sides and back. The offender's hair was dark, curly and shoulder length, in a mullet style and possibly tied back. It was high at the front, there was no fringe, and his forehead was clear and reasonably high. The hair was worn behind the ears. The offender had a reasonably heavy brow and a broad triangular nose.
8. The prosecutor tendered photos of Mr Martin taken on 9 and 13 January 2016, that is, both shortly before and after the incident and also tendered a record of interview showing Mr Martin on 13 January 2016. Accordingly his appearance at about the date of the offending was well established on the evidence. There was one significant difference between Mr Martin's appearance in January and at the trial in April. In January Mr Martin had a distinct blonde highlight in his hair centred immediately above his forehead, but at the hearing his hair was a uniform dark brown colour. The blonde highlight was very obvious in the photos taken in January but was less obvious in the video of the record of interview. The photos also appeared to have lightened Mr Martin's skin colour. I remark on the difference between the photos and the record of interview, because it seemed to me that Mr Martin's blonde highlight appeared more or less obvious depending on the camera and lighting.

9. I have described the CCTV in detail to provide an impression of its clarity and quality. Whilst much could be seen on the footage, the colours were not entirely clear, the combination of the lighting and angle of the camera appeared to create highlights and cast shadows on the image of the offender, and the image was somewhat pixelated. There was no single clear image of the offender's face. There was no single point where I could clearly see his eyes, cheeks, mouth or chin as these were covered in shadow even when his face was shown in profile. Significantly, I could not clearly see the distinct yellow highlight in the offender's hair. Whether this was because of the effects of the lighting or because it was not there I do not know. Having looked at the footage carefully, although I was satisfied that there were points of similarity between Mr Martin and the offender, to my mind, the missing blonde highlight was a relevant point of dissimilarity. The CCTV was not clear enough for me to positively identify Mr Martin as the offender, but neither was I satisfied that he was excluded.
10. The prosecution case therefore relied on the admission and acceptance of ACPO Casey's identification evidence.

### **Was ACPO Casey's evidence relevant?**

11. In *Smith v R*, in the joint judgment of Gleeson CJ and Gaudron, Gummow and Hayne JJ, the High Court held that the evidence of two police officers identifying a person depicted in CCTV footage was irrelevant and inadmissible because the police were "in no better position to make a comparison between the appellant and the person in the photographs than the" tribunal of fact. However, their Honours went on to discuss some of the factors that might place a witness in a better position to make such a comparison and which

might result in such evidence being relevant and admissible. Their Honours said:

“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, differed 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 she or he appeared at that time, would not be irrelevant. Or if it is suggested that there was 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.”<sup>2</sup>

12. Accordingly, ACPO Casey’s identification evidence might be relevant if his experience of Mr Martin brought with it “added value to the exercise of identification”<sup>3</sup>, that is, if his evidence established that he was in a better position than the court to compare Mr Martin to the CCTV.
13. ACPO Casey gave evidence that Mr Martin was his nephew, he had known him since birth, and over the years there had been a “fair bit of interaction”. ACPO Casey said he was familiar with Mr Martin’s gait which he described as a “springy motion when he walks”. He said this particular trait had earned Mr Martin the nickname “tippy toes”. ACPO Casey considered Mr Martin’s hair to be distinctive. He said it was a “big mullet” with “orange peroxide at the front”. ACPO Casey said that in January 2016 much of the Daly River community, including Mr Martin, were evacuated to the

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<sup>2</sup> 656 at [15]

<sup>3</sup> *R v Stamp* [2012] NTSC 18 per Kelly J at [12]



Darwin Show Grounds due to flooding. ACPO Casey said that in January he saw Mr Martin around the show grounds. When asked how often he said “pretty regular”. ACPO Casey said there were limited clothes washing facilities and for this reason the evacuees wore their clothes for several days in a row before they were washed. He said he saw Mr Martin wearing the same clothes for days. When asked to describe the clothes, he said “he usually wears singlets or t-shirts. Your blues, whatever. I think he had a blue shirt”.

14. ACPO Casey said that he saw three still photographs circulated over the police computer and recognised them to be photos of Mr Martin. He said he did not see the CCTV footage until he came to court but having viewed the footage he said he recognised Mr Martin’s walk and his blue singlet with motifs. ACPO Casey was pretty certain it was the same shirt that Mr Martin was wearing when he “was locked up a couple of days earlier”.
15. Although ACPO Casey had a long standing familiarity with Mr Martin’s general appearance, in my view that did not place him in a better position than the court to make a comparison. The relevant point of comparison was at or about the date of the offending. The court was furnished with two photos and a record of interview which clearly depicted Mr Martin’s appearance spanning the date of the offending and clearly revealed the only significant change in his appearance, namely the blonde highlight. In those circumstances, ACPO Casey’s long familiarity was of no real relevance to the task of comparison and did not place him in a better position than the court to carry out that task.

