CITATION: Helen Maree Rowbottam v AM
[2003] NTMC 026

PARTIES:	HELEN MAREE ROWBOTTAM
	v
	AM
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20102088
DELIVERED ON:	23 May 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	17/3/03-19/3/03, 3/4/03
DECISION OF:	Mr Trigg SM

CATCHWORDS:

Evidence: DNA; handwriting; expert evidence generally.
Criminal Code: section 166 (threat to kill).

REPRESENTATION:

Counsel:

Informant :	Mr Hunter
Defendant:	Mr Kavanagh/Ms Farmer

Solicitors:

Informant :	Police Prosecutions
Defendant:	Withnall Maley

Judgment category classification:	C
Judgment ID number:	[2003] NTMC026
Number of paragraphs:	122

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

No. 20102088

BETWEEN:

HELEN MAREE ROWBOTTAM
Informant

AND:

AM
Defendant

REASONS FOR DECISION

(Delivered 23 May 2003)

Mr Trigg SM:

1. The defendant AM pleaded not guilty before me on 17 March 2003 to three charges. The first charge was as follows:

> "Between the 25th day of February 1999 and the 26th day of 1999
>
> at DARWIN in the Northern Territory of Australia.
>
> 1. did, with intent to cause fear, make a threat to kill a person, namely Matt SODOLI which threat was of such a nature as to cause fear to any person of reasonable firmness and courage:
>
> contrary to section 166 of the Criminal Code."

2. To establish that charge the prosecution need to prove beyond all reasonable doubt each of the following:

- between 25& 26 February 1999
- at Darwin
- the Defendant, AM ("AM")

- made a threat to kill Matt Sodoli ("Sodoli")
- that that threat was of such a nature as to cause fear to any person of reasonable firmness and courage; and
- the threat was made with the intention of causing fear to Sodoli

3. The threat that the prosecution rely upon is a two page document posted in Darwin in an envelope addressed to:

> "Detective Matt Sodoli
>
> C/- Berrimah Police Centre
>
> Darwin NT."

The envelope and the said two pages became ExP5, and I will return to this exhibit in more detail later in these reasons. The envelope forming part of ExP5 has a mail stamp on it for "Darwin Mail Cnt. N.T. 0800" bearing the date "25 Feb 1999". In *R V Leroy* (1984) 55 ALR 338 Street CJ (with whom Glass JA and Yeldham J agreed) held that:

> "The evidence of the postmark was admissible, because a postmark is an official cachet which amounts to a contemporaneous record of the transaction and can be taken at face value as indicating the postal origin of the parcel."

I therefore find beyond all reasonable doubt that the envelope forming part of ExP5 was posted in Darwin on 25 February 1999.

4. The second charge was as follows:

> "Between the 25th day of February 1999 and 26th day of February 1999
>
> at DARWIN in the Northern Territory of Australia.
>
> 2. did, with intent to cause tear, make a threat to kill a person, namely John DAULBY which threat was of such a nature as to cause fear to any person of reasonable firmness and courage:
>
> contrary to section 166 of the Criminal Code."

5. To establish that charge the prosecution need to prove beyond all reasonable doubt each of the following :

- between 25 and 26 February 1999
- at Darwin
- the Defendant, AM
- made a threat to kill John Daulby ("Daulby")
- that that threat was of such a nature as to cause fear to any person of reasonable firmness and courage; and
- the threat was made with the intention of causing fear to Daulby.

6. The threat that the prosecution rely upon is a two page document posted in Darwin in an envelope addressed to:

> "John Daulby
>
> Assistant – Commissioner
>
> NT Police
>
> C/- Berrimah Police Centre
>
> Darwin NT."

The envelope and the said two pages became ExP9, and I will return to this exhibit in more detail later in these reasons. The envelope forming part of ExP9 has a mail stamp on it (which is only partly legible) for "Darwin (illegible) Cnt. N.T. 0800" bearing the date "(illegible) Feb 1999". In reliance upon the decision in *R V Leroy* (supra), and given the post code of 0800 I find beyond all reasonable doubt that the envelope forming part of ExP9 was posted in Darwin in February 1999. I will deal with the actual date of posting later in these reasons.

7. The third charge was as follows:

> "On the 26th day of February 1999

at DARWIN in the Northern Territory of Australia.

3. did, with intent to cause fear, make a threat to kill a person, namely Bertram Hofer which threat was of such a nature as to cause fear to any person of reasonable firmness and courage:

contrary to section 166 of the Criminal Code."

8. To establish that charge the prosecution must prove beyond all reasonable doubt :

- on 26.02.99
- at Darwin
- the Defendant, AM
- made a threat to kill Bertram Hofer ("Hofer")
- that that threat was of such a nature as to cause fear to any person of reasonable firmness and courage; and
- the threat was made with the intention of causing fear to Hofer.

9. The threat that the prosecution rely upon is a two page document posted in Darwin in an envelope addressed to:

"Superintendent Bert Hofer

Division Four

C/- Katherine Police Station

Stuart Highway

Katherine NT."

The envelope and the said two pages became ExP4, and I will also return to this exhibit in more detail later in these reasons. The envelope forming part of ExP4 has a mail stamp on it (which again is only partly legible) for "(illegible) N.T. 0800" bearing the date "25 Feb 1999". Again relying on the decision in *R V Leroy* (supra) and given the postcode of 0800 I find beyond

all reasonable doubt that the envelope forming part of ExP9 was posted in Darwin on 25 February 1999.

10. The first thing I note is that the threat in charge 3 is alleged to have been made in "Darwin". It is clear that ExP4 was posted in Darwin and ExP4 contained the threat complained of. However it is also clear from the face of ExP4 that the envelope was addressed to Hofer in Katherine. It is also clear from the evidence that ExP4 was delivered to Katherine, opened in Katherine and read by Hofer in Katherine.

11. Is a threat made at the place where it is posted, or at the place it is received or both? Since both are in the N.T in any event does it matter?

12. In the case of *R v Henry Waugh* (1909) VLR 379 the defendant was tried in Victoria for false pretences in relation to a letter sent be the defendant by post from Melbourne to the intended victim in Launceston. At the trial Cussen J directed the jury to disregard the fact that the proposed victim received the letter out of Victoria, and that the jury might find the defendant guilty of the offence charged by reason of his having posted the letter in Victoria. Because His Honour had reservations about the correctness of that ruling he stated a case to the Full Court for it's consideration. At pages 381 to 382 Madden CJ held as follows:

> "The attempt to commit the crime is what we have to deal with here, and it appears to us that the prisoner's whole scheme was by means of a letter written in Victoria, and posted here, addressed to and received by Connolly in Launceston, to procure the sending of money into Victoria, which he would there obtain. He had no intention of going to Tasmania and getting the money there. Therefore it is quite clear that his whole purpose was to procure the sending of money into Victoria, which he would obtain in Victoria.
>
> …..The result is that there is no doubt that he intended to get something in Victoria. We, therefore, think he was rightly prosecuted here.

> ….Every act the prisoner did as a part of that scheme was an attempt in the direction of the principal crime."

13. It is clear (not unusually) that the cases tend to involve matters which have occurred across borders, whether national or international. To that extent they are not on all fours with the subject case, as they often deal with different laws depending upon which jurisdiction is applicable. Here we are dealing with a crime which has occurred wholly within the borders of the Northern Territory. To that extent I consider that the issue is unnecessary for me to decide. It is clear that the documents alleged to constitute the threat were posted in Darwin and received in Katherine. To that extent, as the same law applied, I consider this to be a particular and not something which goes to the gravamen of the charge. I would amend "Katherine" to "Darwin" if it were necessary to do so, but I am not satisfied that any such amendment is necessary. I raised this issue with both counsel. Mr Hunter has provided me with some authorities, and Ms Farmer has provided none. The few authorities I have received do not assist me to resolve this question with any degree of confidence, so I will leave it unresolved, as at the end of the day I do not consider it important.

14. A "threat" is a declaration of intention. An intention formed in a person's head may be potentially dangerous but it is not a threat until it is declared or acted upon in some way.

15. To be a threat to kill AM must have declared an intention to end the life of Sodoli, Daulby, and /or Hofer - *R v Leece* (1995) 1 ACTR 1@ 5.

16. In relation to charge 1 therefore, am I satisfied beyond all reasonable doubt that ExP5 is a threat to kill Sodoli?

17. I respectfully accept and adopt what Higgins J said in *R v Leece* (supra)@ 6:

> "one may infer from these quotations that to be a threat to kill, the relevant utterance or communication must convey, objectively, to the hypothetical reasonable person in the position of the listener or

> recipient that the publisher proposes to kill the listener or recipient or another person. If it conveys a merely hypothetical proposal that will not suffice, but a conditional threat, particularly when the person threatened is entitled not to meet such conditions, will suffice as "a threat"."

