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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 17/83

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THE QUEEN

v.

RODNEY JENNINGS MARTIN

Coram: Cooke J. (presiding)
Richardson J.
Jeffries J.

Hearing: 8 March 1983

Counsel: G.R.J. Thornton for Appellant
G.A. Rea for Crown

Judgment: 30 March 1983

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JUDGMENT OF COOKE AND RICHARDSON JJ. DELIVERED BY COOKE J.

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This is an application by the accused under the Crimes Act 1961, s.379A, for leave to appeal against a pre-trial order by a Judge under s.344A. It concerns evidence proposed to be called by the Crown directed to identification.

The accused has been committed for trial on a charge of assault with intent to commit rape on 30 January 1982. The incident is alleged to have occurred in Napier in the early hours of the morning. The complainant says that her assailant was unknown to her but that on 1 February 1982 at the police station she put together an identikit likeness of him according to her recollection. A detective sergeant with the necessary expertise guided her in assembling a picture with the pieces available, but there is no suggestion that he himself had any knowledge of the man's

identity. In two respects - the hair and the width of the face - she says that she was not entirely satisfied with the likeness ultimately composed. It was photographed and the photograph was published in local newspapers.

As a result the two proposed witnesses at trial whom we are about to mention came forward. One (Miss Porter) said that she thought the picture was of Rod Martin, an Australian rating from H.M.A.S. Vampire with whom she had an association of varying nature in Napier during the period 28 to 30 January 1982.

Another witness (Mrs Norris), who worked in a takeaway bar, said that from the identikit pictures she recognised a man who had been a customer there between 12.30 a.m. and 1 a.m. on 30 January 1982.

On 3 June 1982 Martin was interviewed in Sydney by Australian police officers at the request of the Napier police. He admitted to having been in Napier on the relevant date and to various details of his associations and movements in Napier of which the police had been informed. But he said that at the time of the alleged crime he had been asleep, alone, in a room in the house where Miss Porter lived. And he denied having been in the takeaway bar. A signed statement was taken from him and on the following day with his consent he was photographed, looking directly at the camera and also in profile, in black and white.

On 10 August 1982 at the Napier Police Station the complainant was shown sets of black-and-white photographs, taken from similar angles, of eleven men. Each set was in an improvised envelope of window shape, designed so as to cover the bottom part of the photographs. Ten of the sets bore printed information which would indicate to a knowledgeable person that they may have emanated from the police 'rogues' gallery'. The photographs of Martin, which were the other set, did not have any such caption; the covering was intended to prevent the photographs of him from being singled out for that reason (unless the envelopes were deliberately opened). The complainant then identified Martin's photograph as that of the man who had attacked her.

Thereafter Martin was charged and extradited from Australia. On 22 November 1982, shortly before the taking of depositions, Mrs Norris was shown the eleven sets of photographs by the police in Napier. She too picked out that of the accused, although she had a reservation about the neck as appearing in the photograph.

The complainant's evidence has been that her attacker was clean-shaven. The accused was clean-shaven when in Napier and when the police first interviewed him in Sydney. By the time of his extradition he had grown a beard, described to us as thick and black. Accordingly, in the submission of the prosecution, an identity parade at the stage when he had been brought back to Napier would have had little value. None was in fact held.

The evidence for the prosecution in the depositions and statements covers a number of other points, none in themselves strong evidence against the accused but contributing, it is said, to the total case against him. It is not desirable for the purposes of the present judgment to say more than that these include a packet of Player's cigarettes found near the scene of the alleged assault; the changing phases of the accused's relationship with Miss Porter over two days; the sounds of an opening door and a dog's growl during the night of 29 to 30 January; the accused's behaviour during the daylight hours on 30 January; a silver watch worn by him on his left wrist in a polaroid photograph taken of him in bed by Miss Porter on the morning of 29 January.

The weight of the evidence to which we have referred will be for the jury. We add only the opinion that if not significantly different at the trial they could reasonably regard it as by no means lacking in cumulative weight.

At the depositions hearing Miss Porter and her friend Miss Maddrin, who had been living in the same house at the time, identified the accused as the Australian seaman they had associated with in January. They said that they recognised him despite the beard he had grown since. It has to be noted that in January they had much more opportunity of becoming familiar with his appearance than either the complainant or Mrs Norris had as regards the man seen by

each. The complainant said in her deposition that she could not recognise him in court with the beard. And Mrs Norris gave no evidence that she could recognise him in court. Counsel for the Crown accepted in argument on the appeal that she had been unable to recognise him.

