

CASE NOTES

by Mark Hunter

HIGH COURT

Smith v The Queen

High Court Nos. S233 and
S234/2000

Judgment of Gleeson CJ,
Gaudron, Gummow, Kirby and
Hayne JJ.

Date of Order: 21 June 2001.

Date of Publication of Reasons:
16 August 2001.

CRIMINAL LAW - EVIDENCE - IDENTIFICATION

On appeal from the New South Wales
Court of Criminal Appeal.

On 26 June 1997, four males robbed a
branch of the National Australia Bank
in suburban Sydney. Photographs taken
by the bank's security cameras showed
one of the robbers wearing a hooded
jacket and acting as lookout.

The Crown alleged this person to be the
appellant. He was convicted at trial of
robbery in company and in April 1999
was sentenced to a minimum term of
three years and ten months penal
servitude.

Bank employees and other witnesses
were unable to identify the appellant
from a video compilation of males faces.
Police officers had already identified
the appellant from the bank's security
camera photographs. Following his
arrest, the appellant agreed to take part
in an identification parade, which was
not held.

The trial judge, over objection,
allowed the Crown to adduce evidence
from two police officers as to their
recognition of the appellant in the
security camera photographs. The only
issue at trial was whether these
photographs in fact depicted the
appellant.

Restrictions on the admission into
evidence of identification from
pictures, as contained in the *Evidence
Act, 1995* (NSW), do not extend to
evidence by a witness identifying a
person in a photograph to be a person
known to the witness.

The Court of Criminal Appeal
accepted the Crown's submission that
the evidence of the police officers was
admissible as direct evidence that a
person shown in a photograph was the
accused, and that it was not a type of
opinion evidence made inadmissible
by s76 of the Act.

HELD - Appeal allowed; new trial
ordered.

(per Gleeson CJ, Gaudron, Gummow
and Hayne JJ) - The controversial
identification evidence was simply not
"relevant evidence" (s55), it being
founded on material no different from
that available to the jury from its own
observation. It should on this basis
have been excluded.

(per Kirby J) - The police officers'
identification of the appellant was
"relevant evidence" because, if
accepted, it (s 55) "...could rationally
affect (directly or indirectly) the
assessment of the probability of the
existence of a fact in issue in the
proceeding". However this evidence
was also a type of opinion evidence
made inadmissible by s 76 of the Act.

Appearances

Appellant - Byrne SC, Austin and
Corish / Sydney Regional Aboriginal
Corporation Legal Service)

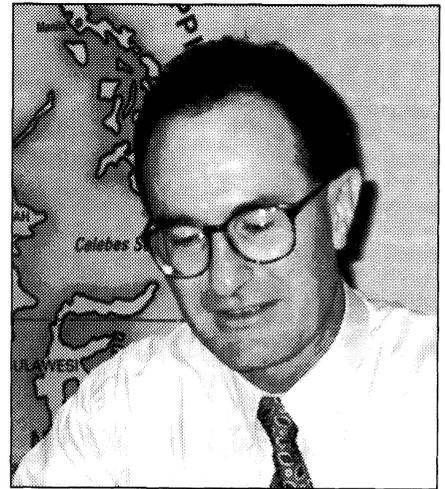
Respondent - Sexton SC (NSW
Solicitor-General), Ellis and Baker /
DPP (NSW).

Commentary

This decision has application in the
Territory by virtue of the
undemanding nature of the definition
of "relevant evidence", as contained
in s 55 of the *Evidence Act, 1995*
(NSW).

In the majority judgment, Their
Honours refer to evidence of a person's
distinctive physical features, clothing
or manner of walking as examples of
material which could make this type
of identification evidence "relevant".

The Court of Criminal Appeal of the
Northern Territory grappled with the
admissibility of this type of
identification evidence in *Cook v The*



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Queen (unreported) NTSC 18/11/98. Mr
Cook was allegedly recognised by a
police officer in a video recording made
by Sterns Jewellers, Smith Street Mall, on
2 August 1996.

The Crown conceded that, *on its own*,
the video was of such poor quality as to
prevent a proper identification of Mr
Cook by the jury. The Court of Criminal
Appeal (Mildren, Thomas and Bailey JJ),
however, upheld the decision of Kearney
J to allow the police officer to give
evidence of his identification of Mr Cook
from the same video.

This officer was unable to attribute any
distinguishing features to Mr Cook, and
his prior knowledge of him comprised
about five hours of surveillance
observation in Sydney during 1993 and
two alleged sightings in Casuarina in early
1996.

