

## Chapter 6

# Bradley Murdoch

**On 13 December 2005, Bradley Murdoch was convicted of the murder of Peter Falconio and of the assault of Joanne Lees**

### Timeline

14 July 2001: Peter Falconio shot dead around 7.30 pm on the Stuart Highway just north of Barrow Creek which is some 300 kilometres north of Alice Springs in the Northern Territory. Peter's partner, Joanne Lees, was abducted by the gunman, but managed to escape.

15 July 2001: between 12.38 am and 12.50 am a man and his vehicle were caught on CCTV at a Shell truck stop in Alice Springs some five hours after the Barrow Creek incident.

16 July 2001: Bradley Murdoch arrived in Broome, Western Australia at 4.00 am having covered a distance of 1,700 kilometres in 28 and a half hours travelling time. If Murdoch had travelled at 100 kph on the bitumen and 60 kph on the dirt it would have taken 23 hours, whereas at 90 kph and 50 kph it would have taken 27 hours.

22 July 2001: Melissa Kendall and Robert Brown purported to identify Peter Falconio as alive in Bourke, New South Wales.

7 August 2001: a photograph taken from the Shell truck stop video was published in *The Western Australian* newspaper which showed the person of interest to the police in connection with the murder of Peter Falconio.

28 August 2002: Bradley Murdoch arrested in South Australia on charges of rape and abduction of a 12-year-old girl and her mother. Bail was refused and Murdoch was held on remand awaiting trial.

10 September 2002: James Hepi, a former business partner of Bradley Murdoch's in running drugs between Sedan in South Australia and Broome

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

in Western Australia, interviewed by police. Hepi claimed Murdoch was the person in the Shell truck stop video.

10 October 2002: Joanne Lees recognised a photograph on the BBC website of a person who was a suspect for the murder of Peter Falconio as her assailant. Bradley Murdoch was the person in the photograph.

18 November 2002: Australian police officers visited Joanne Lees in England and requested Lees examine a photo-board containing 12 photographs. Lees picked out photograph 10 as being her assailant. Photograph 10 was a photograph of Bradley Murdoch.

11 November 2003: a South Australian jury found Bradley Murdoch not guilty on the rape and abduction charges. Murdoch immediately arrested on an interstate warrant for the murder of Peter Falconio and extradited from South Australia to the Northern Territory on 14 November 2003.

17 May 2004: Bradley Murdoch's committal hearing commenced in Darwin Magistrates Court before Magistrate Alasdair McGregor.

18 August 2004: Magistrate Alasdair McGregor ordered Bradley Murdoch to stand trial over the alleged murder of British backpacker Peter Falconio, finding there was sufficient evidence for the case to proceed to trial.

March 2005 to December 2005: Martin CJ, the trial judge, made a series of rulings as to the admissibility of a number of pieces of evidence contested by the defence. These rulings included identification evidence involving spontaneous identification of a photograph on the internet, subsequent photographic identification on a photo-board, dock identification and dog identification; expert evidence involving DNA Low Copy Number technique (LCN) and the possibility of contamination; the taking of photographs for the purpose of further investigations; expert evidence and facial and body mapping/photo-comparison; and possession of weapons and habit of carrying weapons. In each case, Martin CJ admitted the evidence. The defence also applied for a mistrial based on the likely knowledge of jurors of previous charges and acquittal of the defendant and the direction given to the jury. The application for a mistrial was refused.

17 October 2005: Bradley Murdoch's trial began. Murdoch pleaded not guilty to murdering Peter Falconio and assaulting and attempting to kidnap Joanne Lees. The Crown case was based on: (1) Lees's positive identification of Murdoch as her abductor; (2) identification of Murdoch as either the man in the Shell truck stop video or who looked like the man in the video by James Hepi and by others who knew Murdoch, such as Ms Beverley

## BRADLEY MURDOCH

Allan, Mr Brian Johnston and Mr Brett Duthie, as well as evidence given by an expert witness in facial and body mapping, Dr Meiya Sutisno, who testified that the person in the video was Murdoch; (3) Murdoch's DNA on Joanne's T-shirt and on the cable ties used to bind Joanne's hands.

13 December 2005: Bradley Murdoch convicted of Peter Falconio's murder and assaulting Joanne Lees. Murdoch sentenced to life imprisonment with a non-parole period of 28 years.

December 2005: Richard Shears published *Bloodstain: The Vanishing of Peter Falconio* with New Holland Publishers.

January 2006: Sue Williams published *And Then the Darkness: The Disappearance of Peter Falconio and the Trials of Joanne Lees* with ABC Books.

5 October 2006: Joanne Lees published *No Turning Back* with Hodder & Stoughton Ltd.

10 January 2007: the Northern Territory Court of Criminal Appeal (Angel ACJ, Riley J and Olsson AJ) dismissed Bradley Murdoch's appeal against his conviction and sentence. While the Court of Criminal Appeal found that the evidence of body mapping, or facial and body mapping, was not admissible, the court held there was no miscarriage of justice because the other admissible evidence established Murdoch's guilt beyond reasonable doubt.

21 June 2007: the High Court of Australia (Gleeson CJ, Hayne and Callinan JJ) refused Bradley Murdoch's application for special leave to appeal to the High Court as it could see no error in the reasoning of the Northern Territory Court of Criminal Appeal and the proposed grounds of appeal had insufficient prospects of success.

2009: Robin Bowles published *Dead Centre: The Inside Story of the Peter Falconio Mystery* with Five Mile Press.

2015: Dean Mildren published *R v Murdoch: The Falconio Case — A Study in Identification and Circumstantial Evidence* with LexisNexis.

13 July 2016: the Northern Territory *Parole Amendment Act 2016* was assented, which had the effect of inserting s 4B(4) into the *Parole Act 1971* (NT): 'The Parole Board must not make a parole order in relation to the prisoner unless the Parole Board considers that the prisoner has cooperated satisfactorily in the investigation of the offence to identify the location, or the last known location, of the remains of the victim of the offence.'

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

This means that unless Bradley Murdoch reveals the location of Peter Falconio's body, he will never be released from prison as he was sentenced to life imprisonment.

## Overview

The murder of Peter Falconio and the abduction of Joanne Lees, two English tourists, in a remote and isolated part of outback Australia on 14 July 2001 created enormous public and media interest in both England and Australia. Peter Falconio's body has never been found. This triggered speculation he was still alive, and his disappearance was part of a staged insurance fraud. Joanne Lees came under suspicion as either Peter's killer or as being complicit in his faked disappearance. One of the reasons for the speculation and suspicion was an alleged sighting on 22 July 2001 of Peter Falconio by Melissa Kendall and Robert Brown in Bourke, New South Wales.

And what of the man who was eventually charged and convicted of Peter Falconio's murder and the abduction of Joanne Lees? Bradley Murdoch lived a life at the edge of society. A man with previous serious criminal convictions and a self-confessed drug smuggler who had fallen out with his business partner, James Hepi. Hepi pointed the finger at Murdoch to police as the man in the Alice Springs Shell truck stop video taken about five hours after Falconio was shot dead on the Stuart Highway near Barrow Creek some 300 kilometres north of Alice Springs. Murdoch was dramatically arrested on an interstate warrant in a South Australian District Court building following his acquittal for the rape of a 12-year-old girl and the abduction of the girl and her mother. Murdoch was then extradited to the Northern Territory to face a murder trial.

Unlike the other murder trials covered in this book, the victim was not a family member or a partner, but a complete stranger, and the victim's body was never found. So, what motivated Bradley Murdoch to kill Peter Falconio? Murdoch is a strange man and had chosen a bizarre lifestyle, walking on the dark side. However, while Murdoch was making money through drug trafficking, the lifestyle he was leading was devoid of life. Murdoch spent considerable time driving vast distances, often, according to James Hepi's evidence, affected by drugs to keep himself awake, and with only his dog for company.

Murdoch enjoyed power, control and was meticulous in his planning. Murdoch knew the made and unmade roads of the Northern Territory intimately. Murdoch was a man with the necessary equipment and knowledge to live off road for days. This was essential because Murdoch was

## BRADLEY MURDOCH

running drugs between Sedan in South Australia and Broome in Western Australia, and he needed to be difficult to track. Arguably, at some point, possibly after Murdoch saw Falconio and Lees together in Alice Springs as discussed below, Murdoch formed a plan that raised the stakes from drug running to crimes against the person, challenging Murdoch's knowledge of the country and his bushman's skills against the police.

Whether a spontaneous or a premeditated plan, Murdoch appears to have found his 'mark' when he happened to be around a vehicle repair shop in Alice Springs when Peter Falconio and Joanne Lees arrived complaining their VW Kombi van had an exhaust problem. Murdoch followed the couple up the Stuart Highway and used his knowledge of the VW Kombi van's previous exhaust problem to convince Peter Falconio to pull over. Murdoch's plan was working after he had killed Peter Falconio and abducted Joanne Lees, but unravelled after Joanne was able to escape, albeit while still handcuffed with Murdoch's home-made cable ties.

Murdoch underestimated Joanne's athletic ability. However, Murdoch did not expend any great effort in trying to recapture her because he was confident that Joanne would not be able to identify him as the entire murder and abduction scenario had taken place in the dark. Murdoch simply recalibrated his plan. Joanne was now irrelevant, as due to the isolation of the murder location, Murdoch calculated it would be some time before anyone would be able to raise the alarm, given the location where Murdoch had chosen to strike.

The revised plan now became one of Murdoch distancing himself from the scene of Peter Falconio's murder and the blood stain on the Stuart Highway, which Murdoch covered with dirt. Murdoch needed to dispose of Peter's body and be travelling on the Tanami Track to Halls Creek and then onwards to Broome before the Northern Territory police could set up roadblocks. This Murdoch was able to achieve. However, because Joanne had escaped, Murdoch's plans were upset and he needed to refuel at the Alice Springs Shell truck stop, where he was captured on video camera. When Murdoch's former business partner, James Hepi, contacted police and identified Murdoch as the person in the video, the police investigation gathered momentum, eventually leading to Murdoch's arrest in November 2003, some two years and five months after Peter Falconio was murdered.

## Background

Peter Falconio (born 1972) and Joanne Lees (born 1973) were both brought up in the town of Huddersfield in Yorkshire, England. The pair

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

lived together in Brighton between 1997 and 2000 while Peter completed his degree in building and construction. In November 2000, the couple left England to travel around the world, and arrived in Australia in January 2001. In May 2001, after buying an old orange VW Kombi van, Falconio and Lees began their journey around Australia, arriving in Alice Springs in the Northern Territory, a town in the centre of Australia equidistant between Adelaide and Darwin, on Wednesday 11 July 2001.

### ***The premeditation hypothesis***

The VW engine had begun to splutter as Falconio and Lees had headed north from Kings Canyon to Alice Springs. This was found to be caused by the VW running on only three cylinders and meant when the accelerator pedal was lifted, the VW backfired. On arrival in Alice Springs, the pair took the VW to Desert City Motors, a repair workshop. The following day Falconio and Lees returned to collect the repaired VW, which had been worked on by mechanics Rod Smith and Jason Scott. Joanne noticed there was a dog in the workshop's yard and after inquiry learnt it was a red heeler. Near the workshop was parked a white Toyota four-wheel drive. When the news of Peter's disappearance and Joanne's abduction broke, the coincidence of her descriptions of the car and the dog caused Jason Scott to get in touch with the police.

So, did the white Toyota four-wheel drive belong to Murdoch? Was it just a coincidence that the gunman had come alongside the VW and waved the couple down, indicating that there was something wrong with the rear of their vehicle, convincing Peter Falconio that the exhaust might be playing up again and to pull over on the Stuart Highway near Barrow Creek in darkness? Did Murdoch conceive his plan of attack after working out that the VW's exhaust problem might serve two purposes: to provide an opportunity to persuade Peter to pull over and to cover the noise of the gunshot? Peter told Joanne to stay in the VW and went to talk to the gunman who had parked behind them. Peter came back and asked Joanne to rev the engine. So, when Joanne heard the bang, she thought it was the exhaust backfiring and not a gunshot. Was this a coincidence or inside knowledge gained at the Alice Springs repair workshop?

There is some support for a hypothesis of premeditation. Two separate motorists observed an orange VW Kombi van and a white Toyota four-wheel drive both travelling north on the Stuart Highway some 20 to 30 minutes apart.

## BRADLEY MURDOCH

The author suggests that Murdoch was biding his time until dark, knowing that he could easily catch the VW Kombi van with his more powerful, modified Toyota engine on a gun-barrel-straight road. Murdoch's plan was flexible to the extent it did not matter exactly when he caught up to the VW Kombi van because Falconio and Lees were unsuspecting, and the nearest habitation was Wycliffe Well some 95 kilometres north of Barrow Creek. So, unless Falconio and Lees changed their plans and camped off the Stuart Highway out of sight of passing traffic, it seems the couple were sitting ducks, as Murdoch had planned from the moment he identified the pair as his 'mark'.

There is further support for the premeditation hypothesis in the form of evidence that Murdoch changed the configuration of his four-wheel drive utility as soon as he arrived back in Broome on 16 July 2001, using parts he had previously ordered. Brett Duthie, who had employed Murdoch at his engineering business in Broome, recalled Murdoch had 'ordered all the parts for the new mesh sides before 2001'. True, Murdoch was always tinkering and changing his vehicle, which he regarded as his home, but was it merely coincidence that these changes to his vehicle were made immediately after Murdoch returned to Broome from Alice Springs? Or, when Murdoch decided to put his plan into operation after finding his 'mark' in Alice Springs, did Murdoch do so safe in the knowledge that he had all the parts to change the appearance of his vehicle as soon as he returned to Broome? While this latter possibility is speculative, nevertheless the evidence suggests that Murdoch used the ordered parts to change the appearance of his vehicle after committing the murder and the assault in order to conceal for possible future identification purposes the similarities between his reconfigured vehicle and his vehicle at the time the offences were committed.

So, what were the movements of Falconio and Lees on that fateful Saturday, 14 July 2001 before they were ambushed at 7.30 pm on the Stuart Highway just north of Barrow Creek? The pair attended the Camel Cup won by a camel called 'Bazza', after which they visited the Red Rooster fast food outlet, and then left Alice Springs at about 4.00 pm travelling north.

Joanne's attendance at the Red Rooster food outlet sometime between 3.00 pm and 4.00 pm was to become important at Murdoch's trial. Grant Algy, Murdoch's defence counsel, was confronted with the Crown's evidence that Murdoch's DNA had been found on Joanne's T-shirt. Algy sought to suggest that there could be an innocent explanation such as Murdoch brushing past Joanne while he was being served at Red Rooster.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Starting off late in the afternoon in winter in the red centre is not advisable given the real danger of hitting animals at night such as kangaroos, cattle, horses and camels, but Falconio and Lees were on an outback adventure and discounted the risks. In fairness, one risk few travellers would have factored into their calculations was being followed by someone with malice aforethought towards them.

## The fatal interception and abduction

Falconio and Lees arrived at Ti Tree, some 194 kilometres north of Alice Springs just as the sun was setting. The pair bought petrol with the fuel receipt timed at 6.21 pm and watched the sunset before heading back up the Stuart Highway. Barrow Creek is 88 kilometres north of Ti Tree. When Peter Falconio and Joanne Lees departed Ti Tree, with Peter driving having taken over from Joanne, they had no inkling that Murdoch's fatal interception was to occur about an hour later.

The exact location of the spot on the side of the Stuart Highway where the bloodstain that contained Peter Falconio's DNA was found was 10 kilometres north of Barrow Creek and some 100 kilometres north of Ti Tree. The bloodstain was still visible 12 months later. This was where the driver of the Toyota four-wheel drive vehicle came up alongside the VW Kombi van, and indicated to Falconio that he should pull over by pointing to the rear of the Kombi van as though there was a problem. Once Peter decided to stop, get out and move to the rear of the Kombi van where the driver of the Toyota had parked, Joanne's nightmare began. After a discussion with the other man, all unsuspecting, Peter returned to the driver's side of the Kombi van and asked Joanne to move across from the front passenger seat and rev the engine. Tragically, Peter's request to Joanne unwittingly signalled his own death because after Peter went back to the rear of the Kombi van, the other man shot him dead in an execution style murder. All unaware that the bang she had heard was actually a gunshot and not a backfire, Joanne was confronted by the other man coming to the driver's door of the Kombi van holding a silver pistol in his right hand. From this moment onwards, the question would become whether the Crown could prove beyond reasonable doubt that Peter Falconio's executioner was Bradley Murdoch.

At this point, the gunman had a choice. He could execute Joanne immediately or tie her up at gunpoint. The gunman chose the latter course, presumably intending to kill her later as Joanne had seen him close up



BRADLEY MURDOCH

and could recognise him as Peter's murderer because the driver's door had been left open and the interior light was on. The gunman had to move quickly, as although it was dark and the Stuart Highway had little traffic, the gunman could not be sure when another vehicle would pass by, and he had a dead body to dispose of lying on the ground behind the Kombi Van. In his planning, the gunman must have calculated that Joanne would not resist a large man holding a gun. To Joanne's great credit, she exhibited considerable courage in refusing to docilely allow the gunman to tie her up but resisted him as best she could. Had Joanne not showed sufficient resistance to prevent the gunman from gagging her with tape and properly tying her legs together, the gunman's heinous plan would have been completely fulfilled. This story would have ended in the mystery of two English travellers disappearing in the Australian outback.

So, what happened next when the gunman came alongside Joanne sitting in the driver's seat of the Kombi van holding a silver pistol? The gunman turned off the engine and Joanne moved over to the front passenger seat. With the pistol pointed at her head, Joanne was told to put her head down and her hands behind her back so that the gunman was able to fasten them with homemade handcuffs consisting of tape and cable ties. In his closing address to the jury, the Crown Prosecutor, Rex Wild, QC, described the subsequent sequence of events after Joanne's hands had been tied behind her back:

Door open, thrown out. In some way pushed out. Hits the ground. Damage to her knees, elbows, in that instant or in the struggle which follows immediately. He's sitting on top of her backwards trying to fasten her legs. She's fighting. And he only half gets her tied up in the legs ... She's up on her feet. Walks her to the car. She's screaming. She's pushed in the front.

These staccato sentences refer to the gunman taping Joanne's legs, hitting her, lifting her up, frogmarching her ahead of him holding her neck, while Joanne screamed out for help to Peter. Joanne saw no sign of Peter when they passed behind the Kombi van because of the gunman's hold on her neck. After they arrived at the gunman's utility, Joanne put up further resistance when the gunman unsuccessfully attempted to gag her by applying tape over her mouth, so he resorted to putting a sack over her head. Joanne was forced into the passenger seat of the gunman's utility. While this was happening, the sack was dislodged from Joanne's head. The interior light of the utility was on and Dean Mildren in his book

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

*R v Murdoch: The Falconio Case* described, at p 3, what Joanne saw when the sack was dislodged:

Lees saw the dog sitting in the driver's seat. She described the dog as of medium build, chunky and with a patchy black or dark brown and white colouring. She also saw the man's face at a distance of about 18 inches, or 45 cm.