In these circumstances the evidence of the photographic identifications by the complainant in August and by Mrs Norris in November is of importance to the Crown case, although not necessarily crucial. Counsel for the accused having indicated that it would be objected to, the Crown moved for a pre-trial ruling. O'Regan J. declined to exclude this evidence, and it is from that decision that leave to appeal is sought. The objection relates to the evidence of the complainant and Mrs Norris as to identifying the photographs of the accused and the evidence of police officers confirming that these identifications were made in their presence by those two witnesses. The admission of the identikit picture, however, is not objected to. The case has been argued on the footing that whether the photographs themselves are admitted depends on whether the evidence of the identifications by means of them is admitted. And it is agreed that if any photographs are admitted, all eleven sets should be put in evidence.

The whole issue both before the High Court Judge and in this Court has been whether at this stage the evidence of photographic identifications should be excluded on the

ground that its prejudicial effect exceeds its probative value or on the ground of unfairness. Counsel for the accused concedes that it is legally relevant and admissible, subject only to the discretion. This concession is in accord with the law of New Zealand on the point, as stated in R. v. Collings 1976 2 N.Z.L.R. 104, 114, and R. v. Russell 1977 2 N.Z.L.R. 20, 27. For completeness we add a reference to s.22A of the Evidence Act 1908, inserted in 1982, although the present case may perhaps not fall precisely within that section. As to the discretion, it is clear that the Courts are always cautious before admitting evidence of an identification out of court by the use of police photographs, as has more recently been emphasised again in Alexander v. R. (1981) 34 A.L.R. 289, although there a majority of the High Court of Australia held that the particular evidence had been properly admitted at the trial.

In R. v. Davis (C.A. 269/82; judgment 17 December 1982) it was mentioned that amendments to the Crimes Act in 1980 are designed to facilitate pre-trial rulings and appeals from them. As there indicated, when the admissibility of evidence is challenged, not for alleged inadmissibility under strict rules of law, but by seeking an exercise of judicial discretion, there are some cases sufficiently clear for the point to be dealt with in advance and on appeal; whereas in others it will be better to leave the point for

decision by the trial Judge in the light of the evidence as it emerges at the trial. In the present case O'Regan J. thought it right to give a pre-trial ruling. Correspondingly we think it right to deal on appeal with the arguments raised. But we must make it perfectly clear that, like his ruling, our decision can only be based on the evidence in the depositions and equivalent statements and in the exhibits. The evidence at the trial or on a voir dire during the trial may differ, through cross-examination or otherwise. Any ruling by the trial Judge must of course be based on the evidence as it then stands.

In delivering the judgment of this Court in Russell Richmond P. was careful not to lay down hard-and-fast rules regarding the exercise of the discretion to exclude photographic identification evidence. After discussing the dangers that such evidence can have, he said at p.28:

> All of this adds up to the fact, as is recognised in the decided cases, that great care should always be taken with the use of photographs shown to anyone who may later become a witness as to the identification of a suspected person. Further, only in exceptional cases should photographs be used at a stage when some particular person is directly suspected by the police and they are able to arrange an identification parade or some other satisfactory alternative means whereby the witness can be asked directly to identify the suspected person. When photographs have been used it is quite clear, as was accepted in the present case, that in

> normal cases the Crown should not produce the photographs themselves as exhibits in the course of evidence in chief. A more difficult question is whether or not evidence should be led in chief that photographs were indeed shown to a witness. Circumstances vary infinitely and it is impossible to lay down any general rule. But in general terms it seems to us undesirable that such evidence should be given unless it adds in a real way to the other evidence as to identification available to the Crown.

The present case is a good illustration of the virtually infinite variety of circumstances. In its combination of four features - the identikit, the photographic identifications, the growing of a beard , the complainant's inability to identify the accused in court - it is a very unusual case. Counsel on both sides recognised this and could cite no case closely comparable.

In his argument in this Court Mr Thornton assembled quite a long list of ways in which he contended that the evidence in question could be unfairly dangerous or prejudicial to the accused. Counsel stressed that the complainant could not identify the accused in court, had very limited opportunities of detailed observation when absorbed in trying to escape from the attack, and did not make her photographic identification until more than seven months later. He maintained that the other ten sets of photographs included none of a person sufficiently like the accused to provide an adequate test. He said that the

complainant and Mrs Norris could have been under the influence of 'displacement effect' in that they might have unconsciously compared the photographs with the identikit rather than with their original recollections of the man's appearance. Also that the complainant or Mrs Norris might have thought that the man she had seen must be one of the eleven persons in the photographs.