In *Smith* the prior knowledge, found by
the High Court to be insufficient for
identification, consisted of numerous
observations, two arrests and interviews
of the appellant in suburban Sydney in
early 1997. In the course of submissions
Their Honours extracted from the Crown
the concession that, by the end of the
trial, the jurors had spent more time in
the presence of the appellant than had
the Crown's identification witnesses!

In *Smith*, the issue of the relevance of the
police officers' evidence was not raised
at trial, in the Court of Criminal Appeal,
or in the grounds of appeal to the High
Court. Kirby J described the parties'
disinclination to argue the point of
relevance as "well founded" and
observed that appellate courts ordinarily

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defer to the rulings of trial judges about issues of relevance.

The majority found it unnecessary to determine whether the controversial evidence fell foul of the "opinion rule" (s 76), the operation of which is subject to various exceptions. Justice Kirby, however, observed:

"Given all that is now known about the dangers of mistakes inherent in the process of identification (and recognition), it is unsurprising that identification evidence of the kind offered by the two police officers has normally been classified as opinion rather than factual evidence".

The High Court's decision in *Smith* casts doubt upon the correctness of the decision of the Northern Territory Court of Criminal Appeal in *Cook*.

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"DARCY" DUGAN: 40 YEARS AS A MAGISTRATE

Former Victorian Chief Magistrate John "Darcy" Dugan entertained guests at the Kormilda College Speakers Forum in Darwin on Thursday 23 August. *Balance* took the opportunity to speak with Mr Dugan about his trip to the Territory and life as a magistrate.

Mr Dugan retired from the Victorian Magistrates Court in September 1990 after 40 years in the court, the last five as Chief Magistrate. He was known as "Darcy" after the notorious NSW criminal and jail breaker who was in the headlines in the early days of his career.

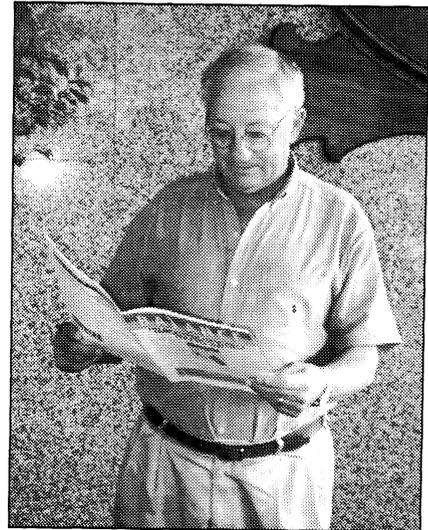
Mr Dugan's visit to Darwin this year was organised by Kormilda College. As well as speaking at the College's Speakers Forum, Mr Dugan meet with students to discuss his experiences as a magistrate.

"I went out to the school and spoke to the year 11 and 12 legal studies classes for an hour or so. It was quite good. The kids seemed to be interested," he said.

"I have been up to Darwin before. I used to come up reasonably regularly when I was on the bench to attend the magistrates conferences they had. The last year I was on the bench in 1990 I went to the Australian magistrates conference in Alice Springs. The person who ran that was Sally Thomas, then Chief Magistrate. I have known Sally over the journey for quite a while," Mr Dugan told *Balance*.

"I also came up here three years ago on a holiday and I was absolutely amazed at the transformation of the place compared to ten years ago — vibrant, lots of young kids from all over the world, it's absolutely marvellous.

"Once I came up here at sat in as a magistrate. I came up for a case where one of the magistrates was charged with, of all things, exposing himself. That got a bit of press at the time. I didn't know until I got here what I was coming up for and was quite shocked when I found out!"



John "Darcy" Dugan reading *Balance* during his recent visit to Darwin

Asked to reflect on the changes in the magistracy over his working life, Mr Dugan told *Balance* the biggest changes were in the jurisdiction and administration of the courts, as well as in advances in technology.

"From my time the jurisdiction of magistrates courts have increased enormously. I imagine it is exactly the same in Darwin. The more you can give down to the magistrates court the more you can avoid sending people to superior courts where things take longer and are more expensive.

"The qualifications of magistrates have increased enormously. In 1984 the recruitment of magistrates in Victoria moved out of the public service into the open market and people were recruited from all over — from the Bar, from solicitors, from corporate lawyers — the whole box and dice. In 1985 we got the first women on the bench in Victoria. It was quite healthy and welcome to have women on the bench and the lady who succeeded me was the first female Chief Magistrate in Victoria," said Mr Dugan.

"I have seen the administration of the courts change enormously. IT has been introduced in the courts. The way information is available and readily

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