Joanne's description of the dog was an issue raised by Murdoch's defence counsel, Grant Algie, as Murdoch's dog, Jack, was a Dalmatian and Joanne's earlier descriptions of the gunman's dog to the police differed from her description in court. Algie also sought to suggest Joanne's testimony was a fabrication because the dog did not react to the sudden arrival of Joanne with a sack over her head. Of more importance, was the fact that according to Joanne she was able to see the gunman at very close quarters with the aid of the interior light of the utility.

The Northern Territory Court of Criminal Appeal, in *Murdoch v R* [2007] NTCCA 1, at para [7] sub-para (17), summarised what happened after Joanne had been pushed into the front passenger seat of the gunman's utility:

Ms Lees said that she eventually found herself in the rear of the utility. Initially she thought that this might possibly have been by means of moving through a gap between the front two seats. Later, she said that it was possible that her assailant had pushed her through the side canvas canopy. She was clear that she did not walk around to the rear of the vehicle and get in from there.

Naturally, Grant Algie sought to exploit this inconsistency at Murdoch's trial as evidence that Joanne was inventing her abduction, while Rex Wild, QC, tried to dismiss any differences in Joanne's account as entirely natural given the trauma Joanne was undergoing, as evidenced by her exchange with the gunman when she was in the back of his utility. In his summing up to the jury, Rex Wild, QC, focused on the gunman's threat to kill Joanne:

Now while she's in the back the man comes to the back of the vehicle, she's making a lot of noise. 'Where's Pete, what have you done with Pete, what are you going to do with me, are you going to rape me?' and he says, 'Shut up or I'll shoot you'. Now you could imagine the feeling of this girl at this time.

## BRADLEY MURDOCH

The jury, which comprised six men and six women, had the benefit of seeing and hearing Joanne give evidence and be cross-examined in the witness box over four days. As Grant Algie and Rex Wild each completed their respective summing up, the jury would have been reflecting on their own assessment of the truth of Joanne's evidence. Did this exchange between Joanne and Murdoch (as the man Joanne had identified as her abductor) ring true?

Previously in the trial, when Rex Wild, QC, was taking Joanne through her evidence in chief, the trial judge, Brian Martin, the Chief Justice, had asked her how she had felt during the events of the night of 14 July 2001.

'The jury has not had the experience of being stopped in the middle of the night on a dark road in the middle of the outback', said Martin CJ. What was Joanne thinking when the silver pistol was pointed at her as she sat in the driver's seat of the VW Kombi van after the gunman had come up from the rear of the Kombi van and stood in the frame of the open door?:

I kept thinking, 'this isn't happening to me, I can't believe this is happening'. I felt alone, I kept shouting for Peter. I thought I was going to die.

As will be examined in detail, the Crown had other strong evidence implicating Murdoch in the murder of Peter Falconio, but Joanne's evidence was crucial. If the jury believed her version of events, particularly Joanne's belief she was going to die, then the jury would agree with Rex Wild that any inconsistencies in Joanne's story were entirely to be expected under the extreme circumstances she faced. Joanne must have realised as she lay bound in the back of the gunman's utility that Peter was in all probability dead and the gunman was not going to let her survive after whatever he was planning in the very near future was over. Joanne had to escape or die.

After the gunman had told Joanne to shut up and he wouldn't shoot her, the gunman walked away. Joanne screamed out, 'Have you shot my boyfriend? Have you shot Pete?'. The gunman returned to the back of the utility and answered, 'No', after which Joanne heard the gunman walk down the side of the utility on the gravel. At the trial, Martin CJ asked Joanne, 'And then you slid out of the rear of the vehicle?:

After I'd asked him if he was going to rape me and if he shot Pete, I just got some energy from somewhere and some inner strength, and my focus was escaping and that's what I just concentrated on, just getting out of there.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Joanne then sat up, moved to the rear of the utility, swung her legs over the back and ran into the bush in a westerly direction. Following her escape from the back of the utility, Joanne hid in the surrounding scrub which had become thicker the further she ran away from the highway.

Dean Mildren in his book described, at p 3, what happened next:

While hiding, she heard the man moving about and saw a light from a torch, after which she heard vehicle doors opening and closing and an engine starting up. She also saw headlights and saw the vehicle move off in a southerly direction. Lees stayed where she was. After a time she heard a crunching noise, as if someone was moving about, and she later heard the noise of a vehicle door or doors and the sound of something being dragged. She again heard a vehicle door closing. The engine then started and the vehicle drove off, heading south.

The Crown case was that while Joanne was hiding in the scrub, the accused shifted the VW Kombi van and left it in the scrub on the western side of the Stuart Highway in an endeavour to conceal it, and then drove south to Alice Springs in his utility.

During this time, Joanne successfully brought her bound hands from behind her back to her front. In an unsuccessful attempt to slip her hands from the homemade handcuffs, Joanne managed to extract some lip balm from the pocket of her shorts, bit the lid off and rubbed the lip balm on and under the handcuffs. Subsequently, the police located both the lid and the tube of lip balm in the scrub.

## The rescue of Joanne Lees

Five hours later, when Joanne had waved down a passing truck, the two occupants of the truck saw Joanne's wrists were bound by cable ties at her front. In Joanne's evidence in chief, she told the court that the accused, Bradley Murdoch, had bound her hands behind her. The position of Joanne's bound hands assumed significance at Murdoch's trial.

Defence counsel, Grant Algie, as part of his attack on Joanne's credibility, sought in his cross-examination of Joanne to cast doubt on her claim that she had been able to slip her bound hands behind her back to her front while Joanne had hidden in bushes after escaping from her abductor. Joanne Lees volunteered to demonstrate her claim, but Grant Algie declined her offer, hoping to leave the doubt hanging unanswered in the court room. Effectively, Grant Algie was 'willing to wound, yet afraid to strike'.

## BRADLEY MURDOCH

However, the presiding judge, Martin CJ, intervened pointing out that Mr Algie had challenged the credibility of the witness. His Honour said Joanne Lees was entitled to the opportunity to demonstrate the truth of her claim. Following Martin CJ's authorisation of a demonstration, Joanne Lees sat, in the well of the court, hands tied behind her back with a necktie. Joanne stood and instantly and effortlessly brought her hands to her front. There was an audible collective intake of breath, and everyone present realised the defence had just suffered a major blow.

Joanne's courtroom demonstration was to occur in October 2005 over four years after she had hidden in the scrub after escaping from the gunman's utility. Joanne's version of events after she heard the utility drive away was given in an interview with Martin Bashir for a British TV show in 2002. The extract below can be found at the 13.02 minute mark of the interview:

I really wanted to come out but didn't know what to do. Best to just stay there, hidden really well and I felt safe in my hiding place. I came out a few times but got back in. I never thought it was safe. I just thought Pete was close by, injured, and I wanted to get to him and get help. That was my motivation, otherwise I would have stayed there till daylight. I walked towards the road but couldn't see it. Then I saw the white line. I walked across the road and fell in some grass on the other side of the road. I couldn't see anything. A few cars passed but I didn't feel brave enough and didn't know who would be driving those cars. Could have been him.

Joanne's instinct to remain hidden meant that when she finally decided to flag down a road train it was 12.45 am on 15 July 2001. The man in the Shell truck stop video was captured on CCTV at around 12.30 am, some 15 minutes before Joanne waved down a road train. As a result, subsequent police roadblocks were far too late to intercept anyone travelling on the Tanami Track towards Halls Creek and then onwards to Broome.

The driver of the road train was Vincent Millar and his co-driver, asleep in the bunk behind the seats, was Rodney Adams. Joanne had jumped out in front of the road train some 20 kilometres north of Barrow Creek with her hands still manacled together above her head. Millar had swerved to avoid Joanne and initially thought he may have hit her. Millar woke up Adams and together they examined the underside of the road train. At this point, Joanne appeared and sought their help. Millar and Adams then cut away the manacles and the duct tape around her legs and in her hair. After Joanne explained what had happened to her, the two men disconnected

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

the prime mover in an attempt to find Peter and the two vehicles (the VW van and the utility) but called off the search when Joanne told them her abductor was armed.

Before departing, Millar noticed a small pyramid of dirt by the side of the Stuart Highway. Subsequently, it was discovered that the dirt covered a bloodstain which contained Peter Falconio's DNA. The Crown case at trial was that Murdoch had sought to disguise the evidence of the shooting under the dirt. Having reconnected the trailers to the prime mover, the trio of Millar, Adams and Lees arrived at the Barrow Creek Hotel at about 2.00 am on 15 July 2001.

On arrival, Millar rang the police station at Alice Springs while Adams looked after Joanne's injuries in the prime mover because Joanne was reluctant to leave the cabin. However, Joanne was eventually persuaded to come into the Barrow Creek Hotel and given a room. Police from Tennant Creek arrived at the Hotel at about 4.20 am and police from Alice Springs arrived at about 6.30 am. Millar accompanied police at about 7.00 am to the location where Joanne had flagged down the road train and discovered the VW Kombi van hidden in the scrub some distance off the Stuart Highway. The party also found the pile of dirt which Millar had noticed earlier, and in the daylight the pile of dirt was seen to be covering a large stain of what appeared to be blood.

As to Joanne's physical appearance, Millar, Adams and Leslie Pilton, the publican of the Barrow Creek Hotel, noticed Joanne had sustained red marks on her wrists, swelling around her face, and scratches and abrasions on her body. All three men expressed the view that Joanne was in shock. When Joanne was examined at Alice Springs Hospital by Dr Wright at around 6.40 pm on 15 July, Dr Wright found Joanne had multiple abrasions to both her knees and elbows and scratches on an ankle and her lower back. All these injuries were consistent with Joanne's story of what had happened to her at the hands of her abductor, such as being pushed out of the passenger seat of the VW Kombi van and being punched in the right temple. Scratches and abrasions were also consistent with Joanne having run into the scrub in the dead of night desperately trying to avoid her captor. Subsequently, the police took photographs of Joanne's injuries in the clothes she was wearing at the time of her abduction, as well as photographing the handcuffs and duct tape which Millar and Adams had commendably retained after freeing Joanne from her bonds.

Most convincing was the evidence Joanne had been in such a state of shock that she was prepared to take a great risk in being run over by the

BRADLEY MURDOCH

road train as she tried to flag down the road train being driven by Millar and Adams. By her behaviour, from the moment Joanne decided to flag down the road train to her arrival at the Barrow Creek Hotel when she had to be coaxed out of the prime mover's cabin, either Joanne was a brilliant actor or she had undergone a traumatic experience.

In view of the supporting evidence that Peter Falconio was dead in the form of the blood stain containing Peter's DNA on the side of the Stuart Highway and the hidden Kombi van, the sightings of the white utility following the Kombi Van, and the injuries suffered by Joanne Lees, it is difficult to understand how the media came to speculate this whole incident was some kind of insurance fraud. Perhaps it was the absence of a body or the purported sighting of Peter Falconio in Bourke that fuelled this media speculation. But objectively, it was clear a major crime had been committed.

## The identification of the gunman

Joanne had been afforded two opportunities to have a clear view of the gunman who had made no attempt to disguise himself. The first opportunity was when the gunman came up to the driver's side of the Kombi van after Joanne had heard the loud bang. The driver's door was open and the interior light was on. The gunman had pushed Joanne into the passenger seat when he turned off the Kombi's engine. The second opportunity occurred when the gunman forced Joanne into the passenger seat of his utility and the sack over her head fell off. Again, the interior light was on and the distance between Joanne and the gunman was a mere 18 inches or 45 cm. Therefore, it was imperative for the police to obtain a good description of the gunman from Joanne.

After Joanne had been examined at Alice Springs Hospital by Dr Wright on 15 July, she assisted police in putting together a 'comfit' (Computer Facial Identification Techniques) likeness of her abductor. The process involved is one where an individual feature such as the eyes, nose, mouth and hair are selected from a comfit book and assembled on a computer. The Queensland Police Service in *OPM* Issue 98 Public Edition (7 February 2024) at 2.11.8 Comfit identification (Computer Generated Images) has explained the comfit method to assist the investigative process in these terms:

Comfit is a facial-composite system developed to allow a qualified operator to create a facial likeness of an offender using a set of facial features chosen by a witness from an online database. The selected facial

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

components are assembled and manipulated by operators into a facial likeness for: (i) viewing by the witness for subsequent amendment at the direction of the witness if required; and (ii) for adoption by the witness when a satisfactory likeness is achieved.

Dean Mildren noted in his book, at p 6, that Joanne ‘was not entirely happy with the result because the hair was not quite right and she could not find a hair configuration in the comfit book that was entirely accurate’. Nevertheless, out of necessity, the police released the comfit image of Joanne’s abductor to the media on 16 July 2005.

To supplement the identification process, the police also engaged the services of an artist, David Stagg, to draw likenesses of the suspect’s white utility, the silver gun and the dog, based on Joanne’s descriptions.

Having been too late to set up effective roadblocks, the police got their first lead in the case when at 9.15 pm on the evening of 15 July police visited the Shell truck stop, which is located on the northern side of Alice Springs and is between 5 and 10 kilometres from the turn-off to the Tanami Track, to check the previous 24 hours video footage.

The police had been given a description of the person of interest as being male sporting a moustache and wearing a cap, jacket and trousers, who was driving a white four-wheel drive utility with a canopy. The video footage contained images of a person and a vehicle that matched the general descriptions given to police. The vehicle was shown parked at the pumps and the person of interest entering and leaving the shop. The video timer showed the person entering the shop at 00.45 am and exiting at 00.47 am on 15 July 2001. The person had paid in cash for fuel and goods. Unfortunately, but probably deliberately, the rear number plate of the utility was not visible in the video footage, and the overall quality of the video was poor and grainy. However, the console operator who served the person in the video, Andrew Head, gave police a description of the person which was at least consistent with Joanne’s description of her abductor. Police took advantage of their first break in the case by circulating the relevant portion of the video footage to the media in early August 2001 for the purpose of seeking assistance from anyone who might recognise the person of interest.

On 7 August 2001 a photograph taken from the Shell truck stop video was published in *The Western Australian* newspaper which showed the person of interest to the police in connection with the murder of Peter Falconio. As a result of the photograph’s publication, Bradley Murdoch had a discussion in Broome with James Hepi, his business partner in their



## BRADLEY MURDOCH

marijuana drug-running business. Hepi believed Murdoch was the person of interest in the video, but Murdoch denied Hepi's accusation. Critically, the publication of the photograph along with parts of the video being later broadcast on television, created a rift between Hepi and Murdoch which ultimately led to Hepi and Murdoch ending their business association, ostensibly over a dispute in relation to missing money and marijuana.

So, when, on 16 May 2002, Hepi was arrested in Western Australia based on 'information received' for possession of 3.7 kg of marijuana found in Hepi's utility, Hepi strongly suspected Murdoch was the police source. Through his solicitor, on 31 May 2002, Hepi spoke to his arresting officer, Detective Sergeant Peter Jenal, in relation to the disappearance of Peter Falconio. Jenal passed this information on to Detective Sergeant Chalker who was coordinating the task force investigating the Falconio case in Alice Springs for the Northern Territory Police.

Dean Mildren, at p 9, has suggested that Hepi's information to Jenal and then to Chalker on 10 September 2002, when Hepi was formally interviewed, can be fairly assumed to correspond to Hepi's evidence at trial, as there was no suggestion in his cross-examination that Hepi's evidence departed from his statement to police, which was to the following effect:

Hepi claimed that Murdoch admitted to him that he was the person shown in the video. He also claimed that Murdoch carried a handgun in his vehicle, hidden in the front door or inside a camping table in the tray. When shown the video of the CCTV footage he said he recognised Murdoch and his vehicle.

In July 2002, Hepi received a suspended sentence having pleaded guilty to the possession charge. As will be seen, it was necessary for Martin CJ to warn the jury about the dangers in accepting the veracity of Hepi's evidence because of his unreliability as a witness. Hepi had been engaged in a criminal enterprise with Murdoch; Hepi had a grudge against Murdoch as he believed Murdoch had informed on him to the police; and Hepi had received a suspended sentence after cooperating with police on the Falconio investigation.

At trial, as will be seen, evidence was given for the Crown by an expert witness in facial and body mapping, Dr Meiya Sutisno, who testified that the person in the video was Murdoch. The defence challenged Dr Sutisno's opinion by calling its own expert witnesses, Professor Spring and Professor Henneberg, who considered the poor quality of the video precluded a positive identification of Murdoch based on the factors Dr Sutisno took into account.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

However, evidence from witnesses who knew Murdoch, such as Ms Beverley Allan, Mr Brian Johnston and Mr Brett Duthie, and who were giving recognition evidence rather than identification evidence, all believed the man in the video looked like Murdoch. This trio of witnesses based their opinion on his body posture, his stance, manner of walking and mannerisms. Implicit in that recognition, or as Ms Allan put it, 'When you know somebody, you know someone', was Murdoch's height. Bradley Murdoch is 6 foot 5 inches (196 cm) tall. The average height of an Australian male is 5 foot 9 inches (175.6 cm) tall. Only 1% of Australian men born in 1958 (the year Murdoch was born) are 6 feet 5 inches tall or above that height. Thus, the man who appeared in the video belonged to a very small group of Australian men. Added to this, the man in the video had a utility that strongly resembled Murdoch's Toyota four-wheel drive vehicle. The Crown led evidence at trial from Mr David Ringrose, a forensic officer with the Australian Federal Police, that the driver of the white Toyota utility depicted in the Shell truck stop video images is of a height consistent with Murdoch's height of 6 feet 5 inches (196 cm).

## Bradley Murdoch's movements

While Joanne Lees was being rescued by Millar and Adams, what were Bradley Murdoch's movements? At 4.00 am on 16 July 2001, Bradley Murdoch arrived in Broome, Western Australia, having covered a distance of 1,700 kilometres in 28 and a half hours travelling time if he was the man in the Shell truck stop video and had started at about 12.50 am on 15 July 2001. If Murdoch had travelled at 100 kph on the bitumen and 60 kph on the dirt it would have taken 23 hours, whereas at 90 kph and 50 kph it would have taken 27 hours. At trial, Murdoch maintained he was not the man in the Shell truck stop video and had commenced his journey from Alice Springs to Broome far earlier than 12.50 am on 15 July 2001. Murdoch also gave evidence that he had driven far slower than the speed the Crown case relied upon because the conditions were difficult on the Tanami Track, and he took regular breaks.

Shortly after his arrival back in Broome, police interviewed Murdoch regarding his movements between 14 and 15 July 2001. This was part of a wide sweep of four-wheel drive owners undertaken by various police forces on behalf of the Northern Territory police. So, right from the outset, Bradley Murdoch was on the police radar as a possible suspect. As events unfolded, Murdoch was to rise to the top of the police priority list of suspects.

## BRADLEY MURDOCH

Following Murdoch's arrival back in Broome on 16 July 2001, he arranged for a workshop, using parts he had previously ordered, to replace the canvas canopy on his utility with an aluminium covering made of wire mesh around the sides and back of the vehicle. This was just a routine utility reconfiguration until on 6 August 2001 the police released photographs of the suspected gunman taken from the Shell truck stop video. Naturally, numerous people closely examined those photographs, including Loi O'Dore, a Broome vehicle upholsterer. O'Dore was certain he recognised his work on the vehicle in the Shell truck stop photograph. When Murdoch visited O'Dore's workshop for further alterations to his vehicle, O'Dore put his suspicion to Murdoch, who acknowledged it might have been him as he had stopped to get petrol around that time.