Another suggestion was that the police precautions regarding the envelopes would not prevent a 'rogues' gallery' effect on the jury, because (according to the argument) there is inadequate evidence that the photographs of the accused were taken in Australia as stated by the prosecution: they might have been photographs previously in the possession of the police. We interpolate that there is no substance in this point. The source of the photographs of the accused can be explained to the jury in such a way as to eliminate any prejudice of that kind. The evidence of Detective Samuels is prima facie evidence that the photographs were those taken in Sydney on 4 June 1982.

Then, something was attempted to be made of alleged variations between descriptions by witnesses of the clothing worn by the accused when in Napier in January and the clothing described by the complainant and Mrs Norris as having been worn by the man of whom they respectively speak. Another point was that there was no identity parade, even for Mrs Norris, who was invited to consider photographs only

and as late as two days before the depositions. And last Mr Thornton claimed that it would be dangerous to invite the jury to compare the identikit and the photographs of the accused, whereas the Judge had thought that they should not be deprived of that opportunity.

A general comment which we make on all the arguments for the accused is that, whether good or bad, they are points which can be made to a jury as effectively as to a Judge. There is nothing especially difficult about them - except possibly the 'displacement effect' point, and on that a jury should be well able to assess whether or not the complainant's evidence of her dissatisfaction in certain respects with the identikit assembled by her shows that she retained a fairly clear recollection of her attacker's features.

Moreover, whether or not the case falls within the literal words of s.344D of the Crimes Act (added in 1982), it is clearly one in which the trial Judge should warn the jury of the special need for caution before finding the accused guilty on identification from photographs. This could conveniently be coupled with the usual warning of the danger of convicting on the uncorroborated evidence of the complainant.

There appears to be ample evidence capable of corroborating that there was an assault with intent to rape. We have not been asked to rule on whether any of the Crown

evidence could strictly be corroborative on the crucial question of identity. It may be of some help to the trial Judge, however, if we mention that at best the evidence may be near the borderline in that respect; and that he may find it sufficient to sum up on the lines suggested in R. v. Raana 1979 1 N.Z.L.R. 678, 681, and the other cases there cited.

That is to say, he could warn the jury that it is dangerous to convict on the uncorroborated evidence of a complainant in a sexual case, as at times such allegations can easily be fabricated. And also that special caution is needed before convicting on identification from photographs only: that memories of how people looked are fallible; the complainant and Mrs Norris, even if they seem convincing, could be mistaken and a photograph is usually not as reliable as actually seeing the person. He might say that in this case there is no independent evidence which they could regard as going as far as corroborating the complainant's identification from the photographs. But the Judge would be entitled to balance those warnings by references to the totality of the evidence. For instance he might tell the jury, if he saw fit, that they are fully entitled to convict and should convict if, bearing in mind those warnings, they are satisfied beyond reasonable doubt on the evidence as a whole that the accused was guilty. And that the right approach is to consider the total effect of

the various strands in the prosecution evidence, weighed with any evidence called for the defence, and then to decide whether or not in the end they are satisfied that the prosecution has proved the case beyond reasonable doubt. He would be able to help them by a review of the evidence and the opposing contentions.

However, the terms of the summing up are of course a matter for the trial Judge in the light of the way the trial develops. It is not the province of this Court to lay them down in advance. What we have just said is intended to be neither mandatory nor comprehensive.

Returning to the issue with which we have to deal now, we note that as against the arguments put forward by Mr Thornton it would be for the jury to weigh the significance or otherwise of the links in the chain of the Crown evidence. For instance, the evidence that the complainant was able to construct an identikit sufficiently like the accused to attract the attention of Miss Porter. And the evidence that the identikit led the police in that way to an Australian seaman who was undoubtedly in Napier at the time of the alleged crime and whose movements and associations there are the subject of other prosecution evidence. The evidence of opportunity may be strengthened if the photographic identification by Mrs Norris is accepted by the jury. Her reaction to the identikit is also a matter for the jury to consider. So are the opportunities of

observation available to her and to the complainant; any discrepancies in descriptions of clothing; lapse of time; and any arguments about the way in which the sets of photographs were put before the witnesses, what was then said and the range of the photographs. On the last matter we add that, having inspected the photographs ourselves, we think that the point raised is essentially one for a jury. We agree too with the Judge that it would be wrong not to allow the jury to compare the identikit and the photographs of the accused.