And also what Mildren J said in *Bunting v Gokel* (unreported decision delivered on 12 April 2001) @ para12:

> "The words used by the appellant cannot be looked at in isolation, but must be construed in the context of all the words spoken, as well in the context of his actions, and posturing: see *Leece* (1995) 78 A.CrimR 531 at 536 per Higgins J; *Leece* (1996) 86 A.CrimR 494 at 498 per Gallop and Hill JJ. In *R v Rich* (unreported, Court of Appeal, Supreme Court of Victoria, 17 December 1997, per Winneke P and and Brooking and Buchanan JJA at p9) their Honours said:
>
> "But where, as in this case, it is alleged that a series of statements, made repetitively to the one person at the one place, constitutes a threat to kill made with a particular intent, common sense dictates that the whole of the conduct of the accused, including the nature of the statements and the context and manner in which they were spoken, must be considered by the tribunal before it can be determined whether a threat to kill within the meaning of s20 of the Crimes Act 1958 has been made. It would be a barren exercise for the jury to consider each utterance in isolation and out of context of the others. So regarded each of the utterances might lose the impact and meaning which, in proper context, the totality of the conduct might otherwise bear. Indeed, it is difficult to conceive, in the circumstances of this case, how the jury could have made any adequate assessment of the intent with which the accused made the threat unless they were to look at the entirety of his conduct, as distinct from "snap-shots" of it, during what was clearly a continuous episode."

And at para 20:

> "Strictly speaking, whether Campbell was put in fear was not relevant, as the test was entirely objective, the question being – was the threat of such a nature as to cause fear to any person of reasonable firmness and courage? This describes objectively the nature of the threat to kill of which this section speaks, and if, as it seems to me, that the words uttered had been properly considered in the context of the tirade of abusive language directed at Campbell

and others on the Balladier II, the learned Magistrate ought to have entertained a reasonable doubt and dismissed the charge."

18. Therefore you need to look at the whole contents of the communication and not look at each word or phrase in isolation. I turn to consider the contents of ExP4, ExP5 and ExP9 to firstly decide if they are each capable of fulfilling the objective test necessary to prove that necessary element of the charge related to it. I will later consider whether the prosecution has proved that the documents forming each exhibit have been proved to have been sent and received in the relevant envelope.

19. Turning firstly to ExP5. There were two separate A4 sheets of paper each with printing on one side only. One sheet had the following words in large bold capital typing lengthwise on the paper:

"**ONE BY ONE YOUR GANG**
ARE GOING TO DIE"

The other sheet of paper appeared as follows:

" **DETECTIVE**
MATT SODOLI

If I ever stick a gun in your mouth I'll pull the trigger. You keep stealing my drugs and Rowena won't make it home from work at the Casino one night. You and your friends can't be protected from us. Faggot!"

20. Firstly it is to be noted that nowhere does the word "kill" appear. Therefore if there is a threat to kill it must be by inference. If the sentence referring to the gun and pulling the trigger is looked at, that on it's face appears to be a conditional threat.

21. I find that taken of a whole ExP5 conveys the following:

- a purported belief that Sodoli is a member of a gang.
- a purported belief that Sodoli is stealing drugs belonging to the sender of ExP5.

- that Sodoli needs protection from them.
- that Sodoli and his friends can't be protected from them.
- that there is more than one person Sodoli and his friends would need protection from.
- that the sender may have access to a firearm.
- that the sender might stick a gun in Sodoli's mouth.
- if the sender did stick a gun in Sodoli's mouth, he'd pull the trigger.
- that the sender knows personal details relating to Sodoli.
    - ie. he has a partner.
    - partner's name is Rowena.
    - she works at the casino.
    - she works at nights.
- that one by one Sodoli and his gang are gong to die.
- that one night Rowena won't make it home from work at the Casino.

22. In context the statement "one by one your gang is going to die" is not to be seen as a general observation of the reality of human frailty. In context it conveys the message that the life of Sodoli is going to end and the sender of ExP5 is going to play some part in that ending.

23. I find that ExP5 taken as a whole is a threat to kill Sodoli. In my view, if either of the two pages of A4 had been sent alone and without the other then it alone may not have been sufficient to constitute a threat to kill Sodoli. The two read together are sufficient. I also find that the threat (as a whole) was of such a nature as to cause fear to any person of reasonable firmness and courage and further that it was made with the intention of causing fear. There is no named author of the threat. Therefore Sodoli (or any hypothetical reasonable person receiving it) was unable to form any view as to the seriousness or otherwise of the threat. The author also resorts to some personal abuse by calling him a "faggot" which shows some added

animosity towards Sodoli. To emphasise the threat the author makes direct reference to Rowena and her circumstances.

- this would reinforce the threat
- shows that the author knows more about Sodoli than Sodoli knows about him / her
- suggests that the author may have been watching Sodoli for some time
- suggests that the author may know where Sodoli lives

24. The anonymity of the threat conveys (and is intended to convey) to Sodoli (as it would to any reasonable recipient) that he won't know who to look out for, so he can't stop him, her or them. I find that the anonymity of the author adds to the sinister nature of the documents. They were intended to cause fear and apprehension and would have to any reasonable recipient. I find that there would be no reason for the author to extend the threat to Rowena other than to heighten the alarm and distress of Sodoli.

25. Sodoli later discovered that similar mail had been received by others, so it was not a one-off isolated threat.

26. "Fear" is defined in the Concise Oxford Dictionary to mean "an unpleasant emotion caused by exposure to danger, a state of alarm, anxiety for the safety of".

27. I turn now to consider ExP9. Again this exhibit contains two A4 sheets of paper. One of the sheets appears to be identical in appearance and wording to one of the sheets forming part of ExP5 just dealt with. This is the sheet that states:

"**ONE BY ONE YOUR GANG ARE GOING TO DIE**"

The second sheet of paper followed a similar format to the second sheet in ExP5 in that it was headed in similar large bold type as follows:

"**ASSISTANT COMMISIONER JOHN DAULBY**"

It goes on to say:

> "So you're the brains. You keep stealing my drugs and none of your friends will protect you from us. We've been around a lot longer than you. Some of your people just talk too much"

28. The similarity between the contents of ExP5 and ExP9 is too striking to entertain the possibility of an unrelated coincidence and I dismiss that possibility. I will deal later in these reasons with whether the whole of the exhibit was sent/received as a single item.

29. In total the contents of ExP9 conveys :

- a purported belief Daulby is a member of a gang.
- That Daulby is the brains of the gang.
- One by one the members of his gang are going to die.
- that Daulby is stealing the author's drugs.
- that Daulby needs protection from the author and an unspecified number of others.
- that Daulby can't be protected from them.
- that "they" have been around for longer than Daulby.
- That some members of the gang talk too much, and hence "they" know some unspecified things.
- that Daulby has no idea who they are.

30. In context this conveys that Daulby needs protection from the authors, but he can't be protected. By itself that would not be enough to satisfy the objective threshold test, as it needs to be more than a threat to do harm, it must be a threat to kill. Likewise the statement "one by one your gang are going to die" by itself may not be enough to constitute a threat to kill. In my view, if either of the two pages of A4 had been sent alone and without the

other then it alone may not have been sufficient to constitute a threat to kill Daulby. The two read together are sufficient. Again, in my view this statement (in context) is far more than a general observation as to the inevitable mortality of life. Looked at together they, in my view, convey (and are intended to convey) a connection between the authors and the death of Daulby that he can't be protected by his friends from. In my view, this conveys and is intended to convey that the authors will have some part to play in the death of Daulby, and there is nothing he can do about it. I find that this is a threat to kill Daulby that would cause fear to any person of reasonable firmness and courage, particularly given the deliberately anonymous nature of it. As noted in relation to ExP5 any reasonable person receiving ExP9 would be in no position to assess the seriousness of the threat as the author has deliberately remained anonymous.

31. I do not think ExP9 is as clear cut as ExP5 but I find that there is a threat to kill Daulby.

32. I find that when Daulby first saw ExP9 (and I deal later with whether it was sent/received as a single item) he was not overly concerned about it, but he became aware very quickly of similar threats to others and therefore discovered that it was not an isolated one-off threat. The author of the threat was sufficiently aggrieved to send threatening mail to others.

33. In those circumstances I find that the threat was of such a nature or to cause fear to any person of reasonable firmness and courage.