If O'Dore was to be believed, Murdoch had made two damaging admissions. First, Murdoch did not challenge O'Dore's recognition of his own work. Secondly, contrary to Murdoch's later statements in court that he had started his journey from Alice Springs far earlier than 12.50 am on 15 July 2001, Murdoch acknowledged to O'Dore that it could have been him as he stopped to get petrol around the time shown on the video timer.

The police were steadily whittling down their field of suspects. Megan Rowe, an intelligence manager with the Alice Springs police, coordinated police efforts to collate information flowing in from the public following the release of the photographs of the suspected gunman. Some 75 'people of interest' emerged from the comparison of data, which was further reduced to around 30 people who matched up as a person of interest with a vehicle of interest. Once those who provided DNA samples or had alibis were eliminated; only one person (who had not provided his DNA) remained: Bradley Murdoch.

Obtaining and matching Murdoch's DNA to the blood on Joanne's T-shirt was to be the final piece of evidence in the Crown's case, but circumstances conspired to delay the Crown's brief of evidence because on 28 August 2002, Bradley Murdoch was arrested in South Australia on charges of rape and abduction of a 12-year-old girl and her mother. Bail was refused and Murdoch was held on remand awaiting trial.

On 11 November 2003, some 14 months after his arrest, a South Australian jury found Bradley Murdoch not guilty on the rape and abduction charges. Murdoch was immediately arrested on an interstate warrant for the murder of Peter Falconio and extradited from South Australia to the Northern Territory. So it was not until Murdoch arrived in the Northern Territory in November 2003, some two years and four months after Peter Falconio

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

disappeared, that a sample of Murdoch's DNA was able to be obtained by the police while Murdoch was held on remand in Berrimah Prison in Darwin awaiting trial. Murdoch's DNA was found to match a sample of blood taken from the back of Joanne Lee's T-shirt.

## Joanne Lees identified Bradley Murdoch as her assailant

On 10 October 2002, Joanne Lees was working in Sicily. A friend referred her to a BBC website article that had treated her favourably. For this reason, she accessed the article. In a photograph on the website, she immediately recognised as her assailant a person who was a suspect for the murder of Peter Falconio. Bradley Murdoch was the person in the photograph. The photograph showed Murdoch as clean shaven with short hair.

On 18 November 2002, Australian police officers visited Joanne Lees in England and requested Lees examine a photo-board containing 12 photographs. Lees picked out photograph 10 as being her assailant. Photograph 10 was a photograph of Bradley Murdoch. This photograph was taken in August 2002 after Murdoch's arrest on rape and abduction charges in South Australia and showed Murdoch with a full beard and moustache and with longer hair than in the BBC internet photograph.

The identification of Bradley Murdoch by Joanne Lees was challenged by the defence at trial, and was the subject of a ruling by Martin CJ, the trial judge, in *R v Murdoch* [2005] NTSC 75. Joanne Lees had given evidence in Murdoch's preliminary hearing in May 2004. The identification ruling was one of a number of rulings Martin CJ delivered in dealing with multiple challenges by the defence to the admission of various types of evidence sought to be adduced by the Crown. These will be examined in the next section.

Following Joanne Lees's identification of Murdoch as her assailant, in conjunction with the witnesses who believed Murdoch was the person in the Shell truck stop video, the Crown had a good circumstantial case against Murdoch. After Murdoch was extradited to the Northern Territory in November 2003, the Crown case became stronger when Murdoch's DNA was found to match the blood on Joanne's T-shirt.

Consequently, it was no surprise that, after Murdoch's lengthy committal hearing, which ran between May and August 2004, on 19 August 2004, Magistrate Alasdair McGregor ordered Bradley Murdoch to stand trial over the alleged murder of British backpacker Peter Falconio, finding there was

BRADLEY MURDOCH

sufficient evidence for the case to proceed to trial. The defence had been able to test the strength of the Crown case at the committal hearing, and so the stage was set for the trial to commence in 2005, but not without a battle royal, as the defence sought to have excluded, in the exercise of the trial judge's discretion, a number of pieces of evidence the Crown sought to have admitted.

## **The defence battle to have Crown evidence excluded**

A process called a *voir dire* (from the French *voir* to see and *dire* to say) occurs when one party challenges the admissibility of evidence the other party proposes to adduce. A *voir dire* is effectively a trial within a trial and almost always a *voir dire* occurs in the absence of the jury.

The matters raised by the defence in the *voir dire*, which required the trial judge, Martin CJ, to rule on each application, included identification evidence involving spontaneous identification of a photograph on the internet, subsequent photographic identification on a photo-board, dock identification and dog identification; expert evidence involving DNA Low Copy Number technique (LCN) and the possibility of contamination; the taking of photographs for the purpose of further investigations; expert evidence and facial and body mapping/photo-comparison; and possession of weapons and habit of carrying weapons. In each case, Martin CJ admitted the evidence. The defence also applied for a mistrial based on the likely knowledge of jurors of previous charges and acquittal of the defendant and the direction given to the jury. The application for a mistrial was refused.

### ***The defence challenges to the identification evidence given by Joanne Lees***

The defence challenged Joanne's identification of Murdoch on the internet, on a photo-board and in the dock. The basis for all three challenges was that the identifications were tainted, unreliable and that their probative value was outweighed by their prejudicial effect. In assessing the strength of the defence argument, it will be recalled that Joanne had two good opportunities to see Murdoch at close quarters with the aid of the interior lights of first the Kombi van and secondly Murdoch's utility. In *R v Murdoch* [2005] NTSC 75, at [45]–[46], Martin CJ first dealt with the internet identification:

Although the area was dark and the events traumatic, Ms Lees saw the offender from a very close position under light and for ample time to gain

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

a clear impression of the offender's features. While the circumstances of identification of the internet photograph were less than ideal, the evidence is capable of significant probative value. It was a spontaneous recognition of the person in the photograph. Whether that spontaneous recognition was reliable or whether the reliability was adversely affected by the circumstances, including the content of the article, are questions of weight for the jury.

In my view, the potential for unfair prejudice does not outweigh the probative value. It would not be unfair to admit the evidence which is legally admissible. I decline to exclude the internet identification in the exercise of my discretion.

Clearly, Martin CJ was guided in his decision to admit the internet identification by the significant probative value of the circumstances under which Joanne first saw Murdoch and by her spontaneous recognition of her assailant when she had originally accessed the article for another purpose. Of course, the question of the weight to be given to the internet identification was a matter for the jury.

Perhaps the final word on the subject of the internet identification should be left to Joanne Lees. In cross-examination, the following exchange took place:

Q: Did the article and the person being identified as a suspect influence you at all in your identification of that person.

A: No, I'd recognise him anywhere.

After all, as Joanne also said in cross-examination, 'I was there, I know what happened'.

Martin CJ then turned to the photo-board identification and considered the well-known dangers of the 'displacement' effect (when a witness is shown a photograph of a suspect before identifying them in an identification parade or photo-board and the witness's memory of the suspect is effectively replaced by a memory of that photograph) and the 'rogues gallery' effect (a police collection of photographs of criminal suspects kept for identification purposes conveying to the jury the accused had a criminal history).

As to the 'displacement' effect, Martin CJ observed that the photograph on the internet and the photograph on the photo-board were significantly different:

## BRADLEY MURDOCH

Notwithstanding an underlying similarity, the direct front on view of the photograph on the photo-board is different from the slightly angled view on the internet. The expression that appears in the posed photograph on the photo-board is quite different from the expression in the internet photograph which appears to have been taken while the accused was walking along a street. There is a small difference in the length of the hair. The accused is clean shaven in the internet photograph, but possesses a full beard and moustache in the posed photograph on the photo-board.

In these circumstances, in my opinion the evidence possesses probative value. It is a fact relevant to an assessment of the reliability of the identification that shortly after seeing the photograph on the internet, Ms Lees positively identified a significantly different photograph of the accused.

As to the ‘rogues gallery’ effect, Martin CJ was mindful of two matters. First, at trial, evidence would be led of Murdoch’s use and selling of illegal drugs. Secondly, given the extensive publicity in the Northern Territory in 2002 and 2003, the jury would recall that Murdoch was charged and acquitted of serious sexual assault offences in South Australia, thereby identifying a source for the photograph on the photo-board:

The admission into evidence of the photograph on the photo-board adds nothing to those circumstances in terms of the potential prejudice ... In all the circumstances, I am satisfied that the probative value of the evidence far outweighs the prejudicial effect. In my view the admission of the evidence is not unfair.

Consequently, Martin CJ admitted the evidence of the photo-board identification because after consideration of both the ‘displacement’ effect and the ‘rogues gallery’ effect, the probative value of the evidence outweighed the prejudicial effect, and careful judicial directions to the jury would ensure the evidence was not used improperly.

As to the dock identification, Martin CJ considered that given Joanne’s two other photographic identifications of Murdoch, the dock identification of the accused was essentially a formality. His Honour cited numerous authorities approving the process of dock identification under such circumstances, including *R v Clark* (1996) 91 A Crim R 46, at 51–2, per Cox J:

... a witness who has identified an accused person out of court should always be asked at the trial whether he or she can identify the accused

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

in court. It gives an honest witness an opportunity of reconsidering the matter and it may also stop the jury from inferring wrongly from the absence of a dock identification that the witness is unable to make one.

Martin CJ in admitting the evidence of the dock identification also noted that at trial Joanne was very positive and emphatic in identifying the accused as the person who had attacked her. This followed a similar dock identification during the preliminary examination.

With regard to the dog identification, it will be recalled that Joanne had said she saw a dog in the gunman's utility. The Crown sought to lead evidence that the accused owned a dog named 'Jack' that regularly accompanied him between Sedan in South Australia and Broome in Western Australia. The Crown also proposed to lead evidence from Joanne that when shown a photograph of the accused's dog she described it as 'very similar to the dog the man had', to which the defence objected on the ground it was demonstrably unreliable and lacking in any probative value.

Martin CJ summarised the sequence of events as follows:

On 15 July 2001 Ms Lees described the dog in the offender's vehicle as 'medium size, brown and white, short haired'. On 15 July 2001 at Barrow Creek Ms Lees expressed the view that Ms Curley's Blue Heeler dog ['Tex'] was similar to the offender's dog. In November 2002 Ms Lees picked from a book a dog identified as an 'Australian Cattle Dog', which would be commonly regarded in Australia as a Blue Heeler, as similar in width, build, shape of face and ears to the offender's dog. In May 2004 when shown for the first time a photograph of the accused's dog, Ms Lees said the build, body shape and ears were very similar to the offender's dog. In evidence in May 2004 Ms Lees said the accused's dog as shown in the photograph was 'very similar' to the offender's dog.

Murdoch's dog was a Dalmatian and when challenged in cross-examination that she had not picked out a Dalmatian, Joanne replied: 'I was going on the build of the dog, the shape of the dog's face, the height, the fur, the length of fur.'

Martin CJ pointed out that the challenged evidence was not positive identification of the accused's dog in the utility. 'At best it will be evidence that it was "very similar" in build, shape of face and ears.' His Honour considered that the dog identification had probative value as a piece of circumstantial evidence and the risk of unfair prejudice was minimal. 'The jury will be able to compare the three photographs involved and draw their own conclusions.'



## BRADLEY MURDOCH

In his summing up to the jury at trial, Mr Wild for the Crown invited the jury to make the comparison between three photographs of the dogs. He reminded the jury that Murdoch's dog Jack was not a pure-bred Dalmatian and was described by Mr Johnston as a 'mongrel'. Mr Wild drew the jury's attention to the differences between Jack and a pure-bred Dalmatian:

He's got spots, naturally. He's got lots of white colour. But he's got a nice big, strong white chest and a nice big strong head. He's a good-looking strong dog. But he doesn't look, I suggest to you, like a pure-bred Dalmatian.

Mr Wild then discussed why Joanne Lees might have thought Jack looked sort of like Ms Curley's Blue Heeler dog 'Tex' when Joanne saw Tex at Barrow Creek:

Now you look at the pictures again and see what you think about an impression which Ms Lees might have got in seeing Tex and recalling the dog she'd seen in the car [the white utility] and what she remembered about it. One of the things she always says of course, is short-haired dog, short-haired dog. It's clear isn't it, Jack is a short-haired dog.

Here, Mr Wild was adding to the list of coincidences, which he told the jury were not coincidences but part of the Crown's circumstantial case against Murdoch: there may have been other people in the vicinity of Barrow Creek but they didn't all have moustaches, all have guns in their vehicles, all drive four-wheel drives, and all have a dog.

### ***The defence challenge to the DNA evidence***

DNA evidence was obtained from four sources that linked Bradley Murdoch to the crime scene at Barrow Creek: blood staining located on the left shoulder at the back of the T-shirt worn by Joanne Lees; on the cable ties; on the Kombi van steering wheel; and on the knob of the Kombi van's gear stick. As to the blood staining on the T-shirt, Martin CJ in *R v Murdoch* [2005] NTSC 76, at [8], observed no objection was taken by the defence to the admissibility of this part of the DNA evidence:

DNA was obtained from a sample taken from the stain which produced a profile identical to the DNA profile of the accused. The forensic scientist is of the view that 'statistical calculations indicate observing this DNA profile is at least 640 billion times more likely if the blood came

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

from [the accused] than from an unrelated person selected at random from the Northern Territory population’.

The defence could not object to the blood stain evidence as the DNA process was standard and the sample strong. The defence would argue at trial that there could be an innocent explanation for Murdoch’s DNA being found on Joanne’s T-shirt through contact at the Red Rooster fast food outlet in Alice Springs on the afternoon of 14 July 2001. However, the DNA evidence relating to the cable ties, the steering wheel and the knob of the gear stick of the Kombi van precluded any innocent explanation because the evidence (a) supported Joanne’s version of events that Murdoch had sat in the driver’s seat of the Kombi van when fastening her hands with the cable ties and had driven the Kombi van into the bush; and (b) reinforced the DNA evidence from the T-shirt.

The defence challenge to the DNA evidence on the steering wheel and the gear stick was founded on how the DNA evidence was obtained through a methodology for testing very small quantities of DNA known as the Low Copy Number test (LCN). LCN differs from routine DNA testing in two ways: (1) an additional step occurs which is called ‘microconing’, a process that removes chemicals that might have been co-extracted in the forensic stain such as dirt, clothing dyes and nicotine; and (2) in the conventional DNA process an amplification is run 28 times, whereas the LCN methodology amplifies 34 times.

The Northern Territory investigating forensic scientist, Ms Carmen Eckhoff, swabbed a substantial portion of the Kombi van steering wheel and the knob of the gear stick, and for the gear stick obtained ‘a weak and partial DNA profile’ with a relative frequency of approximately 1 in 678 individuals in the Northern Territory that included the accused. After Murdoch had been committed for trial in August 2004, Ms Eckhoff travelled to England in October 2004 and handed DNA samples extracted from swabs to Dr Jonathan Whitaker of the Forensic Science Service Laboratory at Wetherby, which had pioneered the LCN test.

The examination of the swabs of the steering wheel using the LCN methodology was that the result ‘lacks any probative value’. However, for the gear stick Dr Whitaker’s opinion was as follows:

I have calculated that the combination of DNA bands, which match the profile of Bradley John Murdoch (and which are not shared with Peter Falconio) would be expected to occur in approximately one in nineteen thousand of the United Kingdom Caucasian population. This result

## BRADLEY MURDOCH

would provide very strong evidence of association between Bradley John Murdoch and the gear stick.

Dr Whitaker also expressed the view that the one in 19,000 statistical evaluation was ‘a very conservative estimate of the strength of the DNA evidence against Bradley John Murdoch’. Martin CJ observed in relation to the gear stick evidence that ‘the proposed evidence from Dr Whitaker is, in all the circumstances of the case, highly probative and of high significance to the Crown case’.

The defence did not specifically challenge the DNA evidence on the cable ties, which was also sent to Dr Whitaker, but instead relied on attacking the validity of the LCN test. Dean Mildren, at p 14, explained how damaging the DNA evidence on the cable ties was to the defence case:

Testing of DNA found in the innermost layer of the adhesive inside the cable ties indicated an incomplete but substantial profile which matched Murdoch’s profile. The probability that the DNA left on the cable tie adhesive was from someone other than Murdoch was estimated to be one in 100 million.

In assessing whether to admit the evidence of Dr Whitaker, Martin CJ undertook a detailed examination of the history of the development of the LCN methodology and concluded as follows:

Dr Whitaker impressed me as a careful and reliable witness. There is no evidence to contradict the evidence of Dr Whitaker ... I accept the evidence of Dr Whitaker generally. In particular I accept his evidence concerning the research, validation of LCN and reliability of LCN. I also accept his evidence as to accreditation, publication and the absence of challenge to LCN from within the scientific community. Further, I accept his evidence concerning the fundamental technique and the differences between the routine methodologies and LCN.

Martin CJ then summarised the fundamental principles governing the admissibility of expert evidence and was satisfied that ‘LCN has a “sufficient scientific basis” and general acceptance within the relevant scientific community to render results achieved by LCN “part of a field of knowledge which is a proper subject of expert evidence”’. Consequently, Martin CJ admitted the evidence of Dr Whitaker.

The final defence objection was to contend that ‘a jury could not conclude beyond reasonable doubt that there was no contamination at some stage in

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

the process between removing the van from the scrub on 17 July 2001 and the handing of samples to Dr Whitaker on 24 October 2003’.

Martin CJ concluded on the basis of the evidence and material before him that ‘it would be open to a jury to conclude beyond reasonable doubt that the results obtained by Ms Eckhoff and Dr Whitaker accurately represent the DNA present on the steering wheel and gear stick knob at the time the swabs were taken by Ms Eckhoff’.

***The defence challenge to the taking of photographs of Bradley Murdoch while in prison on remand for the purpose of further investigations***

While Bradley Murdoch was being held on remand in Berrimah Prison in Darwin awaiting trial, on 11 March 2005 Rex Wild, QC, the Northern Territory Director of Public Prosecutions, advised Murdoch’s solicitor that police intended to take a series of photographs of Murdoch pursuant to s 146(3)(b) of the *Police Administration Act 1974* (NT) for the purpose of allowing the anatomist, Dr Meiya Sutisno, to analyse and compare the photographs with the person depicted in the Shell truck stop video using facial and body mapping.

Murdoch’s legal team sought an injunction based on the argument that the provisions of the *Police Administration Act 1974* (NT) ‘did not empower the police to take photographs or film of the accused in the absence of his consent’.

Martin CJ in *R v Murdoch* [2005] NTSC 77, at [24], set out the issue before the court:

In issue is the extent of the police powers pursuant to Div 7 of the Act. In particular the argument centred on the power contained in s 145A to carry out non-intimate procedures without the consent of the person being subjected to those procedures.

Section 145A(1) of the *Police Administration Act 1974* (NT) is as follows:

**145A. Non-intimate procedures**

- (1) Subject to any general orders or directions issued or given from time to time by the Commissioner of Police, a member of the Police Force holding the rank of Superintendent or a higher rank may carry out or cause to be carried out a non-intimate procedure on a person —
  - (a) whom the member reasonably suspects has committed a crime; or

BRADLEY MURDOCH

(b) who is in lawful custody charged with an offence punishable by imprisonment.