We turn to the point about the omission of an identification parade. A person charged cannot be compelled to attend such a parade (see now s.344B of the Crimes Act). But it is well established that normally a parade is clearly fairer than merely showing potential witnesses a collection of photographs. Valid reasons are required - and this we emphasise - before the prosecution will be allowed to adduce evidence of identification by photographs when a parade could have been held.

In this case, having heard the reasons advanced by the Crown we accept, on consideration, that they are valid. There was nothing unfair in merely showing a range of photographs to the complainant in August. At that stage the police were still pursuing their inquiries. Martin was in Australia and might never have been charged. There was no reason to suppose that, if he were charged, an identification parade could not usefully be held.

The growing of the beard, whatever the motive for it, altered the situation. If a parade had been held after that, identifications of the accused by the complainant or Mrs Norris would of course have strengthened the Crown's case. But we think that the police were reasonably entitled to take the view that a failure to identify a man of such changed appearance would not be significant. In the special circumstances it was not unfair to refrain from offering the accused a parade and to show photographs to Mrs Norris. In our view the Judge was justified on this application in not denying the prosecution the opportunity of putting the photographic identification evidence before the jury for them to weigh in conjunction with the other evidence at the trial.

Before parting with the case it may be useful to repeat two things. First, this judgment does not fetter the trial Judge in the exercise of his discretion on the evidence as actually given at the trial. Secondly, this judgment is essentially no more than an application of what was said by Richmond P. in giving the judgment of this Court in Russell at p.27:

> In the first place we respectfully agree ... that evidence of identification by photograph is legally admissible and relevant. The real question in all cases is whether or not the trial judge ought to have exercised in favour of the accused his discretion to exclude admissible and relevant evidence on the ground

that its prejudicial effect is out of proportion to its true evidential value, or on general grounds of 'unfairness'. All the decided cases are, we think, no more than illustrations of this principle.

In this case the issue is of sufficient importance to warrant leave to appeal, which we grant. But a full review of the case as it stands has not brought us to think that as the preliminary evidence stands the judicial discretion ought to have been exercised to exclude the evidence in question. The appeal is accordingly dismissed.

The Court makes an order forbidding publication of any report or account of evidence which is the subject of the objections dealt with in this judgment unless and until such evidence is given at the trial in open court.

R Bowden J.

Solicitors:
Dowling & Co., Napier, for Appellant,
Crown Solicitor, Napier, for Crown.

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RODNEY JENNINGS MARTIN

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Counsel: G A Rea for Crown
GRJ Thornton for Applicant

Judgment: 30 March 1983

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JUDGMENT OF JEFFRIES J

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The trial before judge and jury in the High Court of this appellant, Rodney Jennings Martin, (throughout he is referred to by name) has yet to take place. The preliminary hearing has been held in the District Court at Napier and following an intimation from counsel for Martin that certain evidence would be challenged at the forthcoming trial Crown counsel brought an application pursuant to s 344A of the Crimes Act 1961 to a High Court Judge to determine whether certain identification evidence should be allowed. It was agreed at that hearing, and such agreement has subsisted in the argument in this court, that the challenged evidence is legally admissible, but nevertheless the defence contends

it ought to be excluded because of the prejudicial effect of that evidence, and the general ground of "unfairness". After argument, in an oral decision, it was held the challenged evidence should be allowed, and it is from that decision an appeal has been brought to this court.

The testing of a judicial discretion as distinct from admissibility by this procedure, with the trial yet to take place, is not free of difficulty, but in the circumstances of this case I wish to add little to what has been said in the majority decision on the point. The application was initiated by the Crown but it is important to note any order made under s 344A does not affect the right of the accused to seek the discretion of the trial Judge to allow or exclude any evidence in accordance with any rule of law. (See s 344A(4)).

I commence with the observation that the facts do disclose some aspects which are not frequently encountered, but that does not place the case in any different category in the criminal law. In particular practical difficulties arising out of the suspect having been in Sydney, Australia, must be put firmly to one side to ensure they have no influence on the integrity and standards of the criminal process. The issue is use of

photo-identification in the pre-trial process and the principles of law applicable are set out in R v Russell [1977] 2 NZLR 20.