34. I further find the threat was made with the intention of causing fear to Daulby.

35. I turn now to consider ExP4. Again this exhibit contains two A4 sheets of paper. One of the sheets appears to be identical in appearance and wording to one of the sheets forming part of ExP5 and ExP9 just dealt with. This is the sheet that states:

"**ONE BY ONE YOUR GANG
ARE GOING TO DIE**"

The second sheet of paper followed a similar format to the second sheet in ExP5 and ExP9 in that it was headed in similar large bold type as follows:

"**SUPERINTENDENT
BERT HOFER"**

It goes on to say:

> "You can shut down as many of my plants as you like, but none of it will protect you from us. We've been around for too long. Make sure the one's you love are protected, because you're never going to know when they won't be."

36. Taken as a whole ExP4 conveys the following :

- a purported belief Hofer is a member of a gang.
- a purported belief Hofer is involved in shutting down the author's "plants".
- Hofer needs protection from us (whoever "us" is)
- Hofer won't be protected from "us".
- The author/s of the letter have been around for a long time.
- Hofer's loved ones need protection from them as well.
- The author/s of the letter are watching and waiting for a time when Hofer's loved ones are not protected.
- The author/s knows about Hofer's personal circumstances.
- One by one members of Hofer's gang are going to die.

37. Charge 3 only concerns a threat to kill Hofer and therefore threats to his "loved ones" are not relevant to the initial question of whether ExP4 conveys a threat to kill Hofer (in the same way that threats to Rowena in ExP5 were not relevant to charge 1). It is relevant however to the objective test and intention of the author. Again the documents must be looked at as a whole (I deal later with whether the whole contents of the exhibit were

sent/received as a single item) to determine whether they should be taken seriously.

38. In all 3 exhibits the reference to death is emphasised by being on a separate A4 piece of paper.

39. In all 3 cases the sender stresses the need for the addressee to be protected from the sender but states that they can't be.

40. When the contents of ExP4 are looked at together then they are linked. In my view, if either of the two pages of A4 had been sent alone and without the other then it alone may not have been sufficient to constitute a threat to kill Hofer. The two read together are sufficient. The need for protection is not to be read in isolation. It must be read in the light of the statement:

> " one by one your gang are going to die"

41. I therefore find that ExP4 conveys a connection between the death of Hofer and the author, and that Hofer can't be protected from the author or "us". Again, as is the same case with ExP5 and ExP9 the anonymous nature of the threat makes it more sinister. There is no way of knowing who it is from and therefore no way of assessing whether it is serious or not. The thinly veiled threat to Hofer's "loved ones" could serve no purpose other than to add to the fear, apprehension and concern of Hofer.

42. In addition, Hofer becomes aware (as did Sodoli and Daulby) within a short period of time of similar threats being received by others at about the same time. This has a number of objective consequences. It re-enforces the belief in the mind of the unknown author that there is a "gang", by identifying at least some members of it. Further, it shows that it is not a one-off or isolated threat. It also shows that the author is prepared to go further by sending similar threats to others.

43. I therefore find beyond all reasonable doubt that ExP4 conveys a threat to kill Hofer, as again, in my view, there is a direct link between the death of the members of the gang and the author/s.

44. I find the threat to kill was of such a nature as to cause fear to any person of reasonable firmness and courage. I further find the threat was made with the intention of causing fear to Hofer.

45. In the case of all 3 charges, the intention of the sender is not known and therefore it must be inferred. None of ExP4, ExP5 or ExP9 were sent on April Fools Day. None of them gave any hint of the identity of the sender. None of them had the appearance of a bad joke. There was nothing about them to suggest other than that the sender wanted to cause some apprehension, alarm and distress to the recipients. There is no other obvious reason for their being sent.

46. In term of seriousness I'd rank ExP5 the most serious and ExP9 the least serious of the threats.

47. The remaining question is whether I'm satisfied beyond all reasonable doubt that in relation to charge 1 AM sent ExP5; in relation to charge 2 AM sent ExP9; and in relation to charge 3 AM sent ExP4.

48. In relation to ExP4, ExP5 and ExP9 I note the following:

- All three envelopes appear to be similar in size, colour, appearance and type.
- All three envelopes have 45c stamps depicting a butterfly – therefore consistent with the stamps coming from the same series.
- All three envelopes allegedly contained 2 x A4 sheets of paper.
    - one of the sheets appears to be identical in all three instances being the one containing the words in bold type – sideways "**ONE BY ONE YOUR GANG ARE GOING TO DIE**"
    - The other sheet in each exhibit is also similar in that:

- computer printed
- printing is sideways across page
- rank and name of person it to in enlarged capitals in bold at the top
- messages to Sodoli and Daulby have same identical phrase

" You keep stealing my drugs"

- All 3 envelopes are post marked at Darwin mail Centre
- 2 of the envelopes were posted on 25/2/03, and the third envelope (for reasons which appear later) was most likely posted on about the same day
- The pen used on ExP5 and ExP9 appears to be similar
- The handwriting on all 3 envelopes does not look so dissimilar as to rule out that it was written by the same person.

49. The possibility of coincidence is so incredible as to be excluded.

50. I therefore find beyond all reasonable doubt (subject to deciding that the contents of each exhibit was sent/received as a single item) that ExP4, ExP5 and ExP9 were prepared, addressed and posted by the same person or persons.

51. Am I satisfied beyond all reasonable doubt that the person, or one of the persons was the Defendant AM? There is no direct evidence that AM was involved as:

- no admissions by AM in his record of interview (ExP1), and he in fact denies any knowledge

- no evidence that any person saw AM do anything in relation to ExP4, ExP5 or ExP9

- nothing found on AM's computer to link him to the envelopes or the contents of the envelopes.

52. The prosecution case is therefore circumstantial, and is based on the following :

1. Expert evidence that DNA on the seal of the envelope in ExP4 matched the DNA of AM.

2. Expert evidence that the DNA on the seal of the envelope in ExP5 matched the DNA of AM.

3. Expert evidence that the DNA on the seal of the envelope in ExP9 matched the DNA of AM.

4. Expert evidence that the handwriting on the envelope in ExP4 matched the handwriting of AM.

5. Expert evidence that the handwriting on the envelope in ExP5 matched the handwriting of AM.

6. Expert evidence that the handwriting on the envelope in ExP9 matched the handwriting of AM.

7. Evidence from Australian Federal Police Officer Quade that, on 5 May 2000 in Canberra, AM conveyed allegations against a number of persons including the addressees of ExP4, ExP5 and ExP9.

53. Each of these 7 circumstances on which the prosecution relies must be looked at in isolation.

54. Each of the circumstances 1 to 6 are a chain. In each case, each link in the chain must be established by the prosecution otherwise the conclusion suggested cannot be safely entertained. That process needs to be gone through separately for each piece of evidence 1 to 6.

55. If any of the circumstantial evidence (1 to 7 above) is established beyond all reasonable doubt then those items then form part of the cable that the prosecution says points to the Defendant being guilty of each of the charges.

56. Circumstantial evidence 2 & 5 goes to charge 1

Circumstantial evidence 3 & 6 goes to charge 2

Circumstantial evidence 1 & 4 goes to charge 3

Circumstantial evidence 7 goes to charges 1, 2 and 3.

57. In the course of my considerations I have applied and had regard to the following authorities on circumstantial cases:

Plomp v The Queen (1963) 110 CLR 234 @ 243 where Dixon CJ said:

> "Much difficulty is found in stating the rule, a difficulty which has not been overcome by employing the expression "more consistent" as if there could be degrees of consistency. In the case cited what is said is: "If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed."

and Menzies J in the same case at page 252:

> "The customary direction where circumstantial evidence is relied upon to prove guilt, that to enable a jury to bring in a verdict of guilty it is necessary not only that it should be a rational inference but the only rational inference that the circumstances would enable them to draw, was given."

Plus the joint judgment of Gibbs, Stephen and Mason JJ in *Barca v R* (1975) 7 ALR 78@ 95 –96:

> "When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are "such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused": *Peacock v R* (1911) 13 CLR 619 at 634. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be "the

only rational inference that the circumstances would enable them to draw": *Plomp v R* (1963) 110 CLR 234 at 252. However, "an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence": *Peacock v R* (13 CLR) at 661. These principles are well settled in Australia."

And the decision of Dixon J in *Shepherd v The Queen* (1990) 170 CLR 573 @ 578-580:

"Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter: of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements. For example, with most crimes it is a necessary fact that the accused was present when the crime was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.

On the other hand, it may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt. Not every possible intermediate conclusion of fact will be of that character. If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that fact must be found beyond reasonable doubt before the ultimate inference can be drawn. But where - to use the metaphor referred to by *Wigmore on Evidence*, vol. 9 (Chadbourn rev. 1981), par 2497, pp. 412-414 - the evidence consists of strands in a cable rather than links in a chain, it will not

be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing to do so. It will generally be sufficient to tell the jury that the guilt of the accused must be established beyond reasonable doubt and, where it is helpful to do so, to tell them that they must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence.