16. If Mr Martin's springy step had truly contributed to ACPO Casey's identification of Mr Martin, it might have been a relevant point of distinction between his and the court's capacity to make a comparison. However, ACPO Casey first identified Mr Martin from three still photos. Little can be seen of the offender's legs in two of those photos and at most, one step is depicted in the third. ACPO Casey did not point to anything in the photos which he said was consistent with Mr Martin's gait. I am satisfied that ACPO Casey's knowledge of Mr Martin's gait did not play any real part in his identification from the photographs and so, at least so far as the still shots were concerned, he was in no better position than the court to make the comparison.
17. When shown the CCTV footage in evidence in chief, ACPO Casey said the shirt, the hair and the facial features were points of recognition but made no mention of the offender's movement. In cross examination he added "and the walk". However, at no stage did ACPO Casey point to any part of the walk as being "springy" such that it assisted him to identify Mr Martin as the offender. Having viewed the footage, I am unable to detect anything distinctive or "springy" about the offender's movements, other than him being quick off the mark when he grabbed the bag. To the contrary, the offender used the golf club like a walking stick and his movements appeared somewhat heavy footed and lopsided (perhaps because of the stick). In those circumstances, I am not persuaded that ACPO Casey's knowledge of Mr Martin's gait placed him in a better position than the court to make a comparison.
18. ACPO Casey also asserted that he recognised the shirt worn by the offender as being one that he had seen worn by Mr Martin. His

identification of the shirt was a further possible point of relevant distinction between his and the court's capacity to make a comparison. However, I note the following. When first asked to describe Mr Martin's shirt, ACPO Casey only described it as blue and made no mention of any motifs. He went on to say he was "pretty certain" the shirt in the CCTV footage was the same shirt Mr Martin had been wearing for some days and the same shirt he was wearing "when he was locked up a couple days earlier". As already noted, the prosecution tendered a photograph of Mr Martin taken on 9 January 2016 when he was in protective custody. It seemed to me most likely that this was the occasion ACPO Casey was referring to when he recalled Mr Martin being "locked up earlier". As the court had the 9 January 2016 photograph, the court was actually better placed to compare the two shirts, than ACPO Casey who was relying on his memory. Although there were similarities between the singlet worn by Mr Martin on 9 January 2016 and the one worn by the offender on 10 January 2016, it was very clear that they were not the same shirt.

19. Taking all the points of possible distinction that I could identify into account, I was not satisfied that ACPO Casey was in a better position than the court to compare Mr Martin to the offender in the CCTV footage. In my view, ACPO Casey's evidence was not relevant and it was not admitted.

**Was ACPO Casey's evidence inadmissible opinion evidence?**

20. Given my ruling that ACPO Casey's evidence was not relevant there was no need for me to consider this further ground of objection. Whilst I make no ruling on this issue I do note the following. In support of the objection, the defence relied on the

single judgement of Kirby J in *Smith v R*<sup>4</sup>. However, his Honour's application of the opinion evidence rule to this type of evidence did not form part of the majority's reasoning in *Smith*, has apparently not been considered or followed in the Northern Territory, and was the subject of critical analysis and considered questionable by Stephen Odger's SC, in his text, *Uniform Evidence Law*<sup>5</sup>. Were Justice Kirby's reasoning to be followed in the Northern Territory, identification evidence of the kind admitted in *R v Murdoch*<sup>6</sup> might no longer be admissible.

### **Should ACPO Casey's evidence be excluded in the exercise of a discretion?**

21. Again, given my ruling that ACPO Casey's evidence was not relevant there was no need for me to consider this further ground of objection. However, I think it important to note the following. The defence complained that the identification evidence relied on by the prosecution had not been served on them in a timely manner. The prosecution case rested substantially on the identification evidence of ACPO Casey. ACPO Casey identified Mr Martin before he was arrested and charged on 13 January 2016. On 5 February 2016, at the first directions hearing, the defence indicated that identification was in issue. However, ACPO Casey's statement was not served on the defence until the very morning of the hearing. The defence, relying on the decision *O'Neill v Rankine*<sup>7</sup>, submitted that procedural fairness required the exclusion of ACPO Casey's evidence.

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<sup>4</sup> At [60]

<sup>5</sup> Eleventh Edition, 2014, Lawbook Co., at [1.3.4180]

<sup>6</sup> (2005) 195 FLR 421, [2005] NTSC 78 at [75-78]

<sup>7</sup> [2015] NTCA 3

22. In *O'Neill v Rankine* the Court of Appeal recognised that the Court of Summary Jurisdiction had an implied power “to refuse to allow the complainant to adduce evidence where there has been prejudicial non-disclosure in breach of pre-trial directions by the court”<sup>8</sup>. I considered the prosecuting authority’s apparently nonchalant attitude to disclosure entirely unsatisfactory, but I do not point to any individual as I understand the brief passed through several hands. In my experience late or non-disclosure of relevant statements is unfortunately not uncommon and the prosecuting authorities ought to consider how their disclosure obligations could be better prioritised and implemented. In spite of those comments, in the circumstances of this case I was not satisfied that there had been any clear breach of pre-trial directions or that any real prejudice was occasioned to the defence.

23. From the date of his arrest, Mr Martin was aware that ACPO Casey had identified him, as he was told about the identification in his record of interview. The defence were therefore not completely taken by surprise when ACPO Casey attended as a witness. In response to the late service of his statement, a short adjournment was granted to allow the defence to consider his evidence. Had a longer adjournment been requested, it would likely have been granted. Thereafter the trial proceeded with the evidence taken under objection pending a ruling as to its admissibility. In those circumstances, and being satisfied as to the evident capability of defence counsel to deal with the late evidence, I was not persuaded there was any real prejudice occasioned to Mr Martin by the late service, nor that it resulted in any unfairness in the conduct of the

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<sup>8</sup> At [22]

trial. Accordingly, I would have declined to exercise my discretion to exclude the evidence.

**Decision**

24. The only evidence admitted which was relevant to identification was the CCTV footage. As I was unable to positively identify Mr Martin as the offender on that footage, the charges were dismissed.

Dated this 8th day of April 2016.

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Elisabeth Armitage SM