In the early hours of Saturday January 30, 1982 the complainant, a woman in her early 30's, was quite violently sexually assaulted in an alleyway off a city street in Napier. The time the attack commenced was probably about 1.15 a.m. but unfortunately complainant was not asked in her evidence, given in the District Court, for an estimate of its duration. It was not transitory for in the time complainant was completely undressed, conversed with her attacker and smoked a cigarette before she was able to choose a moment to make good her escape. Her overall account of the episode indicates that despite the terrifying nature of her ordeal she conducted herself in a calm and mature way which no doubt facilitated her escape and avoidance of more serious sexual violence than actually occurred. Within a short time she was taken to the police station.

Arising out of the appreciable time she was in the presence of her attacker complainant was able to supply the police with reasonably precise details of his description. When first interviewed by a policewoman within minutes of the attack she said the assailant was European. Of the

lighting in the area at the time she said, "I think it was quite light". In her evidence she said she could not remember any specific accent that the person who attacked her may have had. The significance of this will become apparent. She put his age at between 20 and 25 years, about 5'4" or 5'5" in height with a very stocky build. His hair was black, short and very thick. He had on a light open neck shirt with a big pattern on it, dark trousers and black shoes. She noticed he was wearing a big silver watch on his left wrist. Because of its overall significance, and as it concerns other critical evidence in this case, I reproduce her exact words concerning his face:-

> "The person who attacked me was not tanned. Very sort of flabby or baby faced - not at all tanned. The person was clean shaven."

It is convenient here to supply some background facts concerning Martin. In late January 1982 he was a member of the crew of H.M.A.S. "Vampire" which was berthed at the Port of Napier. The complement of the vessel were given shore leave and it is not disputed Martin had been in the city some few days before, and on 30 January, in the

regular company of persons who were ultimately called as Crown witnesses. Police enquiries from 1 February 1982 led to the ship's crew.

On 1 February 1982 complainant attended on Detective Sergeant Rex Preston Worthington at the Napier police station for the purpose of preparing with his assistance a composite picture of her attacker known shortly as an identikit. Mr Worthington (he has since left the police force) knew then nothing of the identity of her assailant and there is no suggestion but that complainant was the sole source of his information about that person. Mr Worthington described his task as assisting the witness to ensure the finished article is in fact an aid to the investigation. Mr Worthington concluded his evidence by saying "... It's important to remember that you are attempting to obtain a likeness and not a photographic image of the person". Mr Thornton submitted the identikit, which becomes a photograph, is subject to the criticism that it may produce itself a "displacement effect" - a phrase frequently encountered in the cases concerned with photo-identification. I do not accept that argument entirely because it overlooks an identikit is the creation of the witness from her recollection

of the attacker. Nevertheless the argument is not without compulsion. An identikit seeks to be no more than a likeness and therefore to identify a particular person by way of likeness, as opposed to a photographic image, generally attenuates the whole procedure. An identikit of a horse might lead to identification of a particular mule, to illustrate with an extreme example. An identikit photograph possesses an inherent vagueness whose inferiority for identification purposes in criminal law must not be overlooked. Mr Thornton's final point here is that the complainant was unable to identify the accused as her attacker when seen face to face at depositions and that simply cannot be denied. Of course, the displacement argument does have validity in the witness Mrs Norris's situation, yet to be dealt with.

The identikit picture was published in the locality, first apparently on 2 February, and as a result two women, entirely independent of each other, came forward with information. A Miss Jacqueline Porter said she, in company with a female friend of hers, had met two sailors from the "Vampire" on the night of Thursday 23 January. The sailors returned to the girls' flat and Miss Porter said she spent the night there with Rod Martin. The next

morning she took a photograph of Martin in bed, which was produced, and whilst of poor quality a largish silver watch is discernible on his left wrist. It was through this witness's information to the police they were able to treat Martin as the suspect.