As I have said, the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact – every piece of evidence – relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

58. I turn now to consider the evidence in respect of the DNA on ExP4, ExP5 and ExP9.

59. In relation to the DNA evidence I proceed on the following basis :

1. I have to be satisfied beyond all reasonable doubt that the NISK sample was correctly taken from AM, correctly processed, and that the DNA profile obtained therefrom was the correct profile for him.

2. In relation to each charge I have to be separately satisfied beyond all reasonable doubt that there was DNA on the seal of each envelope in ExP4, ExP5 and ExP9. That the sample from each of the envelopes was correctly taken and processed and that a DNA profile was obtained, and that each such profile was the correct profile for the envelope that it related to.

3. In the event that there was any reasonable doubt about any of the steps taken in relation to obtaining the profile in relation to any of the envelopes then I should exclude that evidence from my considerations.

4. In relation to this DNA evidence I take the view that it is similar to what is necessary in relation to identifying a particular item found as being a particular drug. Each step is a link in the chain. If there is any break in the chain (which can't be remedied) then the court can't safely proceed further.

5. I then have to be satisfied that the DNA extracted from ExP4 matched the DNA of AM in the NISK sample.

6. I then have to be satisfied that the DNA extracted from ExP5 matched the DNA of AM in the NISK sample.

7. I then have to be satisfied that the DNA extracted from ExP9 matched the DNA of AM in the NISK sample.

8. If I am satisfied of 6, 7 and/or 8, then the only inference I can draw from that is that AM could not be excluded and therefore it was possible that AM was the sender (*Green* a decision of NSW CCA of 26 March 1993; *R v Pantoja* (1996) 88 A.CrimR 554 @ 578).

9. The matching results cannot, in the absence of other evidence, prove beyond all reasonable doubt that AM was the person responsible for sending ExP4, ExP5 and/or ExP9 (ruling of Riley J in the case of *Sultan* on 17 October 2002, where he cited as authority for that *R v Pantoja* (supra) and *R v GK* (2001) 53 NSWLR 317).

10. That if I conclude there was a mismatch or no match or there was a reasonable possibility of such mismatch or no match between any of the profiles in ExP4, ExP5 or ExP9 and that of the NISK of AM then

the DNA is to be treated as excluding AM from complicity in the charge to which that possible mismatch or no match relates (Australian Criminal Trial Directions (Butterworths) at 3-800-16-5).

60. Whilst I proceed on the basis that this represents the current law as I understand it to be, and I therefore will apply it as I am obliged to do, I feel the need to express some disquiet. My personal view (for what it is worth) is that the courts are right to approach any new scientific development with some reservations until it is firmly established and accepted. DNA was in that category, but it has now been around for some time and is more readily accepted. One problem that remains in the mind of the courts appears to be around the size and make-up of the data bases used to form the basis of the statistical "probability" evidence which is given to the courts. Hence, in the case of *Pantoja* (supra) the court was dealing with a defendant charged (in part) with the rape of his wife's sister where the only evidence against him was DNA from semen taken from the victim and her clothing. The defendant was a member of a subgroup of South American Indians known as Quechua Indians. There was no representative of that subgroup within the database used (not surprisingly). Whilst there was other evidence (notably evidence of a different DNA test done which excluded the defendant as the man who had ejaculated into the victim's vagina) which could explain the decision in that case, the proposition (set out as basis number 8 above) appears to have been adopted as one of universal application, rather than limited to the unusual facts in that case.

61. Further, if one accepts that "every person, with the exception of identical twins, has DNA which is unique" (Dr Angela Van Daal, article "DNA profiling" in Australian Lawyer, volume 31, Number 8, September 1996), and I know of nothing to indicate anything to the contrary, then the issue doesn't really arise at all. Clearly every person in the world has not had their DNA analysed, and it is therefore impossible to prove this statement conclusively one way or the other. As more and more persons are tested the

statement gains more weight (unless of course a match is found, in which case it is blown away).

62. To my mind, the courts should concentrate on the adequacy of the sample and the correctness of the testing. If both of those are properly established (and there is nothing to cast a reasonable doubt upon it) then the courts should not be too troubled to conclude that it was a particular person whose DNA was on the particular item. Then the attention should turn to the possibility of how the item with the DNA on it could have gotten there in ways that might be consistent with the defendant's innocence. Unfortunately history has shown that there have been dishonest police who have resorted to false verbal confessions, planting evidence at a crime scene etc in order to gain a conviction against a particular person. Hence the courts do need to be ever vigilant. However, the risk is that statements of general application might be seen as casting doubt on DNA evidence itself rather than upon the real issue which is whether the presence of the defendant's DNA at the scene proves that he committed the actual offence with which he has been charged without the need for any other evidence.

63. In my view, there would be cases where it can and should. Each case should depend upon it's own facts. The more unlikely that particular evidence could be planted (such as semen swabbed from a sexual assault victim, who had been in no sexual relationship with the defendant) then the more readily a finding of guilt could be made in the absence of any reasonable hypothesis consistent with innocence. I will leave that issue and return to the case at issue. As I have said, I will apply the law as I have stated it above being the law as I currently believe it to be.

EXHIBIT P4

64. In relation to this exhibit I make the following findings on the evidence before me:

- The envelope was received at the Darwin mail centre on 25 February 1999 for postal delivery in accordance with the addressee details thereon.

- The envelope was received at the Katherine Police station and opened by administration clerk Bronwyn Palmer on 26 February 1999. Inside the envelope she found two pieces of paper with typing on them. She perused the contents and was shocked by them. She took the envelope and two pieces of paper directly to Hofer.

- Hofer received the envelope and two pieces of paper from Palmer on 26 February 1999.

- The two pieces of paper forming part of ExP4 were inside the envelope forming part of ExP4 at the time it was opened by Palmer. It was the complete contents of ExP4 which were handed to Hofer by Palmer on 26 February 1999.

- Hofer formed the view that he needed to treat it as an exhibit and gave ExP4 to Detective Sergeant Evans sometime between 26 February and 2 March 1999.

- Evans conveyed a number of exhibits including ExP4 from Katherine to the forensic section in Darwin on 2 March 1999. Evans handed ExP4 to Natalie Best.

- Best placed ExP4 into the exhibit room on 2 March 1999 having recorded it on the system.

- Best handed it to Joy Kuhl (who I accept as an expert in forensic biology who is able to give evidence of expert opinion on DNA) on 3 March 1999.

- Kuhl screened (screening involved doing a wet swab of the seal using little pieces of cotton tape moistened with sterile water, followed by a

dry swab with similar unmoistened cotton tape. The swabs were placed into a sterile tube which was sealed with a snap lid, labelled and placed into a tray in the forensic freezer) the adhesive portion of the envelope forming part of ExP4 on 3 March 1999, and returned the whole of the exhibit back to Best on 4 March 1999.

- On 4 March 1999 Kuhl took the tray of sterile tubes (including the one referred to immediately above) from the freezer and performed an extraction (by subjecting the sample in the tube to a chemical resin treatment to release the DNA, suspending the resin in a buffer, performing various washing procedures, boiling the sample in a water bath)

- On the same day and after the extraction was complete Kuhl set the extracted sample up for amplification in the thermo-cycler (which allows the selected loci of DNA to copy themselves again and again so that there is hopefully enough to detect) and started the process (at the end of which the tube of amplified product is returned to the forensic refrigerator).

- On 6 March 1999 Carmen Eckhoff (who I accept as an expert in forensic biology who is able to give evidence of expert opinion on DNA) took the amplified sample out of the refrigerator (along with the rest of the tray of samples) and placed it in the gene-scanner (an automated genetic analyser which runs 49 samples, each taking about 28 minutes, over a period in excess of 24 hours) and started the process after performing checks on the first 3 control samples of the run to ensure all functioning properly.

- On 9 March 1999 Eckhoff took the results from the gene-scanner and used the geno-typer to analyse the result. The result was the profile page referring to biology item 9 forming part of ExP19. Each profile produces three separate lines of results in blue, green and black (for the yellow

dye). Each coloured line concentrates on three distinct sites (making a total of nine sites) plus in the green result it also identifies the sex gene (which should therefore eliminate about one half of the available population).

- On 12 March 1999 Kuhl checked the results and satisfied herself that it was correct.