Murdoch's legal team sought to argue that under s 145A(1)(b) a person in custody who is before the Supreme Court on indictment is not 'in lawful custody charged with an offence'. This construction relied on two inferences: (1) the powers in s 145A were limited to the initial stages; (2) those stages ceased with the laying of an indictment. Martin CJ was unable to accept this proposed construction:

The ordinary and natural meaning of the words ... 'in lawful custody charged with an offence' does not lend itself to the arbitrary division of time for which the accused contended ... In the particular circumstances, s 145A(1)(b) empowered a member of the Police Force holding the rank of Superintendent or higher to carry out or cause to be carried out the taking of photographs of the accused without the consent of the accused.

Martin CJ also rejected the defence argument that the definition of a photograph for the purpose of a non-intimate procedure under s 146(3)(b) of the Act did not include taking a moving film of the accused without his consent:

In my view, the purpose of the legislation and the context in which the word 'photograph' is used support the view that the Legislature intended to include the taking of a moving film of a suspect ... for the purposes of investigations authorised by the Act and the definition of 'non-intimate procedure', the expression in s 4(h) 'taking a photograph of a person' includes the taking of a moving film by means of a video camera or other similar device.

### ***The defence challenge to the admission of the evidence in the Shell truck stop video and any opinion evidence based on the video***

The admission of the evidence in the Shell truck stop video and any opinion evidence based on the video was vital to the Crown case as it strongly pointed to Murdoch having the opportunity to murder Peter Falconio and abduct Joanne Lees. This proposed opinion evidence took two forms: (1) evidence from four people who knew Murdoch in July 2001 and either positively recognised the person depicted in the Shell truck stop video as Murdoch or the person depicted looked like Murdoch; (2) expert evidence

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

from a forensic anatomist, Dr Meiya Sutisno, whose opinion was the similarities between the person depicted in the Shell truck stop video and Murdoch were such that in her view the person in the film was Murdoch. The defence objected to the admission of evidence of the Shell truck stop video and any opinion evidence based on the video.

*Evidence of the Shell truck stop video*

On 15 July 2001, between 12.38 am and 12.50 am a man and his vehicle were caught on CCTV at a Shell truck stop in Alice Springs some five hours after the Barrow Creek incident. At 9.15 pm that evening police arrived and viewed the video images. At 10.00 pm the owner of the firm who maintained the video security equipment, Mr Shane Ride, arrived and copied the relevant footage from the digital format on the hard drive to an analogue format on a VHS video, which had the effect of reducing the quality of the images. Thus, the images in analogue form were not an exact copy of the digital images stored on the hard drive.

Mr Ride explained to the police that if the hard drive was removed, it would cost the truck stop operator approximately \$10,000 to replace the hard drive. Consequently, the police decided to leave the hard drive in place. However, on 27 July 2001 the VHS copy of the analogue images was enhanced by an officer of the Queensland Police Force, and in June 2004 the VHS copy was converted by Mr David Ringrose of the Australian Federal Police into a digital format which improved the quality of the images. None of the improvements in the quality of the images succeeded in making any part of the white utility's number plate legible because the video cameras were set for a general view and a direct line of sight was needed where the number plate represented a significant portion of the image.

In *R v Murdoch* [2005] NTSC 78, at [20], Martin CJ set out the defence's objection to the admission into evidence of the Shell truck stop video film based on the copied film not being the best evidence and it would be unfair to Murdoch to admit the inferior analogue copy:

In essence, counsel submitted that police had available the best evidence in the form of the digital hard drive which should have been seized or from which images directly downloaded in digital form. In these circumstances it was unfair to the accused to admit the inferior analogue copy or the digitally enhanced version of the analogue copy. Counsel contended that if the hard drive had been retained or a digital

## BRADLEY MURDOCH

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

Thus, the defence was raising the possibility of another person being identified as the offender had the original digital hard drive been seized. This was somewhat disingenuous as given Murdoch's occupation as a drug runner he had a vested interest in ensuring his number plate was not visible to security cameras. Further, what were the odds of the hypothesised other person also falling into the 1% of Australians who are over 6 feet five inches tall (196 cm)? But, of course, Martin CJ was required to deal with the objection as a matter of law.

The benchmarks in determining whether it would be unfair to Murdoch to admit the analogue version of the images were twofold: (1) the difference in quality between the enhanced analogue version and the original digital version; (2) the extent of any additional relevant information that might have been gleaned from the digital version. These benchmarks were in turn impacted by (i) the quality of the cameras used and (ii) the setting and location of the cameras.

Martin CJ reviewed the technical evidence given by Mr Ride and Mr Ringrose which was not challenged by the defence. Mr Ride explained that the cameras were set in the mid-range designed to balance longevity with a certain picture quality adequate to identify vehicles and persons, but not number plates at the diesel bowsers. Mr Ringrose explained that the percentage of the overall image of the driveway taken up by the vehicle was quite small and the area taken up by the number plate was even smaller again — 'a tiny 50 pixels'.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Martin CJ accepted the evidence of Mr Ride and Mr Ringrose:

In my opinion it is extremely unlikely that any useful image of the number plate could have been obtained if the hard drive had been retained and the relevant image downloaded from the hard drive in digital format. Further, although the image of the person in the shop would have been of an improved quality, I am unable to be precise as to the extent of improvement and, in my view, it appears unlikely that the quality would have been improved to a significant degree.

Martin CJ then turned to whether grounds existed for the exclusion of the Shell truck stop video evidence, which had probative value without any assistance from opinion evidence if the jury accepted Joanne Lees's evidence because it was capable of proving that Murdoch possessed the opportunity to commit the crimes.

Martin CJ found the evidence was lawfully obtained and was not the product of unfair conduct on the part of the police that excluded the operation of the public policy discretion. However, his Honour was concerned 'with the broader discretion that empowers a Judge to exclude evidence "if the strict rules of admissibility would operate unfairly against the accused"'. Martin CJ concluded that 'whatever approach is taken to the [unfairness] discretion, I am of the opinion that the evidence should be admitted':

It is not uncommon for investigating authorities to conduct investigations that are less than ideal. In such circumstances it does not necessarily follow from the unavailability of the evidence that the trial will be unfair to an accused or that the admission of alternative forms of evidence will be unfair to an accused.

Finally, Martin CJ discussed the evidence of Professor Gale Spring at the trial who was called by the defence and whose opinion was that 'the images produced are not reliable for analytical purposes'. Ultimately, Martin CJ concluded that the evidence of Professor Spring was a matter of weight for the jury and gave no cause to exclude the Shell truck stop video images.

### *Non-expert opinion evidence*

The four witnesses from whom the Crown sought to lead lay opinion identification evidence based upon a viewing of an image taken from the Shell truck stop security video were Ms Beverly Allan, Mr James Hepi, Mr Brian Johnston and Ms Julie-Anne McPhail.



## BRADLEY MURDOCH

Ms Allan, who had known Murdoch since 1997 and from October 2000 had become closer to him, was 'pretty convinced' that it was Murdoch and his vehicle on the front page of the *West Australian* newspaper of 7 August 2001, which contained photographs taken from the security video. When asked what made her think that it looked like Murdoch, Ms Allan said: 'I just remember the way he walked, the way he sort of held himself, you know, his body posture.'

Mr Hepi, Murdoch's business partner at the time, positively identified Murdoch as the man in the Queensland enhanced security video and gave these reasons:

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

Mr Johnston, who had known Murdoch since 2000 and saw him regularly, gave the following statement to police in 2003:

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

Ms McPhail first met Murdoch during a road trip from Perth to Adelaide in June 2001, about a month before the disappearance of Peter Falconio. Significantly, Ms McPhail and Murdoch happened to meet during the journey after Murdoch had overtaken Ms McPhail's vehicle. The pair stopped together on several occasions and spent a night at the same stop sleeping in their own vehicle, parting company at Port Augusta. Was the encounter with Ms McPhail the precursor to the events at Barrow Creek?

In any event, Ms McPhail was shown the photograph taken from the Queensland enhanced video and gave the following evidence:

That looks very familiar to the person that I met on the side of the road. That looked like Brad to me. The same stance, he had slightly rolled forward shoulders and he was nervous or something I suppose because he quite often played with like — had his thumb in his jeans or in his belt like there.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Martin CJ then considered the principles dealing with the admissibility of non-expert opinion identification evidence in *Smith v R* (2001) 206 CLR 650, at 656, where Gleeson CJ and Gaudron, Gummow and Hayne JJ discussed the circumstances in which lay opinion identification evidence would be admissible:

If it is suggested that the appearance of the accused, at trial, differs in some significant way from the accused's appearance at the time of the offence, evidence from someone who knew how the accused looked at the time of the offence, that the picture depicted the accused as he or she appeared at that time, would not be irrelevant. Or if it is suggested that there is some distinctive feature revealed by the photographs (as, for example, a manner of walking) which would not be apparent to the jury in court, evidence both of that fact and the witness's conclusion of identity would not be irrelevant.

Thus, the litmus test for admissibility of lay opinion identification evidence was whether the witness was adding relevant probative value by giving evidence not apparent to the jury who would be able to compare the photograph in the video film with Murdoch sitting in the dock.

Based on the application of the principles set out in the joint judgment in *Smith v R*, Martin CJ admitted the evidence of Ms Beverly Allan, Mr James Hepi and Mr Brian Johnston, and excluded the evidence of Ms Julie-Anne McPhail:

Ms Allan relied upon her recollection of the way the accused walked and held himself and of his body posture. These are features which, by necessity, cannot be made apparent to the jury ... In making a positive identification Mr Hepi relied upon the stance, the look and the moustache. Mr Hepi has had the opportunity and advantage of seeing the moustache which is not available to the jury ... Mr Johnston possesses a clear advantage not available to the jury ... Given Ms McPhail's limited opportunities of observation, her evidence would not be of assistance to the jury and is, therefore, inadmissible.

Ms Allen and Mr Johnston did not give evidence of positive identification (only the image looked like Murdoch) while Mr Hepi did give evidence of positive identification of Murdoch. Martin CJ was satisfied that the risk of the jury giving the lay opinion identification evidence undue weight was minimal as the jury was 'perfectly capable of understanding the limitations of this type of evidence'.

BRADLEY MURDOCH

*Expert opinion evidence from Dr Meiya Sutisno*

Dr Sutisno is a forensic anatomist whose work is primarily concerned with the identification of persons from their anatomical parts by looking at the whole anatomy. In her report dated 17 May 2005, Dr Sutisno explained that facial and body mapping is a process of identification based on the principle that no two individuals are the same in morphology (shape, structure, character and form of the face and body) and habits. The comparison of images involves subdividing the face, head and body into components to obtain a qualitative analysis and to determine visual similarities or differences:

In ‘face and body mapping’ it is the combination of different elements such as morphology, relative proportions, posture, gait, racial traits, distinguishing features or unique identifiers, and habitual characteristics and enables a complete assessment to individualise a person.

Dr Sutisno also applied photograph superimposition, which is a process of overlaying two comparably enlarged images to demonstrate the alignments of matched morphological features or areas of marked differences. In a later case, *R v Hien Puoc Tang* [2006] NSWCCA 167, at [72], Dr Sutisno explained the application of photograph superimposition:

Photographic Superimposition is a process of overlaying ‘two comparably enlarged’ images to ‘determine if facial features and dimensions can be correctly superimposed on each other’. It can be achieved through the use of either video or computer technology. The ‘video or computer system allows the expert to develop and demonstrate a series of visual effects and to focus on morphological details and [dimensions]’ and enable the viewers to ‘see the entire procedure and visualize exactly how the expert came to his or her conclusions’.

In Murdoch’s case, Dr Sutisno identified four levels of identification:

1. Unable to determine: Features not visible due to poor quality images for comparison or incorrect perspectives for comparison.
2. Not the same person: No features match.
3. Inconclusive: Incomplete or limited features for comparison with the lack of characterising or recognisable features, distinctive unique identifiers, or habitual characteristics.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

4. The same person: Multiple number of features match such as the most noticeable or recognisable features, distinctive unique identifiers, habitual characteristics and/or racial traits.

Martin CJ found Dr Sutisno to be an impressive witness who had relied on both the Shell truck stop video and the surveillance video footage of Murdoch recorded at the Berrimah Prison while Murdoch was on remand awaiting trial. Dr Sutisno concluded that Identification Level 4 applied, namely, the image in the Shell truck stop video was Murdoch because Dr Sutisno was unable to identify any differences of significance.

Even though facial mapping has been accepted as a recognised field of scientific expertise in the United Kingdom since the early 1990s and arguably body mapping is merely an extension of the same techniques to the remainder of the body, the defence submitted such a field of science should not be recognised in Australia and Dr Sutisno's evidence should not be admitted:

Counsel contended that the evidence of Dr Sutisno is no more than a statement of her opinion and the jury are in as good a position as Dr Sutisno to make a comparison between the features upon which Dr Sutisno relied. Alternatively, Dr Sutisno's evidence should be limited to the comparison of features and she should not be permitted to express an opinion as to whether the accused is the person in the image extracted from the security film.

Martin CJ concluded that because the Shell truck stop video was grainy and there was evidence Murdoch had changed his appearance since July 2001, 'the comparison between the image from the security film and photographs of the accused is far from straightforward and, in my opinion, the jury would be assisted by the evidence of Dr Sutisno'. His Honour also found that it would not be appropriate to limit Dr Sutisno's assistance to the jury to the comparison of features because the jury would be aided in its fact-finding role by the expert evidence of Dr Sutisno as to her opinion of the significance of the features individually and in their combination.

Finally, Martin CJ held there was no risk that the jury would be misled into giving the evidence undue weight because given the visual materials presented by Dr Sutisno in her evidence, the jury would readily understand Dr Sutisno's comparison of individual features and therefore the jury would be able to critically evaluate her opinion.

At trial, the defence called Professor Henneberg who 'disagreed with the conclusions of Dr Sutisno and expressed the view that comparisons

BRADLEY MURDOCH

could not safely be undertaken because of the poor quality of the images'. In Martin CJ's view, this disagreement was a matter for the jury and not a reason to exclude the evidence of Dr Sutisno.

### ***The defence challenge to the admission of evidence of possession of weapons and habit of carrying weapons***

The Crown sought to lead evidence concerning the possession by Murdoch of a number of weapons and of his habit of carrying a loaded weapon in his motor vehicle during trips between South Australia and Western Australia.

It will be recalled that Joanne Lees had two opportunities to see the gun used by her assailant: (1) when she saw her assailant holding the gun through the window of the VW Kombi van; and (2) when her assailant pointed the gun to her head and told her to put her head down and her hands behind her back. Joanne's description of the gun was as follows:

It's a silver revolver. I'd never seen a gun before. To me it looked like a western type gun. It had — it had engraving on it which was in a rectangular box, that was down the barrel of the gun ... The gun had a scroll-like pattern, the scroll pattern had no words or symbols on the side engraved in the box like border.

Joanne was unable to see the handle or the trigger of the gun but thought the length of the barrel was 6–7 inches.

Mr William Gibbs had known Murdoch for a number of years and in a statement listed the weapons he knew Murdoch possessed, one of which was a silver six shot .22 revolver with a barrel of approximately four inches long with a wooden grip, which he kept in the driver's side pouch.

Mr James Hepi, Murdoch's business partner, gave evidence that Murdoch owned a .22 pistol and a 357 Magnum, which Murdoch would keep separately in the centre of a fold up camping table in the back of the vehicle and inside the seal of the driver's side door.

Mr Hepi's stated that the hand guns were 'kept fairly close to Brad at all times'; the .22 weapon was a revolver which did not have a magazine, rather, 'it had a rolling revolver in it'; and was unable to recall any distinctive markings on the .22.

Mr Brian Johnston met the accused in about 2000, and in a statement gave evidence of a road trip with Murdoch during which Murdoch produced a gun from the inside panel of the driver's door and then put the weapon

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

inside the centre well of the spare tyre. Martin CJ, in *R v Murdoch* [2005] NTSC 79, at [22], observed:

Subsequently they were met by another man to whom the accused gave the weapon saying he had a loaded gun that he did not want to take into Broome. The accused retrieved the weapon from the spare tyre and handed it to the other person. The accused said something to the wife of the other person about the weapon being a 'girlie gun' and that she could use it.

Ms Julie-Anne McPhail met Murdoch in June 2001 when travelling in separate vehicles from Western Australia to South Australia. In her statement, Ms McPhail said that at one point Murdoch produced a 'small ladies' revolver' which he offered to sell her. Ms McPhail described the weapon 'as a revolver, plain silver in colour, and about seven to ten centimetres in length with a spin around chamber'.

Ms Rachel Maxwell met Murdoch when introduced to him by Mr Hepi in January 2001 and gave evidence that in about March 2001 she saw Murdoch and Mr Hepi sitting at a table with parts of a gun which she described as having a wooden handle and a silver barrel, but she could not recall whether there were any patterns on the gun.

In *R v Murdoch* [2005] NTSC 79, at [33] and [35], Martin CJ reviewed the strength of this evidence from a number of witnesses:

From a combination of the evidence of Mr Hepi and Mr Johnston, it would be open to the jury to conclude that as a matter of ordinary practice the accused kept a hand gun in the vehicle in which he travelled. Considered in conjunction with the evidence of Ms McPhail and Ms Maxwell ... such evidence possesses probative value as to the capacity of the accused in July 2001 to carry out a killing by shooting. The evidence is admissible as a piece of circumstantial evidence and I decline to exclude it in the exercise of my discretion ...

It would be open to the jury to conclude that the descriptions of the silver weapon provided by Ms McPhail and Ms Maxwell are, in a very general way, consistent with the description by Ms Lees of the weapon used by the offender. Considered in isolation from the remainder of the evidence, such evidence is incapable of proving that the accused possessed the weapon described by Ms Lees. However, as a piece of circumstantial evidence, the evidence is capable of probative value and, for that reason, is admissible.

BRADLEY MURDOCH

Having determined that the evidence of Murdoch's possession of weapons and his habit of carrying weapons was probative and therefore admissible, Martin CJ then turned to consider whether the probative value of the evidence was outweighed by its prejudicial effect:

The jury would hardly be surprised to hear that a person who engaged in transporting cannabis many thousands of kilometres across the country was in the habit of carrying a weapon during the trips. In my view, given appropriate directions, the risk of impermissible use by the jury is minimal.

The admission of evidence Murdoch not only regularly carried concealed guns in his utility but also that Joanne Lees's description of the gun pointed at her was generally consistent with one of the guns Murdoch was known to possess, was doubly damaging to the defence as (1) it showed Murdoch had the capacity to have shot Peter Falconio and (2) reinforced Joanne's version of events.

***Defence application for a mistrial based on inadmissible evidence alleging prior serious criminal offending***

The defence applied for a mistrial on 11 November 2005 after the following exchange during cross-examination between Grant Algie, Murdoch's defence counsel, and James Hepi:

Q. Just have a look at the second photograph if you will, perhaps also the third one? They show numerous items or articles in the back of the canopy area of the pod. Is that similar to the articles that he [the accused] would keep in the canopy of the earlier 4-wheel drive?

