

# Looking and knowing

## Jurors and photographic evidence

By Katherine Biber



Dr Katherine Biber is a historian and legal scholar in the Department of Law, Macquarie University.

Her recent book, 'Captive Images: Race, Crime, Photography', is published by Routledge-Cavendish, and explores in detail the problems of using photographic evidence in identification cases.

**For a short time, after 2001, juries were left almost to their own devices when considering photographic evidence. Handed surveillance photographs taken at the crime scene, they were simply asked whether or not the person in the photograph was the defendant.**

If they were sure, beyond any reasonable doubt, they could find the defendant guilty of the relevant crime. Most juries had a doubt, and so prosecutors needed to deploy new methods to secure convictions based upon photographic identification evidence.

This brief period of uncertainty followed the High Court's decision in *Mundarra Smith v The Queen*.<sup>1</sup> Smith had been convicted of bank robbery. The surveillance camera in the bank captured images of the crime taking place. Two police officers testified that they recognised Smith from the photographs. The jury was shown the photographs. They were not asked the crucial question: 'Is Smith the bandit in the photographs?' Instead, they were asked: 'Do you agree with the police evidence that Smith is the bandit in the photographs?'

Before the High Court handed down the *Smith* judgment, this was a common—and highly effective—method of prosecuting robberies. There was no need to resolve conflicting eyewitness testimony; there was no need to amass corroborative evidence; there was no need to deal with the poor quality of these blurry CCTV images. Furthermore, there was no need to address the complex nature of photography as a way of knowing things about the world.

The High Court held that the jury had been asked the wrong question, as the police recognition evidence was irrelevant. The

police were not eyewitnesses to the crime in issue, they were not experts in photographic recognition, and they were no better placed than a juror to look at a photograph and compare it to Smith himself, who was sitting in the dock during his trial. The police recognition evidence could add nothing material to the jury's determination of guilt. If the photograph was of poor quality, as was usually the case, the police testimony could not be used to improve bad evidence.

At Mundarra Smith's re-trial, the jury was simply handed the surveillance photographs and asked to compare them with the man in the dock. They were also given additional warnings about the dangers of cross-racial identifications.<sup>2</sup> The police did not testify. The jury had a reasonable doubt, and Smith was acquitted.

### Photographs as truth?

What is a jury to do with these kinds of photographs? They are grainy, often black and white, sometimes stills taken from video footage. It is impossible to know—without being told—what is going on in the photographs. Jurors, like the rest of us, are familiar with photography. We are comfortable with many of its genres: family snapshots, formal portraiture, documentary, history. But the evidentiary capacity of the photograph needs special care. Where, in criminal litigation, the consequences of recognition is a lengthy prison term, jurors want more than an unmediated photograph before making a finding of guilt. While photography has, since its inception, played a role in criminal litigation, the criminal courts have never developed a jurisprudence for images. Courts assume that photographs contain the truth. The jury simply

needs to crack open the image and find it. The jury is not asked to reflect upon the nature of photography, the ubiquity of surveillance, the deceptive power of vision, tricks of the eye, the dangers of suggestion. It is presumed that anyone, any juror, can look at a photograph in order to draw a conclusion.

However, scholars, theorists, artists and scientists have, for over one century, cautioned us against accepting photography as a way of knowing the truth about the world. When we look at photographs, we are implicitly given a caption; we are told what it is that we are supposed to find within them. An uncaptioned photograph cannot be the basis for a conclusion. Further, our capacity to look at a photograph is always dependent upon our having seen photographs before: we are familiar with a particular mode of distortion, of perspective, of flattering angles and candid cameras. Photographs can make us nostalgic, shocked, amazed or disgusted. Each of us believes we are a sophisticated 'reader' of images, and yet when the juror is shown a photograph and asked to exclude all reasonable doubt, they are usually unable to do so, unless they are also given something more; some extra access into the picture, further information, another way of looking.

### Juror doubts

The ramifications of the *Smith* decision were revisited in February 2004, when 'riots' erupted in the Sydney suburb of Redfern, following the death of an Aboriginal boy after a police pursuit. Clashes between Indigenous youth and police were captured by police, media and amateur photographers, and these images were later used to identify some of the participants. The NSW Police Minister at the time, John Watkins, issued a media statement confirming that the High Court's decision in *Smith* would not impede the swift and strenuous pursuit of trouble-makers.<sup>3</sup> However, very few convictions were secured after those events.

These cases demonstrate that photographs alone are not enough to prove guilt beyond a reasonable doubt. Jurors do have doubts about photographs, and need something more in order to conclude their deliberations. This void has increasingly been filled by experts. The High Court's decision left open the possibility that, where there was some specialised knowledge to be applied to the

photograph, that evidence could be given by the witness with that knowledge.

### Use of experts

What makes someone a specialist at making photographic recognitions? The High Court thought that ordinary police officers were not in a better position than a juror to recognise someone with whom they were acquainted from a blurry photograph. Interestingly, the Court wondered why *Smith's* mother, who was a witness at his trial, was not shown the photographs; this suggested that a mother might be well placed to recognise her son from an unclear photograph.