- The results for the DNA on the envelope for this exhibit were:

Blue site one – D3- 15/16

Blue site two – VWA- 16/16

Blue site three – FGA- 22/24

Green site one – sex – XY (therefore male)

Green site two – V8 - 11/14

Green site three- D21- 30.2/32.2

Green site four- D18- 15/15

Black site one- D5- 12/12

Black site two- D13- 12/12

Black site three-D7- 8/10

65. I therefore find that that was the relevant DNA profile of the person who sealed the envelope to Hofer forming part of ExP4. I further find on the evidence that the police had no idea who might have sent ExP4 at any time relevant to the DNA extraction and profiling process (or indeed at any time during 1999) and therefore the result obtained is unaffected by any reasonable possibility of police attempting to "fit-up" AM.

EXHIBIT P5

66. In relation to this exhibit I make the following findings on the evidence before me:

- The envelope was received at the Darwin mail centre on 25 February 1999 for postal delivery in accordance with the addressee details thereon.

- The envelope was received at the Berrimah Police Centre and delivered unopened to Sodoli on 26 February 1999 (and not on the 25th as Sodoli initially said in his evidence). The evidence of Sodoli in relation to the receipt of the envelope was not very impressive and was questionable, especially given the evidence of usual procedure given by Daulby, Hofer, and Palmer. One might wonder why Sodoli's mail would seem to be treated differently to other police officers. However, his evidence was unchallenged and there is not sufficient reason to reject it as untrue.

- Inside the envelope he found the two pieces of paper with typing on them. He perused the contents.

- The two pieces of paper forming part of ExP5 were inside the envelope forming part of ExP5 at the time it was opened by Sodoli.

- Sodoli formed the view that he needed to treat it as an exhibit and gave ExP5 to Detective Senior Sergeant Kerr on 26 February 1999.

- Kerr handed ExP5 to Natalie Best in the forensic section on 26 February 1999.

- Best recorded ExP5 on the system.

- Best handed it to Joy Kuhl (who I accept as an expert in forensic biology who is able to give evidence of expert opinion on DNA) on 26 February 1999.

- Kuhl screened (screening involved doing a wet swab of the seal using little pieces of cotton tape moistened with sterile water, followed be a dry swab with similar unmoistened cotton tape. The swabs were placed into a sterile tube which was sealed with a snap lid, labelled and placed into a tray in the forensic freezer) the adhesive portion of the envelope forming part of ExP5 on 1 March 1999, and returned the whole of the exhibit back to Best on 1 March 1999.

- On 4 March 1999 Kuhl took the tray of sterile tubes (including the one referred to immediately above) from the freezer and performed an extraction (by subjecting the sample in the tube to a chemical resin treatment to release the DNA, suspending the resin in a buffer, performing various washing procedures, boiling the sample in a water bath).

- On the same day and after the extraction was complete Kuhl set the extracted sample up for amplification in the thermo-cycler (which allows the selected loci of DNA to copy themselves again and again so that there is hopefully enough to detect) and started the process (at the end of which the tube of amplified product is returned to the forensic refrigerator).

- On 6 March 1999 Carmen Eckhoff (who I accept as an expert in forensic biology who is able to give evidence of expert opinion on DNA) took the amplified sample out of the refrigerator (along with the rest of the tray of samples) and placed it in the gene-scanner (an automated genetic analyser which runs 49 samples, each taking about 28 minutes, over a period in excess of 24 hours) and started the process after performing checks on the first 3 control samples of the run to ensure all functioning properly.

- On 9 March 1999 Eckhoff took the results from the gene-scanner and used the geno-typer to analyse the result. The result was the profile page

referring to biology item 4 forming part of ExP19. Each profile produces three separate lines of results in blue, green and black (for the yellow dye). Each coloured line concentrates on three distinct sites (making a total of nine sites) plus in the green result it also identifies the sex gene (which should therefore eliminate about one half of the available population).

- On 12 March 1999 Kuhl checked the results and satisfied herself that it was correct.

- The results for the DNA on the envelope for this exhibit were:

Blue site one – D3- 15/16

Blue site two – VWA- 16/16

Blue site three – FGA- 22/24

Green site one – sex – XY (therefore male)

Green site two – V8 - 11/14

Green site three- D21- 30.2/32.2

Green site four- D18- 15/15

Black site one- D5- 12/12

Black site two- D13- 12/12

Black site three-D7- no result

67. I therefore find that that was the relevant DNA profile of the person who sealed the envelope to Sodoli forming part of ExP5. I further find on the evidence that the police had no idea who might have sent ExP5 at any time relevant to the DNA extraction and profiling process (or indeed at any time

during 1999) and therefore the result obtained is unaffected by any reasonable possibility of police attempting to "fit-up" AM.

EXHIBIT P9

68. In relation to this exhibit I make the following findings on the evidence before me:

- The envelope was probably received at the Darwin mail centre on 25 February 1999 (at the same time as ExP4 and ExP5, as I find that they were most likely to have been posted at the same time, by the same person) for postal delivery in accordance with the addressee details thereon.

- The envelope was received at the Berrimah Police Centre on 26 February 1999. It was opened by a person unknown, but I find that it was opened in accordance with the usual police procedure that applied at the time.

- Later on 26 February 1999 the envelope and two pieces of paper forming the whole of the exhibit were delivered opened to Daulby by a person who Daulby could not recall.

- Daulby perused the envelope and the two pieces of paper.

- It was argued by Ms Farmer that without hearing from the person who opened the envelope and every person who may have handled it until it was passed to Daulby then the court could not be satisfied that the two pieces of paper forming part of ExP5 were inside the envelope forming part of ExP5 at the time it was first received and opened. There would be considerable force to this submission if this were the only envelope received. However, one of the pieces of paper was addressed in bold type to Daulby and followed a very similar pattern to similar documents in ExP4 and ExP5. Further, the second sheet of paper was to all intent and purposes identical to a sheet contained in ExP4 and ExP5. On the

evidence I have no doubt (let alone any reasonable doubt) that the two sheets of paper forming part of ExP9 were in the relevant envelope at the time it was sealed, posted, received and opened.

- Daulby formed the view that he needed to treat it as an exhibit and gave ExP9 to Senior Constable Ruth Evans on 26 February 1999. There was some confusion on the evidence as to whether the items were given to Thatcher, but I am satisfied that they were not. I find that what Thatcher was given by Daulby on 26 February 1999 was documents of a not dissimilar nature received by a Peter Murphy.

- Evans handed ExP9 to Natalie Best in the forensic section on 26 February 1999.

- Best recorded ExP9 on the system and then returned the two sheets of paper to Evans for fingerprint examination.

- Best handed the envelope forming part of ExP9 to Joy Kuhl (who I accept as an expert in forensic biology who is able to give evidence of expert opinion on DNA) on 26 February 1999.

- Kuhl screened (screening involved doing a wet swab of the seal using little pieces of cotton tape moistened with sterile water, followed be a dry swab with similar unmoistened cotton tape. The swabs were placed into a sterile tube which was sealed with a snap lid, labelled and placed into a tray in the forensic freezer) the adhesive portion of the envelope forming part of ExP9 on 26 February 1999, and returned the whole of the exhibit back to Best on 1 March 1999.

- On 4 March 1999 Kuhl took the tray of sterile tubes (including the one referred to immediately above) from the freezer and performed an extraction (by subjecting the sample in the tube to a chemical resin treatment to release the DNA, suspending the resin in a buffer,

performing various washing procedures, boiling the sample in a water bath).

- On the same day and after the extraction was complete Kuhl set the extracted sample up for amplification in the thermo-cycler (which allows the selected loci of DNA to copy themselves again and again so that there is hopefully enough to detect) and started the process (at the end of which the tube of amplified product is returned to the forensic refrigerator).

- On 6 March 1999 Carmen Eckhoff (who I accept as an expert in forensic biology who is able to give evidence of expert opinion on DNA) took the amplified sample out of the refrigerator (along with the rest of the tray of samples) and placed it in the gene-scanner (an automated genetic analyser which runs 49 samples, each taking about 28 minutes, over a period in excess of 24 hours) and started the process after performing checks on the first 3 control samples of the run to ensure all functioning properly.

- On 9 March 1999 Eckhoff took the results from the gene-scanner and used the geno-typer to analyse the result. The result was the profile page referring to biology item 1 forming part of ExP19. Each profile produces three separate lines of results in blue, green and black (for the yellow dye). Each coloured line concentrates on three distinct sites (making a total of nine sites) plus in the green result it also identifies the sex gene (which should therefore eliminate about one half of the available population).

- On 12 March 1999 Kuhl checked the results and satisfied herself that it was correct.