A. No, Mr Algie. This is after Brad Murdoch got arrested in South Australia. This is when he had all his gear in the car and he was on the way back to Western Australia to have a go at me. He's packed all his gear in there just after he had abducted and raped children and the whole likes of — so that's probably all his belongings stuffed in there.

Martin CJ, in *R v Murdoch* [2005] NTSC 80, considered the defence application for a mistrial in the context of the extensive pre-trial publicity in October 2002 concerning Murdoch's trial in South Australia on charges of rape, false imprisonment, common assault and carrying a loaded firearm. There was also publicity that an application by the Northern Territory to have Murdoch tried in Darwin for the murder of Peter Falconio before

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

the South Australian charges had been refused. One article claimed: ‘SA prosecutors allege Mr Murdoch abducted the women — whom he had known for 18 months — while “in an extreme frenzy”, because he believed he was the centre of the manhunt for Mr Falconio’s killer.’

Anticipating the need to deal with the pre-trial publicity concerning Murdoch’s acquittal on the South Australian charges, Martin CJ discussed with counsel the need for a direction to the jury. Significantly, counsel for Murdoch, Mr Grant Algy, expressed the view that it was ‘stretching believability to think the jury will not know about the South Australian cases’.

Consequently, before the Crown opened its case on 17 October 2005, Martin CJ gave a standard direction to the jury concerning the need to decide the case based on the evidence presented in court, and in particular to put aside anything the jury had seen or heard in connection with the accused being involved in previous court proceedings outside of the Northern Territory.

On 11 November 2005, shortly after the exchange between Grant Algie and James Hepi and after Hepi had completed his evidence, the defence applied for a mistrial in the absence of the jury. Having heard the thrust of the defence argument, Martin CJ opened the court and made a suppression order covering the evidence given by Mr Hepi that was the subject of the mistrial application. After the jury returned to court, Martin CJ gave the jury a further direction:

It is a pity indeed that Mr Hepi made mention of the South Australian matters and I repeat my direction to your earlier. You must completely and utterly ignore what he said about South Australia. It is of no consequence to you whatsoever. Mr Murdoch, as I told you earlier, was acquitted. It would be, as you would appreciate, totally unfair to take that matter into account in any way whatsoever in your dealings with the evidence in this matter in whether the evidence is sufficient or not to prove guilt of the charges.

At the end of the day, which was just before the adjournment for the weekend, Martin CJ gave a further direction in similar terms and was satisfied that ‘the jury understood and appreciated the significance of the directions [and] understood the importance of complying with the directions and of not engaging in the impermissible line of reasoning’.

Martin CJ then turned his attention to the principles involved bearing in mind the overarching requirement that the accused receive a fair trial.



## BRADLEY MURDOCH

Here the question was whether the extent of the prejudice could be safely dealt with by appropriate judicial directions to the jury. His Honour called in aid *Crofts v R* (1996) 186 CLR 427, at 440, where Toohey, Gaudron, Gummow and Kirby JJ set out the general considerations for discharging a jury:

No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact ... much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript.

Martin CJ next moved to consider the competing considerations. His Honour accepted that Mr Hepi's evidence was prejudicial to Murdoch, but the possible extent of the prejudice must be considered in the context of the source of the information:

It is plain from the evidence that Mr Hepi is not a person of integrity or good character. Mr Hepi and the accused were partners in an illegal commercial enterprise selling cannabis. They fell out. Mr Hepi acknowledged in evidence that he believes he was ripped off by the accused in connection with cannabis and a large sum of money from the sale of cannabis. Mr Hepi asserted that the accused had been involved in stealing a large quantity of Mr Hepi's property while Mr Hepi was absent from his home. Further, it emerged in Mr Hepi's evidence that he had been arrested and charged with a very serious drug offence and was facing the prospect of going to gaol. He recognised that he might be in a position to obtain a 'get out of gaol free card' by giving the authorities information implicating the accused in connection with the disappearance of Mr Falconio. Mr Hepi agreed that as a result of the assistance he gave or was about to give the authorities he managed to stay out of gaol. Finally, Mr Hepi acknowledged that he intended to seek a reward should the accused be convicted.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Martin CJ noted that the jury would be given an appropriate warning as to the dangers of acting on Mr Hepi's evidence and it would be patently obvious to the jury that Mr Hepi was hostile to Murdoch and, in addition, sought to harm Murdoch's chances before the jury. His Honour also took into account that Mr Hepi's evidence dealt with events in South Australia that would have been familiar to the jury from the pre-trial publicity. Consequently, his Honour was satisfied Mr Hepi's evidence 'did not materially add to the jury's collective knowledge of the South Australian proceedings' and concluded that in conjunction with his directions to the jury any potential prejudice to Murdoch had been 'met and dispelled'.

The application for a mistrial was the last throw of the legal objection dice from the defence team who were clearly anxious as to how the trial was proceeding, especially after Joanne Lees's strong performance in the witness box and reinforced by Mr Algy's misjudged challenge to her evidence that she was able to step through her manacles and bring her hands to her front, which Joanne was able to readily demonstrate in court.

### ***Conclusion on the defence challenges to the admission of proposed Crown evidence***

The defence challenges to the admission into evidence of certain parts of the proposed Crown case all failed. On the one hand the defence efforts to minimise the potential damage to Murdoch from the admission of the challenged evidence is to be applauded for due diligence, while on the other hand there was an element of casting a wide net, as the defence sought to cling on to any opportunity, no matter how weak or speculative the argument, to reduce the prospects of their client being convicted in the face of a strong Crown case.

As will be seen later when considering Murdoch's appeal against his conviction, the strongest defence objection on the admissibility of Crown evidence related to the evidence of Dr Sutisno and body mapping or 'face and body mapping' (as distinct from facial mapping). But even here, the Northern Territory Court of Criminal Appeal held that the evidence of body mapping or 'face and body mapping' was admissible if it had been confined to Dr Sutisno pointing out the similarities between the images rather than as to positive identity.

Overall, Martin CJ's approach was to allow the contested evidence to be admitted on the basis the weight to be given to the evidence was a matter for the jury and, where necessary, appropriate judicial directions could be given so that the evidence would not be misused or given undue

BRADLEY MURDOCH

weight by the jury. His Honour found no occasion on which to exclude the contested evidence on the ground its prejudicial effect outweighed its probative value, sometimes referred to as the '*Christie* discretion' after *R v Christie* [1914] AC 545.

## The trial

The Crown case against Bradley Murdoch was circumstantial and relied on a number of strands in a cable to support a guilty verdict of beyond reasonable doubt. These strands comprised positive identification evidence from Joanne Lees, recognition evidence from Murdoch's acquaintances, expert opinion evidence from Dr Sutisno, and DNA evidence. There was also opportunity evidence if the jury accepted Murdoch was the person in the Shell truck stop video, and capability evidence that Murdoch carried firearms in his utility and could have shot Peter Falconio.

### ***Evidential obstacles faced by the Crown***

Set against this strong circumstantial Crown case, there were several difficulties faced by the Crown, starting with the absence of a body. The Crown would rely on the blood stain by the side of the Stuart Highway which contained Falconio's DNA, as well as the fact that Falconio had not been in contact with his family for four years. But as there was no body the Crown could not directly prove how Falconio died, which was complicated by the fact that the police were unable to find a murder weapon. The Crown would have to rely on the inference that the bang Joanne Lees heard was a gunshot and that Murdoch had used his silver .22 pistol known to be in his possession by his acquaintances. A similar type of weapon was identified by Joanne Lees as the weapon Murdoch had pointed at her head.

As Dean Mildren has pointed out, at p 15, a further complication was that if Falconio was shot at the rear of the VW Kombi van would there not be some evidence other than the blood stain?:

Two of the problems facing the Crown case were the lack of evidence of gunshot residue found on the rear of the Kombi Van and the fact that no spent bullet casing or projectile had been found.

Furthermore, it will be recalled that when the gunman frogmarched Joanne holding her by the back of the neck with her hands tied behind her back from the passenger seat of the Kombi van to the passenger seat of his utility vehicle, Joanne had been unable to see any body and kept asking

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

the gunman what had happened to her boyfriend. So, no one had seen Falconio's body.

After all the failed battles by the defence to keep Joanne Lees's identification of Murdoch out of court previously discussed in *R v Murdoch* [2005] NTSC 75, there was still the question of how much weight would the jury give to Joanne's positive identification of Murdoch, given the traumatic experience she had undergone and whether the interior lighting from both vehicles was sufficient to give her a clear line of sight.

Of Murdoch's acquaintances, only James Hepi had positively identified Murdoch as the person in the Shell truck stop video, as the others had only said the person looked like Murdoch. The jury would be made aware at trial of Hepi's bad character and motive to frame Murdoch, so the weight the jury would give to Hepi's identification evidence would likely be heavily discounted.

Furthermore, there was the question of logistics. Firstly, on the Crown case Murdoch travelled some 600 kilometres out of his way by going up the Stuart Highway as far as Barrow Creek and back again, when he could have taken the turn to the Tanami Track just north of Alice Springs. Secondly, the Crown would have to convince the jury that Murdoch could travel from Alice Springs to Broome in 28 and a half hours, with the Tanami Track being an unmade road.

Finally, the Crown would have to prove Murdoch made alterations to his utility shortly after he arrived in Broome on 16 July 2001. The mesh found on Murdoch's utility when police inspected his vehicle would have prevented Joanne Lees from escaping by sliding out of the back of the utility in the manner she described in her statement to police.

### ***The Crown case***

In a circumstantial case, it is necessary for the Crown to marshal sufficient evidence for the jury to draw the inference that the accused is guilty beyond reasonable doubt, which necessarily involves satisfying the jury that there is no reasonable explanation consistent with the accused's innocence.

Here, the Crown case was that: (1) Murdoch shot Peter Falconio with a .22 pistol which was a firearm the Crown could prove he possessed and kept hidden in his utility, providing Murdoch with the means to shoot Falconio; (2) Joanne Lees was a reliable and honest witness whose evidence was independently supported by other evidence; (3) Murdoch was the person in the Shell truck stop video as identified by people who knew him well and by expert evidence, which meant Murdoch had the

## BRADLEY MURDOCH

opportunity to kill Falconio; (4) DNA evidence that proved Murdoch was the person who abducted Joanne Lees and bound her hands with cable ties; (5) Murdoch could have committed the murder at 7.30 pm on 14 July 2001 and driven to Broome via the Tanami Track to arrive in Broome by 4.00 am on 16 July 2001; and (6) Murdoch's post-offence conduct in the form of changing his appearance, altering his vehicle and telling lies exhibited a consciousness of guilt.

*Proving Peter Falconio was dead*

The strongest evidence to support the inference that Peter Falconio was dead came from the finding of his DNA in the blood stain by the side of the Stuart Highway. The Crown told the jury that according to the evidence of Ms Eckhoff, the scientific officer, the DNA evidence was 3.8 quadrillion times more likely to have come from Peter Falconio than from anyone else. The defence had conceded that it was Peter Falconio's blood on the side of the Stuart Highway. Significantly, the gunman had attempted to cover the blood stain with a pile of dirt, first noticed by Vincent Millar, one of the truck drivers who rescued Joanne Lees, while searching for Peter Falconio before departing for Barrow Creek in the early hours of 15 July 2001.

There was other evidence to support the fact that Peter Falconio was dead in the form of (i) the Falconio family had never heard from Peter since the incident at Barrow Creek, and his parents and two brothers had come over from England for the trial; (ii) Peter's passport had not been used; (iii) Peter's bank had not heard from Peter and his credit card had not been used; and (iv) Peter and Joanne were on a world trip with everything to look forward to in life. In short, Peter Falconio had disappeared off the face of the earth.

However, the Crown did have to deal with an alleged sighting of Peter Falconio on 22 July 2001 by Melissa Kendall and Robert Brown in Bourke, New South Wales. The Crown contended that the pair were mistaken, and their evidence was unreliable, particularly considering the other strong evidence that Falconio was dead. In his summing up, Martin CJ referred to the Crown's argument in these terms:

Mr Wild drew your attention to a number of discrepancies between the evidence of Ms Kendall and that of Mr Brown about the appearance of the man and which of them served him. Ms Kendall thought the man had a shaved head with dark stubble. Mr Brown said the man was blonde or sandy of hair and of some length. Mr Wild reminded you that

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Ms Kendall thought that the man, accompanying the man she believed was Peter Falconio, looked like the comfit of the offender.

Identification evidence is notoriously unreliable, but Mr Algy for the defence naturally urged the jury to accept Melissa Kendall's and Robert Brown's evidence as that of honest people giving a truthful account.

*Proving Peter Falconio was shot with a .22 pistol owned by Murdoch*

As the police were unable to find either a body or a weapon, the Crown necessarily relied on inferences to prove Peter Falconio was shot with a .22 pistol owned by Murdoch. The Crown case was that the bang Joanne Lees heard was not a backfire but a gunshot. The inference the Crown invited the jury to make was the firearm used to shoot Falconio was the silver pistol identified by Joanne Lees as the pistol pointed at her head immediately after Joanne heard the bang. The further inference was that a .22 silver pistol was known to be owned by Murdoch from the evidence of Mr William Gibbs, Ms Julie-Anne McPhail and Ms Rachel Maxwell. Thus, if the jury accepted Joanne's evidence that the gunman was Murdoch, then the silver pistol Joanne saw pointed at her head was the same .22 pistol seen by Mr Gibbs, Ms McPhail and Ms Maxwell in Murdoch's possession, and which on the evidence of Mr James Hepi was 'kept fairly close to Brad at all times'.

There was a further difficulty the Crown had to overcome. If Murdoch had shot Falconio, why was there no evidence beyond a bloodstain? The Crown called two expert witnesses, Dr Woodford and Mr Wrobel, to explain that a .22 bullet shot into the head at close range might not exit the skull and therefore leave no evidence of brain tissue or bone fragments in the vicinity of the shooting.

Martin CJ in his summing up discussed the evidence of Dr Woodford and Mr Wrobel:

Dr Woodford said the .22 projectiles are relatively low powered and, if anything, tend to ricochet around inside the skull. Another possibility is that the bullet enters the skull and then lodges in the thicker part of the skull such as the other end of the skull vault or the thick bone at the base of the skull. There are other areas where such a projectile could be brought to a halt by a bony structure ...

Mr Wrobel said that over a period of 18 years where a .22 projectile has entered a skull cavity from close range, including contact with the

BRADLEY MURDOCH

muzzle with the head, Mr Wrobel is unable to recall any cases where the projectile has exited the skull.

Mr Wrobel also explained that because gunshot residue falls off reasonably easily, any activity by the gunman can result in the loss of that residue. Mr Wrobel further explained why Joanne Lees could not detect any odour or feel any heat if the gun pointed at her head had just been fired to kill Peter Falconio. The odour from a .22 revolver is less pungent than a gunpowder smell and may not be detected at all depending on the conditions. By the same token, a .22 revolver fired through a six-inch barrel would not heat up the muzzle very much, if at all. Asked in cross-examination whether on the Crown's version of events it would be unusual for the barrel not to produce appreciable heat, Mr Wrobel answered, 'I would say no'.

*Proving the reliability of the identification of Bradley Murdoch by Joanne Lees*

If the Crown had been unable to obtain any evidence of Bradley Murdoch's DNA on Joanne's T-shirt or on the cable ties and if there had been no Shell truck stop video, it would still have been open for the jury to convict Murdoch on the evidence of Joanne Lees alone. True, the task for the Crown would have been a great deal more difficult, but a guilty verdict would have been possible if the jury accepted Joanne's version of events and her identification of Murdoch as her assailant. Thus, while the DNA evidence was the lynchpin or anchor point of the Crown's case against Murdoch, it was important to the Crown case that the jury believed Joanne was a reliable and credible witness.

As has been seen previously when discussing the defence's challenges to the admission of Joanne's identification evidence on the internet, on a photo-board and in the dock, the basis for all three defence challenges was that the identifications were tainted, unreliable and whose probative value was outweighed by their prejudicial effect. Martin CJ had rejected the defence applications to exclude Joanne's identification evidence and had ruled the identification evidence was probative and its weight was a matter for the jury. Clearly, the Crown sought to present its case such that the jury gave great weight to Joanne's version of events, which involved dealing with any inconsistencies in Joanne's evidence given she had made a number of statements to the police in the course of their investigations.

When the jury retired to consider their verdict, one of the factors in their consideration of the weight to be given to Joanne's evidence was that points

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

in her story could be independently corroborated. For example, Joanne described her assailant as being taller than her boyfriend when after Peter Falconio went to the rear of the Kombi, Joanne looked back partly through the door and partly through the window and got the impression that her assailant was tall, taller than Peter. Peter Falconio was 5 feet 11 inches tall whereas Murdoch was 6 feet 5 inches tall. Joanne had testified her assailant had pointed a silver pistol at her head. Mr Gibbs, Ms McPhail and Ms Maxwell had given evidence that they had seen a silver pistol in Murdoch's possession. Joanne had given evidence there was a dog in the driver's seat of her assailant's utility. According to James Hepi, Murdoch always travelled with his Dalmatian dog, Jack, on long road trips. Joanne had testified her assailant drove a white utility. Murdoch owned a white utility. When Joanne was rescued by Vincent Millar and Rodney Adams, they cut away the cable ties binding Joanne's hands. James Hepi gave evidence he had seen Murdoch making similar cable ties at Sedan. When Vincent Millar and Rodney Adams tried to look for Peter Falconio after rescuing Joanne, Vincent Millar found a pile of dirt on the side of the Stuart Highway, which on inspection the next day was found to be partially covering a bloodstain. Joanne had testified that she unsuccessfully tried to use lip balm to ease her hands out of the cable ties after she had escaped into the scrub. When the police conducted a thorough search of the area in daylight, they found Joanne's tube of lip balm and the cap of the tube in the scrub.

There was further independent support for Joanne's version of events from Pamela Brown and Jasper Haines who on the evening of 14 July 2001 were travelling south from Ali Curung and were passed on the road by a large white tray-top utility with a green canopy on the back heading north, which had just driven slowly onto the bitumen off the verge that had come out from behind an orange Kombi van parked on the side of the road facing north with no lights on and no sign of anyone near the van.

Mr Algie, for the defence, had argued the white utility could not have been Murdoch's because it was heading north and not south. On the Crown case, Murdoch drove south to the Alice Springs Shell truck stop. Mr Wild in summing up for the Crown sought to explain why it was necessary for Murdoch to drive slowly north before doubling back:

Lights shine a long way down that road, so while he's [Murdoch] sitting there at the roadside, he'd see a car and the car that did come was that of the Browns, Nabangardi Brown. He would have known it was coming, and I suggest to you that what they saw was Mr Murdoch's vehicle



## BRADLEY MURDOCH

coming out from behind the Kombi, slowly, you remember they said, heading north.

My learned friend made some issue of this, it was heading north slowly and it's obvious isn't it what happened. He turned around and came back as soon as they're out of the way and did what he had to do, clean up the roadside. A cursory look for Joanne in the bush and then he had to get out of the way *because* he couldn't afford to be seen there, as my learned friend says, in case Joanne did have the courage to run out on the roadway with the vehicle coming. It would have taken a tremendous amount of bravery you might think to do that, and it took her some hours before she was prepared to. So, you might think that the man who cleaned up the scene, who put the gravel on the blood, who moved the body, was a meticulous and a fastidious man, fits Mr Murdoch doesn't it?