It is a fact Martin was not confronted until 3 June 1982, or some 4 months after the event. The interview was conducted by members of the New South Wales police force at Royal Australian Naval Base of H.M.A.S. Nirimba at the request of the New Zealand police force. A 7 page foolscap written statement was given by Martin denying involvement in the attack. The form of the statement reveals the interview was conducted on the question and answer basis all of which were recorded. In confirmation of the fact Martin at that stage was a prime suspect the statement at its beginning records the usual warning that he was not obliged to say anything unless he wished but whatever he said would be recorded and might later be used in evidence. He was asked if he understood that and he replied yes. Rule 2 of the Judges' Rules provides whenever a police officer has made up his mind to charge a person with a crime he should first caution him before asking him any questions. The interviewer asked Martin if he were prepared to supply the police with a sample of his fingerprints for the purpose of elimination and he said he

was. To phrase the question in that way at the end of the interview fairly conclusively conveyed the police attitude. He was asked for, and voluntarily supplied, photographs of himself in full face and profile. At this stage he was clean shaven. By the form and substance of the questions it is clear the interviewers were well briefed on all background facts concerning the 2 days from 28 to 30 January 1982. All the foregoing suggests the New Zealand police had made up their minds to charge Martin before asking for the interview to take place. Nothing of value to support the police case against Martin as a suspect was obtained from the interview - rather the contrary in fact. All this material was forwarded to the Napier police.

In use by police of photo-identification before trial a critical distinction has been made in the cases between the detection stage and evidentiary. See Melany (1924) 18 Cr App R2; Dwyer and Ferguson (1924) 18 Cr App R145; Wainwright (1925) 19 Cr App R52; Haslam (1925) 19 Cr App R59 and Hinds (1932) 24 Cr App R6. Notwithstanding the possible tainting effect photo-identification has long been accepted in the detection stage as a necessary weapon. Mr Justice Stephen in Alexander v The Queen (1981) 34 A.L.R. 289 in his dissenting judgment offered, with respect, a

helpful observation about when the detection process might be held to be determined. He said at p 306:-

> "Whether photo-identification was employed in the detection process or only after it ended will not depend upon whether at the time the accused was already in the hands of the police. No doubt, if he was, his availability for identification at a line-up may suggest that drawing of the distinction at that point. But it is the need of the police to know who is the wanted man which justifies both the use of photo-identification in the detection process and its intrusion into evidence. It will be the existence of that same need which will determine the point at which the distinction is to be drawn between the detection and the evidentiary processes. Once the police know who they are seeking, photo-identification loses its peculiar virtue while retaining in full its particular vices. And, of course, police knowledge of the identity

of the wanted man is not the same as police custody of him. It is the former, once acquired, that should for this purpose mark the end of the process of detection".

I would hold on any opinion after the interview in early June in Australia the detection process had ended.

Miss Porter, her female companion when she met the two sailors, and others associated with the flat gave evidence of the conduct of Martin on Friday 29 and Saturday 30 January. As the trial is yet to take place I make no further comment on the evidence other than to note both were able to identify Martin in court. Martin in his statement does not seek to deny his involvement with this group over approximately 2 days.

The other witness to come forward to supply information after seeing the identikit picture was a Mrs Pamela Norris. On the evening in question she was a part-time assistant at a takeaway food establishment in Napier city. In her evidence she said she remembered serving a person with a hamburger between 12.30 and 1 a.m. on 30 January. His presence stuck in her mind because he was "mouthy" and "loud" and she noticed his accent was Australian. She gave a description of the top part of his clothing. She did not attempt to give a verbal

description of his features but said she recognised the person depicted in the identikit as the person who had visited the takeaway. In his statement Martin denies he visited a takeaway bar that evening.

In June 1982 the Napier police received from Australia the written statement of 3 June 1982 by Martin denying his involvement in the attack. They also received the photographs referred to above which were taken on 4 June. Because of the evidence already detailed the police focus was solely fixed on Martin as a suspect, but they had from him a complete denial. Over 4 months after the crime realistic hope of further evidence, perhaps implicating another person, had probably been abandoned.

On 10 August 1982, nearly 6½ months after the event, the police brought the complainant to the police station at Napier. I am satisfied it was for the purpose of obtaining evidence for a trial against Martin although no formal prosecutorial step had yet been taken against him. The police had made preparations to hold a kind of identification parade, not by the traditional method, but by black and white photographs. The photographs used in this procedure were produced to this court. A verbal description is necessary. The photographs given by Martin were reduced to the same postcard size and style as 10

others of criminals. The latter type of photographs are well known, and frequently used by police for detection. On the left side of the card is a full faced shot and on the right a profile. Running along the bottom of the full face shot there is an inset strip about 2 cm high displaying identification details. These do not exist on Martin's photograph so the following was done. In preparation for the procedure the backs of 11 small brown envelopes were removed leaving an edge over 2 cm in height so as to cover the identification details on the 10 photographs which were not on Martin's. It is of importance to note the photographs were simply slid into the envelope with no attempt to fix them in position so that the slightest movement in handling shifted their position within the envelope. It only requires the barest movement of card or envelope to reveal the identification band along the base of each of the 10 photographs.