- The results for the DNA on the envelope for this exhibit were:

Blue site one – D3- 15/16

Blue site two – VWA- 16/16

Blue site three – FGA- 22/24

Green site one – sex – XY (therefore male)

Green site two – V8 - 11/14

Green site three- D21- 30.2/32.2

Green site four- D18- no result

Black site one- D5- 12/12

Black site two- D13- 12/12

Black site three-D7- no result

69. I therefore find that that was the relevant DNA profile of the person who sealed the envelope to Daulby forming part of ExP9. I further find on the evidence that the police had no idea who might have sent ExP9 at any time relevant to the DNA extraction and profiling process (or indeed at any time during 1999) and therefore the result obtained is unaffected by any reasonable possibility of police attempting to "fit-up" AM.

70. I turn now to consider the evidence in relation to the taking of a buccal swab from AM and how this came about.

71. Superintendent Charmaine Quade of the Australian Federal Police gave evidence by video conference. She first met AM on 4 May 2000 when he had been flown from Darwin to speak to them concerning some allegations that he wished to pass on. She formally spoke to AM on 5 May 2000 when he made allegations of a number of serious matters concerning Shane Stone (which are not relevant to the issues herein). However, AM also alleged that Daulby, Sodoli, Hofer and a former police officer Denver Marchant were involved in importing drugs from Papua New Guinea to Cairns in 1998. In

re-examination Quade was asked what AM had said was the source of the allegations, and he replied "dreams and visions".

72. AM also gave some documents to Quade. Some of these documents were tendered in evidence and became ExP2 and ExP3.

73. ExP3 is an A4 sheet of paper with the heading "**The Untouchables**" printed in large bold print sideways across the page. Under a heading "key players" appears the names of Daulby, Hofer (misspelt "Hoeffer"), Sodoli and Marchant.

74. ExP2 is also an A4 sheet of paper with the heading "**The Untouchables**" printed sideways across the page. Under this there are 4 boxes (one blacked out). The three remaining boxes have typing in them. Next to the blacked out box there is handwriting. The handwriting reads:

> John Daulby – AC.
>
> The boss of the group.
>
> I suspect the man who brought them together.

75. It is interesting to note that AM believed Daulby was "the boss" and the author of ExP9 believed he was "the brains".

76. In one of the boxes was typed the following:

> 2. Bert Hoeffer – Sup Div 4
>
> Largest Div in NT. Large scale dope growing area. Rapid rise through ranks for no apparent reason.

77. It is interesting to note that the person who addressed the envelope forming part of ExP4 addressed it to Hofer at "division four", which division no longer existed at the time the mail was sent according to the evidence before me.

78. In one of the other boxes was typed the following:

4. Matt Sodoli – Snr Sgt

Henchman. Unpleasant man. Dangerous. (Also their weakest link.)

79. It is interesting to note that in his record of interview (ExP1) the following was said:

> CHAPMAN: And do you agree that complaint you laid with the Federal Police you mentioned Senior Sergeant Sodoli approaches Mrs On at her home (inaudible) and threatened to keep quiet by placing a gun in her mouth.
>
> AM: Yes.

And the clear reference to "gun" in "mouth" appears in ExP5.

80. It is interesting to note that the allegations AM made to Quade about Daulby, Hofer and Sodoli related expressly to drugs. ExP4 and ExP5 refer expressly to "drugs". ExP9 refers to shutting down "my plants", which I take to be some reference to either plants of the botanical variety or structures of the drug manufacturing variety. Further, the only three serving NT police officers named in ExP2 and ExP3 were the recipients of the offending mail. There is no evidence to suggest that any other police officers received any similar mail. There is also evidence to suggest that at least two other persons named on ExP3 (Stone and Murphy) received some unusual mail about the same time.

81. I find that sometime prior to May 2000 AM had concerns about Daulby, Hofer and Sodoli in relation to a belief in his mind that they were all involved in an illegal drug operation going back to about 1998. He believed that they were members of a group who had been brought together by Daulby. There are some clear parallels between this and the contents of ExP4, ExP5 and ExP9.

82. As a result of the matters complained of to the Federal Police the possibility of AM being involved in ExP4, ExP5 and ExP9 is raised in my mind. I find

that Daulby was made aware of the allegations to Federal police by AM for the first time in the year 2000 when he was informed of the matter by the Commissioner and given the opportunity of reading the file. As a result of that Daulby identified AM as a possible suspect in relation to the current charges for the first time, and directed that investigations be undertaken.

83. As a result of those investigations AM's computer was seized (nothing was found to implicate him); he took part in an electronically recorded record of interview on 30 August 2000 (in which he denied any knowledge or involvement with this offending); he consented to providing a buccal swab (which he did voluntarily on 30 August 2000); and documents allegedly written by AM were seized on 14 November 2002 and again on 29 November 2002 to assist in handwriting analysis.

84. In relation to the buccal swab I make the following findings:

- At the conclusion of the record of interview Detective Senior Constable Mark Stringer handed a new swab to AM and instructed him to rub it around his teeth and gums and then place it on the table to dry. Stringer observed AM follow these instructions correctly in relation to two separate swabs. Stringer then sealed and marked both swabs in their tubes, placed them into the envelope provided, sealed it and completed the identifying details (this was the non-intimate sample kit).

- Stringer gave the completed non-intimate sample kit (NISK) to Elizabeth McKeown in the forensic science section on 30 August 2000.

- McKeown recorded the NISK on the system and placed it into the forensic laboratory freezer.

- McKeown handed the NISK to Eckhoff (who I accept as an expert in forensic biology who is able to give evidence of expert opinion on DNA) on 31 August 2000.

- Megan Hibble (who I accept as an expert in forensic biology who is able to give evidence of expert opinion on DNA) screened (screening involved opening the sealed envelope, opening one of the swabs and cutting it) one swab from the NISK on 31 August 2000, and completed the paperwork.

- On 1 September 2000 Hibble performed an extraction on the cut swab in order to extract DNA.

- On the same day and after the extraction was complete Hibble set the extracted sample up for amplification in the thermo-cycler (which allows the selected loci of DNA to copy themselves again and again so that there is hopefully enough to detect) and started the process (at the end of which the tube of amplified product is returned to the forensic refrigerator).

- On 2 September 2000 Eckhoff placed the amplified sample in the gene-scanner (an automated genetic analyser which runs 49 samples, each taking about 28 minutes, over a period in excess of 24 hours) and started the process after performing checks on the first 3 control samples of the run to ensure all functioning properly.

- On 5 September 2000 Hibble took the results from the gene-scanner and used the geno-typer to analyse the result. The result was the profile page referring to biology item 12 which became ExP20. Each profile produces three separate lines of results in blue, green and black (for the yellow dye). Each coloured line concentrates on three distinct sites (making a total of nine sites) plus in the green result it also identifies the sex gene (which should therefore eliminate about one half of the available population).

- According to ExP18 Julie Stitfold (nee Garratt) allegedly checked the results at some time, but I have heard no evidence from her and do not know what the result of that was. However, Kuhl gave evidence before

me that she checked the results herself before she wrote her report (which report for some reason was never sought to be tendered before me).

- The results for the DNA on the NISK of AM were:

Blue site one – D3- 15/16

Blue site two – VWA- 16/16

Blue site three – FGA- 22/24

Green site one – sex – XY (therefore male)

Green site two – V8 - 11/14

Green site three- D21- 30.2/32.2

Green site four- D18- 15/15

Black site one- D5- 12/12

Black site two- D13- 12/12

Black site three-D7- 8/10

85. I therefore find that that was the relevant DNA profile of AM. A person's DNA profile does not change with time. It is a constant, and hence it's usefulness as an identifying tool. It is open to anyone to have their DNA checked independently in order to verify that a particular profile is in fact theirs. There is nothing on the evidence before me to cast any doubt (let alone any reasonable doubt) that the DNA profile extracted from the NISK sample was anything other than the true and correct DNA profile of AM.

86. Unlike in the case of *Pantoja* (supra) there is no evidence of any conflicting DNA results or analysis. Kuhl compared the result in ExP20 with each of the three results in ExP19. Her evidence was that the NISK provided a perfect DNA profile across all 9 loci plus sex. I respectfully agree with and accept

that evidence. She went on to say that the probability of that DNA profile was far rarer than one in 200 million of population. She offered to give the exact calculated figure, but this was not asked for. She did not claim to be a statistician (although statistics are a not insignificant part of her work and she has qualified as a trainer in statistics).

87. As to the database used the evidence from Kuhl is that it is 1878, but down as low as 1874 for some loci. It was not specific to any ethnic background otherwise (as she correctly pointed out) you would be starting with a preconception as to who may have committed a particular crime. On her evidence the size and generality of the database is far more than adequate for statistical analysis. There is no evidence to refute this, and no evidence on which I could have any reasonable doubt about this evidence. That is not to say that a court blindly follows expert evidence, as to do so would be to abrogate it's responsibilities. In any case involving expert evidence (whether in the criminal or civil area) there are a number of requirements which a court always has in the back of it's mind and which I accept and have applied in the instant case, namely:

- The first requirement for the admission of expert evidence is that a relevant field of expertise should exist. A field of expertise has been described as an organised branch of knowledge (*Cooper v Bech (No2)*(1975) SASR 151 @ 153). In the end this is a question of fact.