The jury could have been in no doubt that Joanne had suffered a traumatic experience as such was her mental state that she was very nearly struck by Vincent Millar as she tried to wave down his road train. Mr Millar and Mr Adams both testified to Joanne being in a state of shock, which was supported by Leslie Pilton, the publican of the Barrow Creek Hotel, who also noticed Joanne had sustained red marks on her wrists, swelling around her face, and scratches and abrasions on her body. But had her trauma and shock coloured Joanne's identification of Murdoch as her assailant?

Mr Wild took the jury through Joanne's three identifications of Bradley Murdoch and argued they were consistent. At the outset, on 15 July 2001 Joanne had described her assailant as a big man, slightly stooped with a bushy Mexican moustache, and had provided police with a comfit picture of her assailant. Joanne's basic description of her assailant was consistent with the video images of the man in the Shell truck stop video. Joanne returned to England and on 10 October 2002 she was in Sicily when a friend alerted her to a favourable story about her on the internet.

Mr Wild pointed out to the jury that after some 15 months since the Barrow Creek incident, from Joanne's perspective, no-one was in the frame and to her knowledge the police were not looking for a prime suspect:

So, she looks up the story. She's not expecting, she told you, to see a picture and you've got exhibit P40 in front of you. It's a story on the Internet and as she turns the screen, turns the page on the screen figuratively speaking, there's a picture of a man. And the man doesn't have a moustache, but she says that's the man in evidence to you ... she just knew it was him.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Now my learned friend criticises that on the basis — well, she's expecting to see him, but she wasn't. She is expecting a story that talked about the man, but she was not at that instant expecting a picture, and she recognised the man.

Thus, the Crown argued, the internet identification was spontaneous and natural, not contrived as put by the defence.

Mr Wild then moved to the photo-board identification on 18 November 2002. The jury had the 12 pictures of the photo-board as exhibit P48, as well as the videotape of Joanne's identification of Murdoch as photo number 10 (exhibit P47).

So, you can see exactly what happened between her and the police officer who took her through it. And she identified number 10, and she said, 'I think it's number 10'. His Honour asked her what she meant by the word, 'think', and she says, 'I was very positive'.

It is common practice to videotape the process by which the witness identifies the suspect to remove potential complaints that the witness was coached or prompted towards a selection by police. When the jury looked at the photo-board and photo number 10, they could see that Murdoch had shaved off his Mexican moustache and had grown a full beard with moustache. Murdoch's hair was also cut much shorter than when Joanne first saw her assailant. Nevertheless, Joanne picked Murdoch out from the other 11 fully bearded men with short hair.

Mr Wild then turned to the dock identification. Joanne had identified Murdoch at the committal hearing in 2004 and then again at the trial in 2005. Asked if she sees her assailant she says, 'I'm looking at him' when looking across at Murdoch. Mr Wild concluded by reminding the jury that when Murdoch put Joanne in the front seat of his utility, 'He is right in her face' and she's looking right at that man:

And you might think that gives it some additional significance to what you have seeing a fleeting glance of somebody at a pub or in the street. This is man who became part of her life on that day, and she identifies him as Mr Murdoch.

Mr Wild is treading a narrow path between explaining any inconsistencies in Joanne's story by asking the jury to make some allowance for her having the most terrifying experience of her life, 'She was not there taking notes', while at the same time urging on the jury the strength of Joanne's identification of Murdoch because of how close she was to Murdoch's face

## BRADLEY MURDOCH

in the front seat of his utility, which Joanne estimated to be to within a foot to 18 inches (30 cm to 45 cm) of her face.

Martin CJ summed up to the jury on Joanne's positive identification of Murdoch on the night of 14 July 2021 in these terms:

Well, ladies and gentlemen, what do you make of that opportunity for Ms Lees to see the face of the man who attacked her? Is it reasonably possible that as close as they were, the trauma and lighting distorted Ms Lees' views or recollection of the image of the man? Or are you satisfied that this was an opportunity which, in the circumstances, gave Ms Lees a very good look at the face of the man for a reasonable period and which would have impressed the face upon her mind quite vividly. What was the combined effect of the two stages at which Ms Lees could see the man's face, that is in the Kombi and in the four-wheel drive?

In the same vein, Martin CJ turned to the internet article and photograph of Murdoch that Joanne Lees accessed in Sicily on 10 October 2022:

Is it a reasonable possibility that whatever image Ms Lees had in her mind, it was displaced by a combination of the circumstances of the article and the photo of the accused with the image of the accused? Was there the displacement effect, to which Mr Algy referred, or is it reasonably possible that such a displacement effect occurred, or are you satisfied that Ms Lees had a vivid and reliable image in her mind which she accurately recognised as soon as she saw the photograph and the article?

As to the photo-board, Martin CJ pointed out to the jury that Joanne's identification of Murdoch as the person in photograph 10 had occurred only a month after she had seen the photograph on the internet which she believed was her assailant, albeit there were differences between the photographs:

You will quickly appreciate that you cannot place too much weight on the identification of the photograph in the photo board because it is obviously a photograph of the same man whose photograph appeared on the Internet. In those circumstances, it is hardly surprising that Ms Lees would pick the photograph because you would still expect her to have in mind the image of the photograph she saw on the Internet. However, the identification of photograph 10 is a matter for you to bear in mind and to give such weight as you see fit.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Finally, Martin CJ addressed the dock identification of Murdoch by Joanne Lees, and told the jury that ‘very little weight, if any, can be given to these identifications of the accused in the dock’, because of Joanne’s previous identifications and the fact that Murdoch was sitting in the dock. His Honour suggested to the jury that the critical identification was the internet identification and he had reminded them ‘about the opposing submissions concerning that identification’.

*Proving Murdoch was the person in the Shell truck stop video*

The Shell truck stop video was important for two reasons if the person depicted in the video was Murdoch: (1) the video provided evidence of Murdoch’s opportunity to have killed Peter Falconio and put Murdoch in the frame; (2) the false denial by Murdoch that it was him shown in the video was made because of a consciousness of guilt of the Barrow Creek offences, as Murdoch thought telling the truth would have incriminated him.

Mr Wells commenced his summing up on this point by telling the jury there was plenty of time on a straight de-restricted highway for Murdoch to have driven the 300 kilometres from Barrow Creek to Alice Springs in three hours and still have had an hour and a half spare between 8.00 pm and 12.30 am. Mr Wells also dealt with the defence argument that Murdoch would not have driven into the Shell truck stop with a body in his utility by pointing out that no-one would know. Murdoch could have disposed of the body on his way down to Alice Springs or if he felt confident that his vehicle would not be searched, he might have taken the risk.

Then, Mr Wells turned to the evidence of Mr James Hepi and addressed Mr Algy’s argument that Hepi’s evidence was especially unreliable as Hepi had fallen out with Murdoch and was lying in order to use his ‘get out of jail’ card for his drug offences. Hepi had positively identified Murdoch as the person in the Shell truck stop video, and therefore his evidence was a significant strand in the Crown’s circumstantial evidence cable of proof, provided the jury accepted Hepi’s evidence as truthful and not tainted. Mr Wells directed the jury’s attention to the fact that Hepi’s drug offences had been dealt with in May 2002, three and a half years before Murdoch’s trial:

He’s out of jail, he’s been out of jail for three and a half years, so he’s not still I suggest to you, using a get out of jail card. That’s long used, if it

## BRADLEY MURDOCH

ever was related to the evidence he was going to give in this case, which didn't become the subject of a statement [to the police] until September, in any event, of 2002. So, in our submission, you can discard that and you can treat him as every other witness on his merits in the witness box ... And I suggest to you that Mr Hepi, although he's got a checkered background as we obviously all know, nevertheless was a witness of truth that you could accept in this case and that's a matter — I think my learned friend would say — a matter for you in due course.

As previously mentioned, because of Mr Hepi's 'checkered background' it was necessary for Martin CJ to give the jury specific directions and warnings as to how the jury should approach Mr Hepi's evidence:

There are a number of reasons associated with Mr Hepi, which make it dangerous to rely upon his evidence alone and which require that you approach his evidence with great caution and scrutinise it particularly carefully before acting upon it.

His Honour then listed those reasons. (1) Hepi was not a person of integrity or good character who admitted he was involved in transporting and selling cannabis on a commercial scale. (2) Hepi and Murdoch were involved in that illegal enterprise until they fell out because Hepi believed Murdoch had ripped him off and 'dobbed him in' to the police over the cannabis. (3) This background provided Hepi with a strong motive to falsely implicate Murdoch in Peter Falconio's disappearance. (4) Hepi acknowledged that as a result of his assistance to the police, he had managed to stay out of jail. (5) Hepi intended to seek a reward should Murdoch be convicted. In sum, Martin CJ told the jury that in considering Mr Hepi's evidence they should have regard to other evidence that either supported or contradicted Mr Hepi.

Thus, in light of his Honour's directions and warnings, it was unlikely that the jury accepted Mr Wild's submission to treat Mr Hepi as just another witness whose evidence was to be assessed on its merits.

After dealing with Mr Hepi's positive identification of Murdoch as the person in the Shell truck stop video, Mr Wild turned to the evidence of Ms Beverly Allan, who was obviously fond of Murdoch and as the witness with the closest relationship with Murdoch provided an extra element of reliability in her evidence. Ms Allan had testified that she was 'fairly convinced' that Murdoch was the man in the Shell truck stop video because of 'what he's wearing, the way he holds himself, the hat'.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Mr Wild suggested to the jury that Ms Allan was a very honest witness who gave her evidence in a forthright manner and was fair to Murdoch without embellishment:

When you then think of someone who knows somebody well, and in this case had a relationship by whatever name over a period of at least seven or eight months, and they spent time in the same house as the person, then the evidence, I suggest to you, starts to have a great deal more credibility. You've got that evidence from Beverley. And you've got it from other people as well.

The 'other people' were Mr Brian Johnston and Mr Brett Duthie, as well as Mr Hepi. In this respect, a trio of witnesses, Ms Allan, Mr Johnston and Mr Duthie, all supported Mr Hepi's evidence that the person in the Shell truck stop video was Murdoch. This identification evidence was entirely separate from the evidence that it was Murdoch's white utility parked by the diesel bowsers in the Shell truck stop video, such as the evidence given by Mr Loi O'Dore who believed he recognised his own work on Murdoch's utility.

Martin CJ asked the jury whether, in relation to the evidence of Mr Hepi, Ms Allan and Mr Johnston, if they accepted the evidence of those three witnesses, they were able to discern a common theme in their evidence:

Do you discern a common theme about body posture, the way the man carries himself in the video and the way the man walked. If you accept their evidence about those similarities, then the existence of those similarities would be a piece of circumstantial evidence which you could take into account in deciding whether you are satisfied that the person in the video is the accused.

Conversely, if the jury was not satisfied of those similarities, they should put that evidence aside.

Mr Wild then directed the jury's attention to the evidence of Dr Sutisno and the attack on her methods by Professor Henneberg who was an expert called by the defence. It will be recalled that the defence had sought to exclude the admission of evidence of the Shell truck stop video and any opinion evidence based on the video. Martin CJ ruled the opinion evidence should be admitted and any disagreement between the experts was a matter for the jury.

BRADLEY MURDOCH

With this background in mind, Mr Wild reminded the jury that they had two exhibits from Dr Sutisno: one which explained her work and one which explained her definitions and how she undertook the morphology analysis:

Morphology analysis is facial and body mapping — that's her subtitle to it. And it is the feature-by-feature approach to evaluating faces, heads and bodies. It involves the comparisons of two images, one from the crime scene and videos generally and one of the suspect. It involves subdividing the face, and you heard the way she described that, subdividing the face, head and body into components to obtain a thorough qualitative analysis and determine visual similarities or differences. Now that's how she describes it and the definition is there for you to see.

Now, Dr Henneberg was very dismissive of her, new kid on the block, doesn't use the same methods as him, and yet when we examine that carefully it turns out that they're using exactly the same method, except she has some different computer systems ...

So where is the dispute about methods? The dispute is what she sees that he can't see, that's what the dispute is. The difference might be in the actual computer system she uses, you might think, and also in the fact that she was looking at the screen with a magnifying glass as well. So it was a different exercise being conducted by this young person and Professor Henneberg couldn't see it.

Effectively, Mr Wild was suggesting to the jury that Professor Henneberg was of no assistance to them because Professor Henneberg did not understand the MGI software that Dr Sutisno used and did not see what she saw. Mr Wild then read out Dr Sutisno's conclusion:

The multiple numbers of features match, which includes the most noticeable or recognisable features, the distinctive unique identifiers, the habitual characteristics and racial traits indicate the level of identification is the same person.

The final comparison was a superimposition where Mr Wild suggested the two figures on the video provided by Dr Sutisno moved seamlessly into the one figure. The jury were given this video as Exhibit 260. The jury also had Exhibit D9 from Professor Henneberg, which Mr Wild suggested was 'one man being forced into the other man'. Mr Wild urged the jury to make the comparison between the two videos, which Mr Wild

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

submitted showed that Dr Sutisno's superimposition worked and Professor Henneberg's did not.

Irrespective of the strength of Mr Wild's submission that it was Bradley Murdoch in the Shell truck stop video, the jury were able to make up their own minds through examining the exhibits. To the extent the jury accepted Dr Sutisno's conclusion, then this reinforced the evidence of Mr Hepi, Ms Allan, Mr Johnston and Mr Duthie. The sheer weight of the identification evidence from both lay opinion and expert opinion was supporting the Crown case that Murdoch was the man in the video, had the opportunity to kill Peter Falconio, and was lying out of a consciousness of guilt.

Martin CJ summed up Dr Sutisno's evidence by listing the primary features upon which Dr Sutisno relied: (1) elliptical or oval shaped face with sunken upper lip due to loss of upper frontal teeth; (2) cheek bones projecting towards the front and left, but not projecting fully forward because of a sloping back; (3) large mandibular symphysis or chin area; (4) mandibular prognathism — slightly protruding forward of the chin region; (5) mouth area from lower tip of the nose to the top of the lip quite large; down turn of the corners of the mouth common with missing teeth; very thin bottom lip; (6) large ears in height and projection; (7) distinctive hairline pattern; (8) short neck of medium width; (9) cervical spine extending forward and producing forward projection of the head; (10) forward curving of the upper back leading to a projection of the chest; (11) squarish shoulders, long torso, long arms and long legs; (12) flat back posture; (13) gait — distinctive walking pattern of side bending in the torso with corresponding step and sway of arms; (14) habitual placement of the hand on the hip while standing; (15) right-handedness.

His Honour took the jury through Mr Algy's criticism of Dr Sutisno's evidence that the video images were too vague and blurred to permit this type of comparison, which was supported by the evidence of Professor Spring and Professor Henneberg. His Honour reminded the jury that Mr Algy had urged the jury to 'treat the evidence of Dr Sutisno with great caution and scepticism'.

Martin CJ told the jury that if they had a doubt about Dr Sutisno's opinion then they should put that opinion aside, although it would be open to the jury to have regard to Dr Sutisno's evidence of the comparison of the various features in deciding whether there was a significant similarity between Murdoch and the man in the video. The reason for the distinction was that the jury had the evidence from Mr Hepi, Ms Allan, Mr Johnston



## BRADLEY MURDOCH

and Mr Duthie, which was unavailable to Dr Sutisno, and the similarity of features was circumstantial evidence that could support a conclusion that Murdoch was the man in the video.

His Honour concluded by telling the jury that they should compare Dr Sutisno's evidence with that of Professor Henneberg:

Do you accept the evidence of Dr Sutisno that there were no dissimilarities? Do you accept her evidence as to the number of similarities? If you do, again, that would amount to circumstantial evidence that you could take into account in deciding whether you were satisfied that the person in the truck stop video is the accused.

*Proving it was Murdoch's DNA on Joanne Lees's T-shirt and his DNA on the cable ties that bound her hands*

The DNA evidence was the jewel in the Crown's case against Murdoch. As has been previously discussed, the defence unsuccessfully attempted to persuade Martin CJ to exercise his Honour's discretion and exclude part of the DNA evidence the Crown proposed to adduce. Ironically, no objection was made to the strongest piece of DNA evidence in the hands of the Crown, namely, the blood staining located on the left shoulder at the back of the T-shirt worn by Joanne Lees.

Mr Wild reminded the jury of the sequence of events in the struggle between Joanne Lees and the gunman: from the moment the gunman entered the Kombi van to the gunman forcing Joanne into the back of his white utility. Mr Wild painted a vivid picture for the jury of the gunman being all over Joanne whether it be when trying to put the handcuffs on her while her back was exposed to him or walking behind Joanne holding her by the neck as he frogmarched Joanne from the Kombi to his utility:

At some point, all of that gives him, that man, the opportunity to plant whatever blood he's got loose on a finger or on his nose or a scratch somewhere on her and that's what happens ... So, the Crown relies on the DNA which is found on that T-shirt as being the most single significant piece of evidence in this case. And what it does is supports all of the other evidence that we've led and been talking about for the last day or so. It supports all of that. You can have a little bit of doubt about this and that. But this makes all of those doubts of no point because it ties this man to this woman on this day.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Mr Wild derided the lack of explanation from Murdoch under cross-examination as to how his DNA got on the T-shirt, and suggested to the jury Murdoch knew full well how his DNA had come to be there:

It doesn't fly through the air, this DNA, just like that. We're told about people blowing their noses, but of course if one of you blows your nose, Bradley Murdoch's DNA doesn't get on the page in front of you, your DNA gets there, so its not a miraculous thing that floats around in the sky somewhere. DNA has to be transferred in some positive way.

Faced with the evidence of Murdoch's DNA on Joanne's T-shirt, the defence suggested there was a real possibility that Murdoch's blood was capable of both primary and secondary transfer and could have been accidentally deposited without anybody knowing about it in Alice Springs. One possibility put forward by the defence was that this accidental transfer could have taken place at the Red Rooster fast food outlet. Mr Wild sought to suggest that such an accidental transfer was nonsense, and that Joanne's evidence was she had only stayed at the Red Rooster for as long as it took to drink a bottle of Coca-Cola.

Then, by way of reinforcement, Mr Wild turned to the DNA on the gear stick and on the cable ties. The difficulty for the defence was the sheer compounding statistical improbabilities of their being innocent explanations for the evidence of Murdoch's DNA being found on the T-shirt, cable ties and gear stick. For the T-shirt, Ms Eckhoff had estimated the DNA profile was at least 640 billion times more likely if the blood came from Murdoch than from an unrelated person selected at random from the Northern Territory population. For the cable ties, Dr Whitaker had calculated, using the Low Copy Number technique (LCN), the probability that the DNA left on the cable tie adhesive was from someone other than Murdoch to be one in 100 million. For the gear stick, Dr Whitaker estimated the combination of DNA bands which matched the profile of Bradley Murdoch would be expected to occur in approximately one in 19,000 of the United Kingdom Caucasian population.