I turn now to the 10 photographs among whom Martin's was placed, and the complainant invited to identify her assailant of 6 months ago. Without needlessly canvassing why, it is of the utmost consequence to the integrity of and weight to be attached to an identification parade that it be inherently fair and the identifying witness be given a challenging choice. Counsel for the appellant in this court mounted a powerful argument against

the fairness of this particular exercise. It is of importance to remember the verbal description given by complainant of her attacker, already detailed in the judgment, which quite clearly ought to form the basis for choosing a comparison group with as close resemblance to the suspect as possible. Counsel submitted that Martin's photograph, of the 11 shown to the complainant, and to Norris, is the only one that fits the description given by the complainant of her attacker. More particularly he pointed out about the comparison group of 10 photographs:-

- 3 photographs appear to be of Maoris.
- 5 photographs show persons with facial hair.
- 8 photographs show persons of other than very stocky build.
- 2 photographs show persons other than the 20-25 years age range.
- 4 photographs are of persons who appear to have blond hair.

Based on the foregoing counsel submitted that only the photograph of Martin had all the characteristics described to the police by complainant. He made the point

that Martin's photograph in the group was unique because it had no identifying details along its base, and he drew to the court's attention the ease and simplicity with which this could be discovered by an identifying witness.

I have examined the group of 11 photographs and agree 8 of the 10 photographs seem to be of persons with a slimmer build than Martin appears to have by his photograph, but think this particular point marginal because it is difficult to be sure with head and shoulders' photographs. With that reservation I am satisfied counsel's criticism of the fairness of the comparison group and the whole procedure is entirely justified. I cannot forbear observing to include in the comparison group of 10 no less than 3 photographs of Maoris in the face of complainant's insistence that the attacker was European is very damaging to the prosecution case.

The foregoing procedure is clearly distinguishable from one where a witness at a police station is supplied with several photographs of criminals for the purpose of seeing if an identification can be made, usually to give police a lead in the detection process. Before this procedure began Martin was the only person upon whom police

had focussed their suspicion. He had been interviewed and had made a stout denial, and furnished photographs. The police thereupon decided to set up in the police station with only one police officer present and the identifying witness what could be accurately described, in my opinion, as a functional identification parade. Distinctions between photographic displays of this kind and true identification parades are arguable for and against fairness to an accused not present. I acknowledge the evidence is preserved for production to a jury but on balance I am of theopinion photographic displays are more likely to result in unfairness to an accused. In a line-up, or parade, his presence alone would be conducive to impartiality.

There is another objection to the prosecution case. Perhaps fears concerning the inherently suggestive nature of this particular identification procedure could have been allayed to an extent by evidence from the police officer, Detective Sergeant William Rae Withers, who supervised it. His evidence was contained in a statement to the court and of special cautions adopted it is almost silent. No record apparently was kept of the procedure containing, for example, a comment by the witness which might be of assistance if made. The substance of his

evidence is contained in less than half a page and concludes by saying complainant had no hesitation in identifying accused as her attacker. I give another example of a material omission in this regard but it is fair to state in advance these exact rules are not applicable in New Zealand. Rule 5 of the Home Office Circular No. 109/1978 ("Use of Photographs for Identification Rules" - Archbold - Criminal Pleading Evidence and Practice - 41st edn. at page 900) states at p 901 "The witness should be told that the photograph of the person whom he has said that he has seen previously on a specified occasion may or may not be amongst the photographs shown. He should then be left to make any selection without help". In the absence of this caution it probably was assumed by the complainant the group contained the photograph of her attacker. In Mrs Morris's case, yet to be detailed, the objections are even more serious.

On 25 August 1982 the police laid an information indictably against Martin for assault with intent to rape pursuant to s 129 of the Crimes Act 1961. On 25 October he was arrested and on 29 October an extradition order was made and he returned to New Zealand next day.