- Not only must a field of expertise exist, the witness must be adequately qualified in it. The obvious qualifications are formal academic or professional qualifications. But assuming that a field of expertise is established, it should not matter in principle how the witness acquires his expertise in it.

- The object in calling an expert is usually to have him express an opinion. In part, that opinion will be based on facts ascertained by

him or put before him as a basis for his opinion. Normally, he will disclose those facts before being permitted to express his opinion. Those facts must be proved by the party who calls him by admissible evidence. Otherwise, the opinion must be excluded or rejected, unless the variance between the posited facts and the facts ultimately proved does not deprive the opinion of it's basis, or does no more than weaken the force or weight of the opinion (*Paric v John Holland* (1984)2 NSWLR 505). (As to the aforementioned three propositions they are taken from an article "admissibility of opinion evidence" written by JJ Doyle QC when he was then the solicitor general for South Australia and published in (1987) 61 ALJ 688).

- A court ought not to act on an opinion, the basis for which is not explained by the witness expressing it (*Steffen v Ruban* (1966) 84WN (Pt1)(NSW) 264). Unless the process of inference by which an opinion is reached is expressed in a manner which permits the conclusions to be scrutinised and a judgment made as to it's reliability, the opinion can carry no weight (*Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370). -(see: *Pollock v Wellington* (1996) 15 WAR 1).

- On general principle, if the court does not know or cannot understand the process of reasoning, if it were to adopt the opinion, it would abdicate it's function of deciding the case in favour of the expert (*R v Jenkins; Ex Parte Morrison* (No2) (1949) ArgusLR 468 @ 475-6, *Samuels v Flavel* (1970) SASR 256 @ 260) – see article by Von Doussa J "difficulties of assessing expert evidence" published in (1987) 61 ALJ 615 @ 618.

88. No evidence to challenge any of the expert evidence (including handwriting to which I will turn next) was called. In saying that no evidentiary burden is

cast upon the defence, and the prosecution must prove all necessary elements of the offence beyond all reasonable doubt.

89. On the evidence I am satisfied that based upon the DNA evidence AM could not be excluded as the person who sealed the envelope forming part of ExP4. Based upon the evidence of Quade and the exhibits tendered through her I find that AM had a motive, the ability and the opportunity to prepare and send ExP4. Further, the similarity between the layout, the names, and the drug theme between ExP2, ExP3 and ExP4 re-assure me that they had a common author. Likewise, the striking similarities between ExP4, ExP5 and ExP9 leave me satisfied beyond all reasonable doubt that they had the same source or origin. This additional evidence is sufficient to satisfy me that AM was that source or origin. I am therefore satisfied beyond all reasonable doubt that AM is guilty of charge 3, and I find him guilty thereof.

90. In relation to the DNA results on ExP5 only 8 loci plus sex produced a result. In this regard therefore a complete profile was not obtained. If the 9th locus had been plotted and was different to the NISK result then AM would have been excluded positively. The absence of a result at a particular locus does not have the same consequence. Rather, it goes to the statistical probability of the two samples coming from the same individual. The less loci that are able to be plotted must reduce the statistical probability, and coincidentally increase the possibility of a reasonable doubt. A point would be reached where the number of loci were so reduced that the evidence would have little (and may be excluded as more prejudicial than probative) or no weight (in which case it should be excluded altogether).

91. The 9 different loci that are chosen for plotting purposes are hyper-variable from person to person.

92. The sex gene established that the DNA belonged to a male. The 8 loci that were able to be plotted were identical to the results from both ExP4 and the NISK of AM. Despite the lack of a result for one locus Kuhl said that the

DNA profile was still rarer than at least one in 200 million of the population. She offered to provide the exact calculated figure, but this was not asked for. I accept her evidence.

93. On the evidence I am satisfied that based upon the DNA evidence AM could not be excluded as the person who sealed the envelope forming part of ExP5. Based upon the evidence of Quade and the exhibits tendered through her I find that AM had a motive, the ability and the opportunity to prepare and send ExP5. Further, the similarity between the layout, the names, and the drug theme between ExP2, ExP3 and ExP5 re-assure me that they had a common author. Likewise, the striking similarities between ExP4, ExP5 and ExP9 leave me satisfied beyond all reasonable doubt that they had the same source or origin. This additional evidence is sufficient to satisfy me that AM was that source or origin. I am therefore satisfied beyond all reasonable doubt that AM is guilty of charge 1, and I find him guilty thereof.

94. In relation to the DNA results on ExP9 only 7 loci plus sex produced a result. In this regard therefore a complete profile was not obtained. If either of the 8th and 9th loci had been plotted and were different to the NISK result then AM would have been excluded positively. That was not the case. The sex gene established that the DNA belonged to a male. The 7 loci that were able to be plotted were identical to the results from ExP4, ExP5 and the NISK of AM. Despite the lack of a result for two loci Kuhl said that the DNA profile was still rarer than at least one in 200 million of the population. She offered to provide the exact calculated figure, but this was not asked for. I accept her evidence.

95. On the evidence I am satisfied that based upon the DNA evidence AM could not be excluded as the person who sealed the envelope forming part of ExP9. Based upon the evidence of Quade and the exhibits tendered through her I find that AM had a motive, the ability and the opportunity to prepare and send ExP9. Further, the similarity between the layout, the names, and

the drug theme between ExP2, ExP3 and ExP9 re-assure me that they had a common author. Likewise, the striking similarities between ExP4, ExP5 and Exp9 leave me satisfied beyond all reasonable doubt that they had the same source or origin. This additional evidence is sufficient to satisfy me that AM was that source or origin. I am therefore satisfied beyond all reasonable doubt that AM is guilty of charge 2, and I find him guilty thereof.

96. I turn now to consider the handwriting evidence. In addressing this aspect the same comments that I made above concerning expert evidence apply.

97. During November 2002 Brendan Dowd was the acting chief executive officer for the Darwin City Council. At that time AM was also an employee of the council, working as a public relations manager. Dowd was due to attend the ABC for an interview about car parking. He spoke to AM and he provided Dowd with a briefing note (ExP11). On 14 November 2002 Detective Senior Constable Mark Stringer obtained a search warrant (ExP7) to obtain documentation containing handwriting of AM from the Council. Stringer attended upon Dowd with the search warrant on the same day. Dowd showed ExP11 to AM, who confirmed to Dowd that it was his handwriting. Dowd gave ExP11 to Stringer in satisfaction of the search warrant.

98. I find beyond all reasonable doubt that ExP11 was written by AM.

99. On 29 November 2002 Stringer obtained a further search warrant (ExP8) to obtain documentation containing handwriting of AM from the Council. Stringer attended upon Dowd with the search warrant on the same day and advised that they wished to search AM's work-station. Dowd then spoke to AM to advise him of the situation. AM did not wish to remain during the search and voluntarily left the area. Dowd took Stringer and Detective Senior Constable Nicholson to AM's work station. They conducted a search. They located a number of items which they seized, namely:

- A 2002 Mooloolaba Triathlon entry form in the name of AM, and purportedly signed by him (ExP12);
- A quill A4 spiral notebook titled “marketing/advertising” on the front (ExP13); and
- An A4 foolscap lined writing pad (ExP14).

100. In relation to ExP13 page 55 is headed “Mooloolaba” and has a number of entries which appear to relate to possible accommodation options in that area and the cost of the same. At the bottom of that page it refers to “triathlon: weekend”. Pages 61 to 65 contain a number of financial/budget calculations of a private nature, and within those entries there are a number of references to “AM pay”, “AM’s pay”, “AM”. On page 80 there are entries which appear to relate to times of various individuals and “team” and “AM” for various triathlon events. Where a person’s name is written their first name is also written in every case except for the entry relating to “AM”. There are other entries related to triathlon matters on pages 33, 34, 35, 36, 37. On page 52 there is an entry that reads “Update – AM. CV.”

101. In relation to ExP14 this is clearly a working pad with all sorts of short entries, and doodles.

102. I find beyond all reasonable doubt that ExP12 and the entries in ExP13 are in the handwriting of AM. I find that the handwriting in ExP14 appears to be very similar to the handwriting in ExP11, ExP12 and ExP13, and given that it was also located at the work-station of AM I find beyond all reasonable doubt that it was also written by him. In relation to all of these documents there is no evidence to suggest that any of them might not have been written by AM.