Mr Wild then invited the jury to consider whether in light of these statistical improbabilities, what is the likelihood of Murdoch being completely innocent:

The attacker leaves no evidence of DNA on her [Joanne Lees] but Mr Murdoch, who accidentally left his DNA somewhere in Alice Springs earlier that day, did. How unfortunate would Mr Murdoch be?

## BRADLEY MURDOCH

And then you add this: somehow or other, some other person, perhaps even the person who's responsible for the killing and the attack, deposits DNA which matches Mr Murdoch on the gearstick of the vehicle which is driven off after the young woman's attacked. How unlucky would you be with those two sets of circumstances running against you.

And then the third one: in this most remarkable of possible coincidences, your DNA turns up deep inside the cable ties ...

So, you're asked to conclude, this has come about from innocent or devious means [a reference to the defence allegation that the police had acted corruptly by planting evidence to 'fit up' Murdoch]. Mr Murdoch is in no way connected to the crime. A combination of those three things [the DNA evidence] put together, makes this as powerful a case as you could expect there to be.

At the opening of his final address, Mr Wild had told the jury that there was 'not one tittle of evidence' to support the defence's allegation of corruption by the Northern Territory Police Force. In a trial, when the defence attacks the integrity of a Crown witness, the 'shield' preventing the Crown adducing evidence of the defendant's bad character comes down. In Bradley Murdoch's case, through widespread pre-trial publicity of the rape and abduction charges against Murdoch in South Australia and the evidence of Murdoch's drug running business adduced during the trial, the jury was already aware of Murdoch's background such that Mr Algy for the defence probably considered there was nothing to lose in attacking the police.

Leaving aside the innuendo of corruption running through the defence case, Mr Wild for the Crown was putting to the jury that either Bradley Murdoch was the unluckiest of men or the combination of the three pieces of evidence of Murdoch's DNA at the crime scene removed any possibility consistent with innocence.

*Proving Murdoch could have committed the murder at 7.30 pm on 14 July 2001 and driven to Broome via the Tanami Track to arrive in Broome by 4.00 am on 16 July 2001*

The Crown case was that Murdoch was the person in the Shell truck stop video and he departed the service station at about 12.50 am on 15 July. Murdoch admitted he arrived in Broome at 4.00 am on 16 July which, allowing for the time difference between the Northern Territory and Western Australia, meant on the Crown case Murdoch drove 1,800

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

kilometres in 28 and a half hours. The Tanami Track is 1,100 kilometres in length running from Alice Springs to the Halls Creek turnoff where the bitumen commences. Then, there is a further 300 kilometres to Fitzroy Crossing and another 400 kilometres from Fitzroy Crossing to Broome.

Murdoch claimed this timeline was not possible given the poor state of the Tanami Track, which comprised 1,100 of the 1,800 kilometres to be covered, and in any event Murdoch's evidence was he drove like 'Tommy the Tourist' to avoid drawing attention to himself with plenty of rest breaks. Murdoch claimed he left Alice Springs at 3.30 pm and took the Tanami turnoff just north of Alice Springs. Murdoch's evidence, supported by his friend Pete Jamieson, was he arrived in Fitzroy Crossing between 6.00 pm and 9.00 pm Western Australian time on 15 July 2001.

To counter Murdoch's claim the Tanami Track was in poor condition, the Crown called two witnesses, Mr Stones, a road inspector, and Mr Hall, a police officer, who had good knowledge of the state of the Tanami Track at the same time as Murdoch made his trip and who both gave evidence of the conditions on the Tanami Track. Mr Stones estimated it would take an experienced four-wheel driver like Murdoch 18–20 hours to travel from Alice Springs to Fitzroy Crossing. Mr Hall's estimate was 16–18 hours.

Mr Wild in his summing up to the jury used the higher figure of 20 hours provided by Mr Stones for illustrative purposes, which would result in Murdoch arriving in Fitzroy Crossing at 9.00 pm on 15 July 2001. Mr Wild then pointed out for the benefit of the jury this left Murdoch with a comfortable seven hours to travel the remaining 400 kilometres to Broome on bitumen with a speed limit of 110 kilometres per hour to arrive by 4.00 am on 16 July 2001. Mr Wild used the expression 'do it on your ear' to describe the last leg of the journey. Mr Hepi told the court he could do the trip from Alice Springs to Broome in 16 to 20 hours, which gave a large extra margin to Murdoch to make the distance in 28 and a half hours. So, the Crown argued that the jury could put aside the question of whether Murdoch could have made the journey between Alice Springs and Broome in 28 and a half hours: 'He had plenty of time that he could have done it and he was an experienced four-wheel driver driving on the Tanami when it was in reasonable nick.'

To reinforce the Crown's case, Mr Wild turned to the amount of diesel fuel that the person in the Shell truck stop video purchased, which was 117.56 litres because the vehicle in the video had an enlarged tank. On the Crown case, Murdoch needed to refuel because he had just travelled 600 kilometres to and from Barrow Creek. Yet, Murdoch had filled up at the

## BRADLEY MURDOCH

BP service station in Alice Springs at 2.00 pm that day. Thus, if Murdoch was the person in the Shell truck stop video, then not only did this establish Murdoch had the opportunity to kill Peter Falconio but also explained why Murdoch was filling up at the Shell truck stop when he had also filled up at the BP service station – because he had just returned from Barrow Creek.

*Proving Murdoch's post-offence conduct in the form of changing his appearance, altering his vehicle and telling lies exhibited a consciousness of guilt*

The Crown led evidence from several witnesses who knew Murdoch well and who told the court Murdoch had a moustache, but that immediately after he had returned from Alice Springs on 16 July 2001, he had shaved off his moustache. Ms Beverley Allan, who was in a relationship with Murdoch between the end of 2000 and July 2001, gave evidence that Murdoch had shaved off his moustache on 16 July 2001. Another witness, Mr Brian Johnston, known as 'the Sheriff', told the court throughout the time he travelled with Murdoch he had a moustache, but that shortly before Mr Johnston left Broome on 24 July 2001, Murdoch had shaved off his moustache. Under cross-examination, Murdoch told Mr Wild that Ms Allan was wrong about his shaving off his moustache. Murdoch said: 'She's wrong on a lot of things.'

In his cross-examination of Murdoch, Mr Wild then turned to the evidence of four witnesses, Ms Rachael Maxwell, the Sheriff, Ms McPhail and Mr Hepi, who all testified that the mesh in his white utility had gone after March 2001:

Q: Ms McPhail says there was no mesh in your vehicle. She's wrong too?

A: Yes.

Q: So that's four people who are wrong, they're all wrong and Mr Hepi's wrong. He says there was no mesh at that time too?

A: There's mesh in there all the time Mr Wild, for my dog, Jack. I've got a lot more respect for him than all of those people.

Mr Wild then asked Murdoch about the taking off of the mesh by Mr Johnston (the Sheriff). Murdoch's answer was: 'I've told you all along there's a lot of things I disagree with. One of Hepi's gophers, Sheriff.'

In regard to the mesh and the Shell truck stop video, Mr Wild invited the jury to look at the video when after paying in cash th'e man in the video deposits his purchases of spa water and iced coffee, 'puts them in the

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

right-hand side, back driver's side of the canvas, flicks it up, in it goes, no mesh in there of course'.

Mr Wild was seeking to corroborate Joanne Lees's evidence that Murdoch had pushed her into the back of his utility from the side, which could not have occurred if there had been mesh in place. Mesh would also have prevented Joanne Lees from escaping from the back of the utility, contrary to her testimony.

As to the broader implication of the Shell truck stop video, Mr Wild homed in on Murdoch's vehement denial that he was the man depicted in the video, which Mr Wild suggested to the jury was because if the jury accepted it was Murdoch in the video, Murdoch was 'in the frame for the Barrow Creek job'. As Dean Mildren, in a footnote at p 113, put it in his book, Murdoch 'has denied that it is him in the video when on the evidence it is him, because he thinks that if he tells the truth it will be damning'.

Mr Wild concluded as follows:

The Crown suggests to you that it's a false denial. He's not telling the truth about that. And he's not telling the truth because of a consciousness of guilt of the Barrow Creek offences. That's what it is. And I invite you to find that's what it's all about.

In his summing up to the jury, Martin CJ told the jury that if they were satisfied it was the accused and his vehicle at the truck stop, it followed that the accused had not been truthful, and his Honour needed to give the jury directions as to the proper use of such a finding of untruthfulness. This is known as an '*Edwards* direction' after the case of *Edwards v R* (1993) 178 CLR 193:

In giving you this direction, I must emphasise some matters. First you must be satisfied that the lie was deliberate. Second, you must be satisfied that the lie relates to a material issue in the case. You might think there is little doubt that a lie by the accused as to whether he was at the truck stop is material to the case. Third, and importantly, it is only if the accused told the lie because he perceived the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him. It must be a lie an innocent person would not tell.

Martin CJ went on to tell the jury people sometimes lie out of panic or even though they are innocent they think the truth might wrongly implicate them. Consequently, his Honour directed the jury that to find the lie about the truck stop was told out of a consciousness of guilt they

## BRADLEY MURDOCH

must reject all other possible reasons and find the lie was only explicable because the accused knew the truth would convict him. Even then, 'it is another piece of circumstantial evidence that on its own cannot prove guilt, but is to be considered in conjunction with the rest of the proven facts'.

*Summary of the Crown case*

The Crown case was entirely circumstantial and was constructed to prove beyond reasonable doubt that the only man who could have killed Peter Falconio and abducted Joanne Lees was Bradley Murdoch. In other words, there was no possibility consistent with Murdoch's innocence. The Crown relied on the positive identification by Joanne Lees of Bradley Murdoch as her assailant which was very strongly supported by Murdoch's DNA on Joanne's T-shirt, on the cable ties used to secure Joanne and on the gear stick of the Kombi van. The Crown also relied on the positive identification of Murdoch as the person in the Shell truck stop video by Mr James Hepi and Dr Sutisno, supported by the evidence of Ms Beverly Allan, Mr Brian Johnston and Ms Julie-Anne McPhail who all thought the person in the video looked like Murdoch. The Shell truck stop video provided the Crown with evidence that Murdoch had the opportunity to kill Peter Falconio, and as a person who regularly carried firearms Murdoch also had the means to execute the killing. Murdoch's denial that he was the person in the video allowed the Crown to argue it was a false denial made out of a consciousness of guilt, supplemented by evidence Murdoch changed his appearance and his vehicle configuration immediately after returning from Broome on 16 July 2001. The Crown contended that Murdoch could easily have made the trip from Alice Springs to Broome in 28 and a half hours, supported by evidence from Mr Stones and Mr Hall as to the state of the Tanami Track. In sum, the sheer weight of evidence against Bradley Murdoch pointed to his guilt beyond reasonable doubt.

***The defence case***

The defence case relied on the presumption of innocence. Bradley Murdoch gave evidence at his trial, which was an important decision made by the defence as it exposed Murdoch to cross-examination, that he had no knowledge of the events at Barrow Creek because he was not there. Murdoch's testimony was he left Alice Springs at 3.30 pm on 14 July 2001 and took the turn off for the Tanami Track just north of Alice Springs. Murdoch's version of events was he pretended to be a tourist to keep a low profile and enjoyed a number of rest breaks before arriving at Fitzroy Crossing between 6.00 pm and 9.00 pm Western Australian time on

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

15 July 2001. Murdoch reached his destination of Broome at 4.00 am Western Australian time on 16 July 2001.

Grant Algy's decision to call Murdoch into the witness box was a calculated risk. Algy would have been hoping Murdoch's conduct in the witness box would be unfaltering and measured, presenting as a credible witness. However, there is a marked difference between a defendant being taken through their evidence in chief by their counsel and a searching cross-examination probing any inconsistencies in their version of events. In his evidence in chief, Murdoch denied having anything to do with the alleged disappearance of Peter Falconio and was calm and confident in giving his answers.

Murdoch's demeanour changed under cross-examination from Mr Wild, and he seemed startled by Mr Wild's first question: 'Where did you bury the body?' Murdoch had to fend off a string of accusatory questions that ranged from accusing him of panicking when Joanne escaped which caused him to only cursorily search for her and wrapping Peter Falconio's head in a denim jacket he took from the Kombi van to avoid spilling any of the victim's blood when he loaded the body into his utility to fleeing to Alice Springs to fill up and denying he was the person in the truck stop video because it put him in the frame for murder. Murdoch admitted many of his friends and even his father thought the person in the video looked like him, 'but I knew it wasn't me, end of subject'. Murdoch denied each of the accusations put to him by Mr Wild and strongly disagreed he could easily have driven from Alice Springs to Broome in 28 and a half hours. Murdoch could offer no explanation as to why his DNA was on Joanne's T-shirt.

All in all, while Murdoch had undergone a rigorous and demanding cross-examination, he had held up reasonably well and had justified Mr Algy's decision to put him on the witness stand. The jury would have been expecting Murdoch to be called and a failure to do so would inevitably have caused the jury to speculate as to why they had not heard his version of events.

The early part of Mr Algy's final address to the jury reflected the defence's reliance on the presumption of innocence:

Now the difficulty I have is that there's a limit to the help I can give you because as you've heard from my client, Brad Murdoch, he wasn't there. So it's not a case where he can tell you what happened, you know, on his version of events because he wasn't there and that I suppose provides some limitations insofar as the help I can give.



## BRADLEY MURDOCH

So, what was the defence strategy to counter all the Crown evidence that strongly pointed to Murdoch as Peter Falconio's murderer and Joanne Lees's abductor? Mr Algie's summing up to the jury ranged far and wide, from suggesting Peter Falconio might not be dead and Joanne Lees may have been involved in his disappearance to raising the possibility the police had 'fitted up' Murdoch and the DNA evidence had been contaminated.

On the issue of whether Falconio was still alive, Mr Algy pointed to the evidence of an alleged sighting of Peter Falconio on 22 July 2001 by Melissa Kendall and Robert Brown in Bourke, New South Wales. The Crown had argued the pair were mistaken, but Mr Algy urged the jury to accept Melissa Kendall's and Robert Brown's evidence as that of honest people giving a truthful account. However, at the same time Mr Algy accepted it was Falconio's blood under the pyramid of dirt on the side of the Stuart Highway that Mr Millar had found when he rescued Joanne Lees. The following extract from Mr Algy's summing up is an example of his technique of raising features of the case that he suggested might trouble the jury without exactly explaining why and leaving the matter to the jury almost as a question mark:

I mean the blood is there, there's no question about that. And it's Mr Falconio's blood. So, is the pyramid of dirt some sort of marker? And if so, why? Why would the bad guy, who's meant to have shot him, want a little pyramid of dirt marking it? It's just another feature you might find curious. It might trouble you, members of the jury.

The Crown had offered a simple answer to Mr Algy's question: the pyramid of dirt was not a marker at all, but an attempt by Murdoch to cover up the blood stain and hide the evidence. Without being specific, Mr Algy appeared to have been suggesting there was something untoward about the pile of dirt, perhaps involving a third party who needed to find the location of the attack.

Mr Algy also addressed the question of what had happened to Peter Falconio's body if he had indeed been shot dead. Mr Algy argued that it was unlikely the gunman would have risked putting the body in his utility as he could not have known at what time Joanne Lees would try and flag down a passing vehicle, thereby potentially raising the alarm. At the same time, Mr Algy pointed out the police conducted a thorough search of the area and could not find a body. Mr Algy contrasted the police finding Joanne's lip balm with the police being unable to find a body.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

The counter argument was that Murdoch had to remove the body because there was an even greater risk the police would be able to trace the bullet in the skull to the firearm Murdoch used to kill Peter Falconio had he left the body in situ. In addition, given the remoteness of the Barrow Creek location it was unlikely that the alarm would be raised before Murdoch had time to dispose of the body either on the 300-kilometre drive back down to Alice Springs or along the Tanami Track.

The defence was presented with the difficulty that a number of witnesses who knew Murdoch well had identified him as being the man or who looked like the man in the Shell truck stop video. Mr Algy had sought to discount this evidence by telling the jury that the very poor grainy quality of the images meant that any identification based on these images was unreliable. Mr Algy specifically singled out Mr James Hepi, Murdoch's former business partner, as having an axe to grind because Hepi believed Murdoch had 'dobbed' him in to the police, and therefore it would be 'extremely dangerous' for the jury to rely on Hepi's evidence. Indeed, Hepi's evidence was particularly dangerous to the defence because Hepi had told the court that Murdoch had admitted to Hepi: 'Yes, that is me in the truck stop.'

The defence also had to counter the evidence of two expert witnesses called by the Crown. First, Mr David Ringrose had given evidence that the man in the Shell truck stop video images is of a height consistent with Murdoch's height of 6 feet 5 inches (196 cm). Mr Ringrose acknowledged his calculations factored in a 3% plus or minus margin or 5.88 cm. Mr Algy pointed out that the 3% minus margin meant the person in the video would be nearly 6 cm shorter than Murdoch and therefore it was inconsistent with Murdoch's height and unlikely to be him in the video.

Secondly, Dr Sutisno had given evidence that based on her facial and body mapping analysis, the man in the video was Murdoch. The defence had called Professor Henneberg to challenge Dr Sutisno's conclusion. Mr Algy described Professor Henneberg in glowing terms:

It's difficult, I'd suggest, to imagine anybody more qualified in this area, more learned, more published in this area, than Professor Henneberg and what he says is, 'Look, I had a look at it, I was interested to try but the images are simply so poor, there is no sufficient information on the truck stop images, that it can't be done. The information is not there.'

Mr Algy's approach was to ask the jury whether they could see the similarities identified by Dr Sutisno between the images of the person in

## BRADLEY MURDOCH

the truck stop video and the images taken of Murdoch when he was held on remand in Berrimah Prison in Darwin awaiting trial:

But, members of the jury, could I invite you to consider this: if you can't see them when, according to her they can be seen, how could you be confident they are there? How could you be confident that this mapping purportedly undertaken by Dr Sutisno is anything more than entrails gazing dressed up as science? It's a matter for you but you might be caused some concern by her unique identifiers.

Despite the hyperbole adopted by Mr Algy in likening facial and body mapping to entrails gazing, the visual materials presented by Dr Sutisno in her evidence were available to the jury, who would be able to readily understand Dr Sutisno's comparison of individual features and therefore would enable the jury to critically evaluate her opinion.

Clearly, it was essential to the defence case to discredit Joanne Lees as either an untruthful witness because she was involved in Falconio's disappearance or as an unreliable witness because she had incorrectly identified Murdoch as her assailant. As to the former, Mr Algy implied that Joanne Lees could have driven the Kombi van into the scrub and hidden it herself. As to the latter, Mr Algy submitted that Joanne's identification of Murdoch was unreliable because of the displacement effect: Joanne had first seen a photograph of Murdoch on the internet naming him as a suspect in Falconio's disappearance, and therefore any later identification of Murdoch was unreliable because of the risk Joanne was identifying the photograph on the internet and not her actual memory of the man who abducted her.

Mr Algy also attacked any inconsistencies in Joanne's various statements to the police or sought to describe some aspects of her version of events as strange or odd, always with a final comment to the jury of 'it's a matter for you'.