Criminal courts have accepted that a person might become an expert, through study or experience, in photographic recognitions where the face is distorted (for instance, through wearing a stocking over the head).<sup>4</sup> Courts have accepted that a witness can testify where they have some prior knowledge of a person's features (including distinctive clothing, tattoos, injuries, manner of walking) where these are represented in a photograph.

Moreover, courts are now accepting expert evidence using new technological methods for 'reading' photographs. New technologies produce new ways of seeing. These technologies purport to mediate between the juror and the image, rendering legible, or visible, what was previously unclear. These techniques are supposed to narrow the gap between 'resemblance' and 'recognition'. They are supposed to assist the jury to make a better determination of the facts. To date, however, Australian courts—and jurors—remain ambivalent about these techniques.

### Photogrammetry, facial mapping & photo-comparison

Methods such as photogrammetry, facial mapping and photo-comparison have been used, and widely accepted, in the United States and United Kingdom since at least the early 1990s.

Photogrammetry is the process of measuring photographed objects. Using the principles of perspective—wherein three-dimensional objects are represented in two dimensions—and using the measurements of known objects, unknown objects can be

△ New technologies, while they offer us new ways of looking, also pose new evidentiary problems. △

measured in photographs. In the United States, photogrammetry experts from the FBI Special Photographic Unit testify in bank robbery cases: they take measurements of various permanent objects in the bank, and use them to measure the bandits captured by the camera. They can measure—with a high degree of precision—features such as height and shoe size, and jurors are informed of the statistical occurrence of people with those dimensions.<sup>5</sup>

Facial mapping begins with the assumption that no two people share the same facial features. It brings together the techniques of photo-anthropometry (comparing facial dimensions or proportions between two photographs), morphological analysis (a feature-by-feature comparison), and photographic superimposition (using computer software to manipulate images so that one can be laid on top of the other to make a comparison). A recent decision in the NSW Court of Criminal Appeal addressed, in part, the frustration of a jury trying to evaluate this expert evidence.<sup>6</sup>

The jury in that case was asked whether the defendant was represented in the surveillance photographs, and the expert in facial mapping was called by the Crown in order to assist their deliberations. The jury sent a note to the trial judge, seeking to know more from the expert about the reliability of the technique, the error rate, and the number of features that needed to match in order for a recognition to be accurate. The Court of Criminal Appeal held that these were pertinent questions which, when put to the expert, were not satisfactorily resolved. As a result, the evidence of the expert was held to be inadmissible for not meeting the requirements of 'specialised knowledge' under the *Evidence Act*.<sup>7</sup>

The same expert had testified in the prosecution of Bradley John Murdoch, who was subsequently convicted of the murder of Peter Falconio, and associated offences.<sup>8</sup> It was a complex prosecution which relied, in small part, upon CCTV footage taken at a truck stop featuring a man whom the expert identified as Murdoch. A defence expert challenged the reliability—and the originality—of the facial mapping technique used by the Crown's witness. He said that the technique was simply another form of photo-comparison which, prior to the use of DNA evidence, was used in cases of contested or disputed paternity. With the proliferation of CCTV,

photo-comparison techniques were given new applications.<sup>9</sup>

## New technology/new problems

New technologies, while they offer us new ways of looking, also pose new evidentiary problems. Photographic evidence demands that jurors take care not to conflate 'looking' with 'knowing'. Particularly in our current climate, where surveillance and biometrics proliferate, we have exponentially more ways of visually capturing images. We, therefore, need more ways of looking at them; we need to learn how to read them, understand them, and when to exercise caution.

Law must embrace these technologies, but it must recognise their limits. Photographs do not speak for themselves; they require interpretation and care, and jurors must be assisted in using them. A 'jurisprudence of the visual' needs to be developed, requiring detailed thought, guidance and instruction for jurors, litigants and judicial officers in using photographic evidence and newer visual forms of imaging. Visual images are complex, contingent, unstable and misleading. Without consigning all forms of looking into the realm of experts, we must also concede that it is unsafe and unfair to expect jurors to remain unguided in drawing conclusions from photographs.

## Endnotes

1. *Smith v R* (2001) 206 CLR 650.
2. Mundarra Smith is Indigenous. Psychological studies show that people typically make more errors of recognition when they are asked to recognise a person from a racial group different from their own. Cross-racial identification jury instructions are entrenched in United States jurisprudence, and occasionally given in Australia. See *State of New Jersey v Cromedy* (1999) 158 NJ 112; S Johnson, 'Cross-Racial Identification Errors in Criminal Cases' (1984) 69 *Cornell Law Review* 934; K Biber, *Captive Images: Race, Crime, Photography* (2007).
3. J Watkins (NSW Minister for Police), 'Police Power to Prosecute Using Video Footage Confirmed', (Media Release, 26 February 2004).
4. *R v Griffith* (1995) 79 A Crim R 125.
5. See, for example, *United States v David Wayne Johnson* (1997) 114 F.3d 808.
6. *R v Hien Puoc Tang* (2006) 161 A Crim R 377.
7. *Evidence Act 1995 (NSW)*, s 79.
8. See *R v Murdoch (No 4)* (2005) 195 FLR 421; *Murdoch v R* [2007] NTCCA 1.
9. See *Murdoch v R* [2007] NTCCA 1, [265].