It was observed that in the meantime he had grown a beard. This is, of course, a circumstantial fact for the jury at his trial, but it has already considerably influenced the subsequent conduct of the police. After Martin arrived in New Zealand a deliberate decision was made by the prosecution not to hold a true identification parade on the sole ground it was considered a worthless exercise because he had grown a beard. Mr Rea informed us from the Bar of this fact. I do not accept this was a valid decision for the police to make unilaterally. It is to be recalled the complainant had not been face to face with Martin since she was attacked, and it must have been unknown to the police whether or not she could identify him with a beard. She had been in the presence of her attacker for an appreciable time with good lighting conditions. Her verbal description of the attacker immediately after was excellent. It is an error to assume a beard would have made such a difference that identification, or exclusion of him as a suspect, would have been impossible. In argument I put to Mr Rea whether the possibility of Martin supplying to the complainant at a parade a voice exemplar had been canvassed. He frankly admitted it had never been considered. This possibility would have been very real because he had voluntarily given photographs of himself without a beard and offered

fingerprints. As we shall see with all its disadvantages to an accused the complainant could not make an in court identification.

On 22 November 1932, 2 days before the preliminary hearing in the lower court Detective Sergeant Clews of the Napier C.I.B. went to the home of Mrs Norris at Napier and there conducted another functional identification parade along similar lines to that carried out with the complainant. No notice of this action, with an important witness, was given to Martin who was then in New Zealand, or his counsel. It was entirely unconnected with the detection process and done solely for evidentiary purposes. The procedure itself is open to much the same objections as when done with the complainant but exacerbated by the lapse of a further 3½ months and the way it was carried out. Mrs Norris in her evidence said "I was asked to identify the person who was like the person I had seen at the burger bar". The objections to the invitation phrased in that way are self evident. Detective Sergeant Clews confirms it was put in that way. He said he asked her to look at the photographs - "She did so, and indicated that the defendant's photo, which was No 7 was the most likely person - was most like the person who had called at Popeyes

hamburger bar in the early hours of 30 January 1982". To allow such evidence to go before a jury would be dangerous and prejudicial because the improper suggestion is substantial. Two days later the witness was led in evidence on her identification of Martin's photograph as outlined above but, and I regard this as a critical omission, she was not asked by the prosecutor if she was able to identify the accused in court as that person. I regard the secret police action with this witness two days before the hearing and the manner in which it was performed as improper. If there were any elements of mitigation in the police conduct of the first functional identification parade with the complainant because the suspect was in Australia and no formal charge had then been actually laid there was absolutely no excuse two days before a court hearing when identification was to be the crucial question.

The objection of counsel for Martin in the court below, and in this court, is that to allow the evidence of complainant's and Mrs Norris's identification of Martin by the procedures undertaken on 10 August and 22 November, respectively, is unfair and prejudicial to the accused. With respect to the decision of the Judge in the court below in the exercise of the discretion I would exclude that evidence on the grounds advanced.

The trial of a person accused of a crime takes place in a courtroom where the witnesses are sworn on oath to tell the truth, and nowhere else. The preliminary hearing of evidence before two Justices of the Peace in the District Court has been completed and the accused has been committed to the High Court for trial before judge and jury. The central issue, almost the only issue, is identification of the complainant's assailant in the early hours of 30 January 1982. In the circumstances of this case there is one witness upon whom the Crown case almost exclusively rests and that is the complainant. When for the first time since the attack she faced her alleged assailant, which was in the courtroom at the preliminary hearing, she was simply unable to recognise and identify him as her assailant. The one other Crown witness who might have put the accused Martin in the vicinity at the material time was not asked to attempt an identification of that person in the courtroom. Not one Crown witness can point to the accused and identify him before the jury, who will be charged to return the verdict, as the person at or near the scene of the crime in circumstances whereby he is likely to have been its perpetrator. The best that the complainant said from the witness box, when for the first time she was on oath, is she

once chose the accused's photograph from a group of 11 in circumstances already outlined, but face to face with him she cannot identify him as her assailant. The best Mrs Norris said when for the first time she was on oath, is that she once chose the accused's photograph from a group of 11 in circumstances already outlined and she was not asked whether she could identify the accused in the courtroom as the person at the takeaway bar that night. The only other evidence is very slight, and has been referred to in the judgment of the majority, and about which I seek to make no comment. Any authority which the prosecution case did possess derived from pre-trial procedures conducted in the absence of the accused or his counsel, but in the courtroom, which is the venue for the adversarial criminal trial, it dissolved with the failure of the complainant to identify her assailant as the accused on trial.

The issue is whether the Judge in the lower court exercised his discretion correctly in not excluding the evidence. In my view he did not exercise it correctly, I would allow the appeal and exclude the evidence of the complainant and Mrs Norris of the photographic identifications together with the evidence of the two police officers concerning those two identifications.

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