For example, Mr Algy described as 'a little odd' Joanne's description of Murdoch pushing her out of the passenger seat of the Kombi van so she landed on her knees and then resisted Murdoch's attempts to put tape around her legs:

Don't you think in those circumstances if the man wanted to put tape around her legs he could have and would have? If she's lying face down on her stomach with her hands handcuffed behind her back, a man standing over her and grabbing her legs, it's not going to be too hard to tie them up with tape if that's what he wanted to do, is it? It's a

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

matter for you to assess, members of the jury. You've been around, you understand the way the world works, does that sound right?

Well, on Joanne's version of events, Murdoch did succeed in getting tape around her legs, but in the dark a young athletic woman was putting up strong, perhaps unexpected, resistance such that the tape was not very effective. Furthermore, all the time Joanne battled him, Murdoch would have been acutely aware of Falconio's body lying on the side of the Stuart Highway not knowing when a vehicle's lights would be seen in the distance. Murdoch had to hurry and get Joanne into the back of his utility as fast as possible.

Then again, Mr Algy took issue with Joanne's version of events regarding the behaviour of Murdoch's dog, Jack, and in particular that first the dog just sat quietly when Murdoch pushed Joanne into the front seat of his utility, and secondly that Murdoch was unable to find Joanne after she escaped when he had a dog to help him follow her scent:

Have you ever heard of such a dog? It's sitting there in the car, driver's seat. It's not barking or sniffing or licking or anything. Just staring straight ahead, sort of dog. This is while a stranger, presumably Ms Lees is a stranger to the dog, being as it were pushed into the vehicle, presumably some yelling or carrying on. This dog doesn't do anything ...

I mean you might have the same problem with respect to not being found in the bush and she gets out of the car, the four-wheel drive, runs off, the man doesn't catch her. It's not clear whether he took the dog looking for her or not, you might think on the evidence, but gee, it'd be a bit odd if he didn't, wouldn't it? A man's out there with his dog, the first thing he'd do is grab a torch and the dog and go and find her. Dogs are good at that. You can smell them and all that sort of thing. It's a bit strange, members of the jury. A matter for you.

The evidence from Crown witnesses was that Jack was a quiet and obedient dog, especially when around Murdoch. Also, Jack was a companion dog for Murdoch not a tracker dog. When Joanne escaped from his utility, Murdoch was on the horns of dilemma: the longer he looked for Joanne, the greater the risk of detection by the occupants of a passing vehicle who might have become suspicious of the white utility parked behind the Kombi Van. Indeed, as previously mentioned, the danger of detection was very real as the evidence given by Pamela Brown and Jasper Haines demonstrated, when on the evening of 14 July 2001, as they were travelling south on the Stuart Highway, the pair saw a large white tray-top utility with a green

## BRADLEY MURDOCH

canopy on the back come out slowly from behind an orange Kombi van parked on the side of the highway heading north.

Mr Algy had tried to turn this evidence in Murdoch's favour by pointing out the white utility was heading north when on the Crown case Murdoch headed south to Alice Springs. Mr Wild sought to rebut this argument by suggesting Murdoch turned around immediately after Pamela Brown and Jasper Haines had disappeared from view as he needed to clean up the crime scene.

While it was essential to the Crown case to discredit the evidence of Joanne Lees, the cornerstone of the Crown's case against Bradley Murdoch was the DNA evidence. Mr Algy sought to undermine the DNA evidence by taking the very dangerous line of attack in suggesting the possibility of police corruption. The attack was insidious because it implied the police engaged in doctoring the DNA evidence because, so Mr Algy speculated, the police reasoned that as Murdoch was obviously guilty there would be no harm done:

Could they [the DNA samples] have been contaminated intentionally, members of the jury? Could it be to adopt a vernacular, a set-up, a fit-up? Would police do that, members of the jury, do you think that's possible? ... I mean, if Murdoch's guilty, if he did it, no harm done ... And you might think that whatever else is in dispute, the police really thought Brad Murdoch did it. Are police, do you think, to bend the rules, to fabricate a little bit, to lie a little bit, particularly if there's no harm done?

Mr Wild had responded by telling the jury that there was 'not one tittle of evidence' to support the defence's allegation of corruption by the Northern Territory Police Force. Certainly, it was a dangerous strategy for the defence to adopt, but possibly a calculated risk based on having nothing to lose given the cumulative strength of the three DNA samples (T-shirt, cable ties and gear stick) that linked Murdoch to the crime scene.

The alternative defence line of attack on the DNA evidence was to suggest poor handling and storage procedures as well as a lack of proper record keeping may have contaminated the DNA samples. Mr Algy suggested that contamination was an area 'that will legitimately cause you some serious concern'. Mr Algy exemplified the handcuffs or cable ties and the material from the gear stick which was held in the Darwin Forensic Science Centre from July 2001. Mr Algy pointed out the laboratory at that time was not accredited for normal LCN testing because 'all the various steps that need

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

to be undertaken from the sampling to the extraction of the DNA to the amplification of the DNA to the PCR [Polymerase Chain Reaction] and then the analysis, was all undertaken essentially in one room'. Mr Algy then proceeded to suggest that because it was three or four years later that Dr Whitaker undertook his LCN analysis in England, there was a risk that some form of unknown contamination had occurred intra-laboratory: 'There could have been some form of transfer or tainting of the [DNA] extract intra-laboratory, accidental or intentional, I suppose.'

Mr Algy also sought to challenge the accuracy of the LCN testing because when DNA is amplified more than 28 times it could produce more artefacts or 'stutters' which are by-products of amplification. This could lead to incorrect copying of alleles. Alleles are matching genes: one from the biological mother, one from the biological father. Dr Whitaker had explained in his evidence that stutters were easy to recognise because the stutter always had one number lower than the true number, and in any event a second test was routinely undertaken to eliminate stutters.

Mr Algy had called Dr Katrin Both, who did not accept Dr Whitaker's LCN testing as a 'valid scientific method' because of the acceptance of contamination in the negative controls. However, under cross-examination Dr Both conceded Dr Whitaker's results could have been independently verified had the defence chosen to follow that course.

Mr Algy highlighted what he claimed was poor record keeping as to the custody of the handcuffs between July 2001 when they were analysed by Carmen Eckhoff and May 2005 when they were examined by Dr Whitaker in England. Mr Algy singled out the movement of the handcuffs from Darwin to Adelaide for the purpose of an interview with Murdoch in Yatala Labour Prison where he was being held on remand prior to his trial in South Australia on charges of rape and abduction. The police claimed the handcuffs were at all times in the original sealed paper evidence bag and were not removed from the evidence bag.

Mr Algy's recitation of the history of the journey of the handcuffs was leading up to the defence trying to minimise the strength of Dr Whitaker's conclusion that the probability that the DNA left on the cable tie adhesive was from someone other than Murdoch was one in 100 million, by postulating the possibility of transfer:

It's got to be possible, doesn't it, members of the jury, particularly when you're dealing with such miniscule amounts of DNA, and that again was one of the critical concerns of Dr Both [the defence expert]. Because there's such small amounts of DNA to start with, and because if contamination

## BRADLEY MURDOCH

occurs it will also be in a very, very small amount, and because you're then amplifying not only the tiny little bit that was there to start with, but also the contamination that's come to join it, and you amplify it 34 times, you're amplifying the contamination as well and you can't tell what's real and what's contaminant. It's part of the problem with interpretation.

The Crown response was that any suggestion of contamination of Murdoch's DNA on the handcuffs had to be viewed in the context of his DNA on Joanne's T-shirt and on the Kombi van's gear stick. The defence was left to explain Murdoch's DNA on Joanne's T-shirt as having possibly occurred by accidental transfer at the Red Rooster in Alice Springs, even though Joanne was only at the Red Rooster briefly to consume a Coca-Cola. The Crown argued that Murdoch had tailored his evidence to allow for this unlikely possibility to have occurred.

For the jury, it was a question of whether the almost incalculable odds of the DNA on all three pieces of evidence, the T-shirt, the cable ties and the gear stick, being anyone else's but Murdoch's, were undermined by contamination (whether deliberate or accidental transfer or both) and the sheer coincidence of Joanne Lees and Bradley Murdoch crossing paths at the Red Rooster.

In concluding his final address to the jury, Mr Algy focused on several pieces of circumstantial evidence relating to the incident at Barrow Creek which he put to the jury were inconsistent with Murdoch being present. These included Murdoch's vehicle not fitting Joanne Lees's evidence of front to rear access; inconsistencies in Joanne's description of Murdoch's dog, Jack; and differences in Joanne's comfit image of her assailant and photograph 10 of the photo-board that Joanne picked out and which was a picture of Murdoch. 'Well, members of the jury, is that good enough for you. Are you happy to find my client guilty of murder on that sort of evidence, members of the jury?'

## The verdict

At 12.50 pm on 13 December 2005 the jury retired to consider their verdict. At 5.15 pm the jury returned to ask for clarification of a guilty verdict for murder without a body. Martin CJ told the jury that the absence of a body is not a bar to a guilty verdict of murder:

The critical question for you to consider on this issue is whether on the whole of the evidence, notwithstanding that you do not have a body, you are nevertheless satisfied that Peter Falconio was killed that night.

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

Martin CJ then went on to remind the jury of his previous instructions that if they were satisfied Peter Falconio was killed that night, the next question was whether they were satisfied he was killed by the accused. This required the jury to be satisfied the Crown had proved the four elements of murder he had set out in an *aide-mémoire* for the jury.

At 8.45 pm, after nearly eight hours deliberation, the jury returned a unanimous verdict of ‘guilty’ on each charge. Martin CJ told the court he entirely agreed with the jury’s guilty verdicts, and on the murder conviction sentenced Murdoch to imprisonment for life, with a non-parole period of 28 years commencing on 10 November 2003.

Under s 53A(1)(a) of the *Sentencing Act 1995* (NT), the standard non-parole period for the offence of murder is 20 years, but under s 53A(4) the court may fix a longer non-parole period:

(4) The sentencing court may fix a non-parole period that is longer than a non-parole period referred to in subsection (1)(a) or (b) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

Martin CJ gave the following reasons for setting Murdoch’s non-parole period at 28 years:

The nature of your crime, your personal history, including your prior offending, your obvious aggression and complete lack of remorse for the commission of the crimes or for the devastating impacts upon others, coupled with your maturity, paint a bleak picture of your prospects of rehabilitation.

The criteria relevant to the fixing of a non-parole period longer than 20 years must be viewed in the context of the statement in s 53A(2) that the standard non-parole period of 20 years represents the non-parole period for an offence in the middle of the range of objective seriousness for crimes of murder. Your crime is not in the middle of the range of objective seriousness for crimes of murder. While it is not at the top of that range, it falls within the upper end of that range.

I am satisfied that by reason of the objective and subjective factors affecting the relative seriousness of your crime, a longer non-parole period than 20 years is warranted. In that situation the legislation provides that I may fix a longer non-parole period. In other words, my discretion to fix a longer non-parole period is enlivened. All the factors to which I have referred must be weighed in determining whether to fix



## BRADLEY MURDOCH

a longer non-parole period. In arriving at a period, I have borne in mind the advanced age at which you will become eligible for parole and the real prospect that you will die in gaol.

However, on 13 July 2016, the Northern Territory *Parole Amendment Act 2016* was assented, which had the effect of inserting s 4B(4) into the *Parole Act 1971* (NT):

(4) The Parole Board must not make a parole order in relation to the prisoner unless the Parole Board considers that the prisoner has cooperated satisfactorily in the investigation of the offence to identify the location, or the last known location, of the remains of the victim of the offence.

This means that unless Bradley Murdoch reveals the location of Peter Falconio's body, he will never be released from prison as he was sentenced to life imprisonment.

Mr Wild had variously described Murdoch as 'meticulous' and 'cunning'. However, Murdoch's plan unravelled from the moment Joanne Lees resisted Murdoch and eventually escaped. Murdoch had a body to dispose of and a crime scene to clean up next to the Stuart Highway. Murdoch had to get down to Alice Springs fast and join the Tanami Track before police roadblocks were set up. Murdoch's problem was he had to risk filling up his white utility with diesel before taking the Tanami Track turn-off because he had travelled 600 kilometres to and from Barrow Creek.

That was Murdoch's undoing. Without the Shell truck stop video there would have been no photograph published in the *Western Australian* newspaper on 7 August 2001 which ultimately led to Joanne Lees recognising Murdoch as her assailant. The Northern Territory police had an unknown man's DNA on Joanne's T-shirt. Now they had a suspect's DNA to match against the DNA on the T-shirt. Murdoch was out of coincidences. No one else fitted.

## The appeal to the Northern Territory Court of Criminal Appeal

Bradley Murdoch appealed against both his convictions and his sentence. The Northern Territory Court of Criminal Appeal comprised Angel ACJ, Riley J and Olsson AJ.

One ground of appeal asserted that 'the learned trial judge erred in admitting evidence of Ms Lees purporting to identify the appellant and his

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

dog because, it is said, in neither case was the evidence spontaneous or reliable and it was tainted in all the circumstances or, alternatively, its probative value was outweighed by its unfair prejudice to the appellant'. This was essentially a rerun of the issues previously discussed in *R v Murdoch* [2005] NTSC 75. The main contention was the displacement effect of Joanne seeing the internet photograph before picking out Murdoch as photograph 10 in the photo-board. The Court of Criminal Appeal held 'such are the differences between the two photographs, that any danger arising from the displacement effect was, in this case, minimal'. Consequently, the Court dismissed this ground of appeal.

The Court of Criminal Appeal was clearly unimpressed by other grounds of appeal such as describing as 'plainly untenable' the challenge to the learned trial judge's instruction to the jury that if they found the appellant told a lie about whether he was present at the Shell truck stop, as alleged by the Crown, the lie could be used by the jury as evidence of a consciousness of guilt of the offences charged, because the trial judge had rendered 'it plain to the jury that they could not move direct from findings that it was the appellant at the truck stop and that he had lied about that situation, to a finding of guilt of murder'. The Crown had presented its case on the basis that the appellant's presence at the Shell truck stop gave him the opportunity to have been at Barrow Creek.

Similarly, the Court of Criminal Appeal criticised the challenge to the trial judge's ruling to admit the appellant's ownership and possession of firearms and a silver handgun as having 'an air of unreality'. This was a rerun of *R v Murdoch* [2005] NTSC 79 and the Court of Criminal Appeal reached the same conclusion as Martin CJ:

In the present case, it was inevitable that the facts that the appellant was of bad character, had been accused of other serious offences and was a habitual drug runner would come before the jury. These were matters necessarily inherent in and interwoven with the relevant events. As the learned trial judge said, it would come as no surprise that the jury would hear that a drug runner operating in the manner adopted by the appellant would routinely carry firearms.

Another ground of appeal was the admission of the evidence of the witnesses Ms Allan, Mr Johnston and Mr Hepi as to the identity of the person shown in the truck stop video. The Court of Criminal Appeal dismissed this ground of appeal in the following terms:

## BRADLEY MURDOCH

Each of the relevant witnesses in the instant case was singularly well qualified, by his or her close association with and knowledge of the appellant at the relevant times, to make the comparisons expressed. Conformably with what Kirby J said in *Smith v The Queen* (2001) 206 CLR 650 at 656, the evidence was particularly important when it is borne in mind that the appellant had deliberately changed his appearance from that at the time of the alleged offences. Each of the witnesses concerned knew him well both before and after that change.

There was only one ground of appeal against conviction which the Court of Criminal Appeal considered to have merit, namely, ‘that the learned trial Judge erred in admitting the evidence of Dr Sutisno because it was not established that body mapping, face and body mapping or posture comparison were recognised fields of specialised knowledge nor was it established that Dr Sutisno was an expert in any identified aspect of a field of specialised knowledge relevant to her evidence’.

As can be seen from this appeal ground, there was no objection to facial mapping which has been accepted as a recognised field of scientific expertise. The Court of Criminal Appeal reviewed the authorities and concluded ‘it was not established that body mapping or “face and body mapping” is a technique that has a sufficient scientific basis to render results arrived at by that means a proper subject of expert evidence’.

As a result, the Court of Criminal Appeal upheld this ground of appeal, finding that while Dr Sutisno ‘was able to give evidence of points of similarity regarding the facial features of the persons shown in the images’ her evidence was ‘not admissible as to positive identity’:

Dr Sutisno was not qualified to give evidence, as she did, based on ‘face and body mapping’ as to whether the two men were, indeed, the same man. Her evidence in this regard should not have been received.

This meant that the Court of Criminal Appeal had to consider whether to apply the proviso found in s 411(2) of the *Criminal Code* (NT):

(2) The Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

The Court of Criminal Appeal concluded that the case against the appellant was overwhelming and compelling, and therefore no substantial miscarriage of justice had occurred because of the error in admitting one

## DID THEY DO IT? SIX NOTORIOUS AUSTRALIAN MURDER TRIALS

aspect of the evidence of Dr Sutisno. Consequently, the appeal against conviction was dismissed.

This left the final ground of appeal that the non-parole period of 28 years set by the trial judge was manifestly excessive. The Court of Criminal Appeal considered the following factors important:

- (a) The killing was cold blooded and premeditated;
- (b) The appellant has not demonstrated any remorse and the body of the victim has not been found. As the Crown put it there can be no closure for those grieving for the victim as the appellant has chosen not to reveal what he did;
- (c) As to the other offences each was of an inherently serious nature that subjected Ms Lees to a terrifying ordeal in circumstances in which she had every reason to anticipate at least sexual violation and at worst eventual death herself;
- (d) There were no factors to mitigate the appellant's conduct which was cruel, remorseless and completely unprovoked.

The Court of Criminal Appeal considered the circumstances called for a non-parole period substantially in excess of the standard statutory term of 20 years and noted the trial judge had addressed the age of the appellant who might well die in prison. The Court concluded 'there is no basis on which this Court might properly interfere with the exercise of the sentencing discretion'.

## Application for special leave to appeal to the High Court of Australia

On 21 June 2007, the High Court of Australia (Gleeson CJ, Hayne and Callinan JJ) refused Bradley Murdoch's application for special leave to appeal to the High Court of Australia as it could see no error in the reasoning of the Northern Territory Court of Criminal Appeal and the proposed grounds of appeal had insufficient prospects of success.

## Postscript

Under the Northern Territory's 'no body no parole' rule, Murdoch may never be released even after he has completed his 28-year non-parole period of imprisonment. However, given his age and his state of health at the time, the Parole Board may exercise compassion.

## BRADLEY MURDOCH

As to the location of Peter Falconio's body, there is a binary choice: either he disposed of it between Barrow Creek and Alice Springs, or on the Tanami Track. One possible theory is that Murdoch did not dispose of the body on his 300-kilometre journey south from Barrow Creek to Alice Springs, but in order to flee the crime scene and get on to the Tanami Track as fast as possible, he risked having the body in the back of his utility when he filled up with diesel at the Shell truck stop. Thus, under this speculative theory, the body is buried somewhere along the Tanami Track, possibly at the point Murdoch had reached when the sun rose between 7.15 am and 7.30 am in Central Australia in July. If Murdoch had been travelling at 90 kilometres per hour after taking the Tanami Track turnoff at about 1.00 am, then allowing for several short rest breaks, Murdoch would have travelled about 520–540 kilometres along the Tanami Track when the sun rose.