103. Christopher Anderson gave evidence for the prosecution. He is a forensic document examiner. He examined the handwriting on the envelopes forming part of ExP4, ExP5 and ExP9 (the questioned documents) as well as the

documents aforementioned being ExP11, ExP12, ExP13 and ExP14 (the specimen documents). He provided a report which became ExP15A. Within that report he set out his curriculum vitae as annexure A. Based upon his years of experience and training I accept him as a suitable person to give expert evidence on handwriting. I note that in *Bennett and Another v The Queen* ((1998) 144 FLR 311) the WA Court of Criminal Appeal held that a person may be viewed as being an expert in an area of skill or knowledge by virtue of nothing more than his or her practical experience in a field.

104. Anderson conducted a microscopic and macroscopic examination of the handwriting on both the questioned and specimen documents. He conducted a comparative examination of the entries in both sets of documents using the software program "write-on". He stated that for an identification of handwriting two criteria must be satisfied, these being that:

(a) there are sufficient individual features, in combination, that preclude the accidental coincidence of the writing of another person;

(b) there are no significant or fundamental differences.

105. Anderson went on to say that there were different levels of conclusion that could be drawn and the strongest of these was "conclusive evidence". In the instant case he advised that there was conclusive evidence that the writer of the handwritten entries on the specimen documents wrote the handwritten entries on the questioned documents. Even though there was no evidence to challenge this evidence it still requires closer analysis. A court is not bound to act on the evidence of expert opinion, even where it is unchallenged (*Davie v Magistrates of Edingurgh* (1953) S.C. 34).

106. Anderson expressed the view that a person's handwriting is unique. He said that we all start with a copy-book style, which we move away from over time. Also, a person's own handwriting modifies over time as well. In addition, a person cannot write with machine like precision and hence there

is variability within a person's own handwriting. I agree with and accept this evidence. It makes good logical sense.

107. Anderson went on to say that it is for these reasons that a good specimen base is required. It was for this reason that he was unable to form any opinion based solely on ExP2 and ExP11 as his only specimen base, and hence further specimens were gathered by police at his request. This was a prudent thing to do and suggests that Anderson is reasonably thorough and not quick to jump to conclusions, which is a good thing in an expert.

108. Anderson had an initial look at the writing looking at the general features of it. He then looked at the specimen writing to satisfy himself that he had sufficient to enable a comparison. He then compared the specimen writing to satisfy himself that in fact it all came from the same person. This again is a prudent thing to do. As he correctly said you don't assume that the specimens are in fact from the same source, you have to satisfy yourself of this to make sure there are no contaminated specimens. He satisfied himself of these matters.

109. He closely looked at the writing under a microscope (after he had determined which features appeared important by comparing the scanned documents using the "write-on" program) making notes of what he observed. He looked at the way letters were formed noting such things as where a letter commenced from, ended at, where the pressure was applied and lifted during the formation etc. He did the same looking at various letters in combination to see if they joined, and if so, how.

110. In relation to the "write-on" software program, he explained how that is used. He scanned the questioned and specimen documents into the computer. He then brought this into "write-on". The text of all the documents was then typed in (so that the computer knew where to find anything searched for on the scanned images). He was then able to do a search of a letter, a combination of two or more letters, a word etc and the computer would then

sort and display all the responses from the scanned documents so that they could be viewed together and compared.

111. Anderson correctly noted from the specimen documents that AM had a range of variation in the way that he formed particular letters and combinations of letters. Hence he did not necessarily stick to the same form each time. For example, in ExP11 when writing the letter “i” he usually has a dot placed above the body of the letter, but sometimes he doesn’t appear to use anything (for example in the word “believe” on the third last line), and on other occasions (for example in the word “is” on line 9, “complain” on line 13, “will” on line 18, “in” on line 19, “examine” on line 20, and “committee” on line 21) he uses a circle instead of a dot. This variation is repeated throughout the other specimen documents. The variation between using a dot and sometimes using nothing appears in ExP4 and ExP9. The variation between using nothing and also using a circle appears in ExP5.

112. In addition, it appears from the specimen documents that AM moves between a printing and cursive style as he writes (for example he uses a printing style upper case “A” or lower case cursive style “a” in the middle of words apparently at random throughout ExP13 - see page 25 for instance). The same variation appears on line 3 in ExP4 where “KATHERINE” is written in upper case and “Station” is written predominantly in lower case.

113. Anderson gave evidence as to how the letters B, R, A, E, F, G, I, K, M and S were formed. I generally accept his evidence on these matters. I was able to follow his evidence and note for myself the various matters that he directed the court’s attention to. For example, with the letter “A” I agree that in the specimen documents there were occasions when there was a foot at the completion of the letter to the right and there are similar instances in the questioned documents. Further with the letter “A” I agree that there are instances of no foot in both the specimen and questioned documents as well. Further with the letter “A” there are instances in both the specimen and

questioned documents where the cross bar goes on to run into and commence the next letter, and other occasions when it doesn't. In relation to the letter "E" this could be formed by 2, 3 or 4 strokes of the pen, but in the specimen documents AM appears to use 3 strokes and this is consistent with the questioned documents also. Likewise, there are instances in both the specimen and questioned documents when the top stroke of the "E" goes on to run into and commence the next letter, and other instances in both when it doesn't.

114. I agree with the evidence of Anderson that the range of variation in the specimen documents is also generally present in the questioned documents. I also agree with and accept his evidence that there was no significant or fundamental differences between the handwriting in the specimen documents and the questioned documents to exclude AM as the likely author of both.

115. I am satisfied beyond all reasonable doubt that the writing on the envelope forming part of ExP4 is that of AM. I therefore find beyond all reasonable doubt that AM addressed the said envelope. I am satisfied beyond all reasonable doubt that the writing on the envelope forming part of ExP5 is that of AM. I therefore find beyond all reasonable doubt that AM addressed the said envelope. I am satisfied beyond all reasonable doubt that the writing on the envelope forming part of ExP9 is that of AM. I therefore find beyond all reasonable doubt that AM addressed the said envelope.

116. I find on the evidence before me that the only rational inference is that it was AM who prepared and sent ExP4. I find on the evidence before me that the only rational inference is that it was AM who prepared and sent ExP5. I find on the evidence before me that the only rational inference is that it was AM who prepared and sent ExP9.

117. I further find that the circumstances are such as to be inconsistent with any reasonable hypothesis other than the guilt of AM in relation to each of charges 1, 2 and 3.

118. Section 166(2) of the Criminal Code states as follows:

> "It is a defence to a charge of a crime defined by this section to prove that making such a threat or causing it to be received was reasonable by the standards of an ordinary person similarly circumstanced to the accused."

AM has totally failed to prove this defence. There is nothing to suggest that there was any provocation by Hofer, Sodoli or Daulby towards him to cause him to react in this way, or any similar way. There is no evidence of any personal dealings with AM by any of the three recipients of the threats such as to explain in any way his nasty personal threat to them and members of some of their families. There is no evidence of any basis for any of the apparent beliefs that AM had concerning any of the three recipients. The threats were not sent on the sudden. He had to prepare them, address them and post them. He had more than sufficient time to not send them. Assuming that an ordinary person would have formed an adverse belief about Hofer, Sodoli and/or Daulby (and there is no evidence from which I could find that they could have, let alone would have) I would be satisfied beyond all reasonable doubt that no ordinary person would have sent ExP4, ExP5 or ExP9 on the evidence before me. Further, I am satisfied beyond all reasonable doubt that the sending of ExP4, ExP5 and EXP9 was not reasonable by the standards of an ordinary person similarly circumstanced to AM.

119. No other possible defence is raised or appears to be open on the evidence.

120. Even if the evidence of Quade (and/or the documents tendered through her) had not been before me I consider that the other evidence (DNA and handwriting) together would have been sufficient to prove all three charges against AM beyond all reasonable doubt. Further, even if the DNA evidence had not been before me I consider that the other evidence (of Quade and the documents tendered through her, and the handwriting evidence) together would have been sufficient to prove all three charges against AM beyond all

reasonable doubt. Further, even if the handwriting evidence had not been before me I consider that the other evidence (DNA evidence and the evidence of Quade and the documents tendered through her) together would have been sufficient to prove all three charges against AM beyond all reasonable doubt. However, if only one part of the evidence (DNA, handwriting, or of Quade and the items tendered through her) was before me then I would not have found it sufficient by itself to prove any of the charges beyond all reasonable doubt.

121. I find the defendant guilty of charges 1, 2 and 3.

122. I will hear both counsel on the question of sentence.

Dated this 23rd day of May 2003.

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D TRIGG
STIPENDIARY MAGISTRATE