

Serial No. 21/1983
List "A"

THE QUEEN v. RANDALL LUDLOW ASKELAND

RULING GIVEN AT TRIAL
(Delivered orally)

COSGROVE J.

11th February 1983

I have been much troubled overnight by this photograph No. 99. Not so much, Mr. Wright, because of your argument concerning the exercise of my discretion, but over the question of whether it is admissible at all. I did some little research - not as much as I would like, but in the course of it I came across the case of Scott v. Numurkah Corporation which is reported in (1954) 91 C.L.R., p.300. That was a case in which a judge, hearing an application for an injunction against the playing of music in a dance hall, went to the scene and heard the dance band play. The applicant was the operator of a movie theatre who claimed that the noise interfered with the operation of the movies. The judge heard the band play then said that as it was a 'view' he would put it out of his mind for the purpose of assessing the evidence, and he granted the injunction, although he said that the sound did not seem to him to disturb the operation of the movies.

It went to the Full Court which set aside the trial judge's ruling.

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It then went to the High Court. A new trial was ordered on the basis that the judge should not have heard the demonstration at all. In a passage from the judgment of Fullagar J., a judge for whom I have very great respect, (and although his Honour did not dissent, he nevertheless wrote a separate judgment) he said this (pp. 315-6):

"For what his Honour was really being asked by the defendant to do was to treat what he heard as a demonstration or reproduction of what the witnesses had described to him in court. It seems clear to me that he could properly do this only in one or other of two events. He could do it if the parties specifically admitted that the demonstration was, or agreed that it should be treated as, a reproduction of what the witnesses had attempted to describe. Or he could do it if it were proved by evidence to his satisfaction that the demonstration really did reproduce what the witnesses had attempted to describe."

Now that was a civil case, of course, but nevertheless the same principles seem to me to apply, and having reconsidered photograph No. 99, it seems to me that it is a demonstration; it serves no other purpose. It is not taken, for example, for the purpose of reproducing the marks on the road which might indicate where an accident happened (a course that is often taken in trials), it does not seem to me to serve any other purpose but to demonstrate to the jury what the witness Cohen might have seen. Now it is not consented to and I have not got any evidence that the camera was in the same position on the road as Cohen's vehicle. I have not got any evidence that the height above the road was the same as that of Cohen's vehicle. I have no evidence of the weather conditions; whether they were the same. In fact, although no objection has been taken, I have no evidence that the lighting was the same as it was on the

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night of the 9th or 10th November. There is the point made by Mr. Wright about the effect of the time exposure and the effect of vehicles coming behind the photographer. It is a still photograph, therefore there is no indication in the photograph of the effect of the speed of Cohen's vehicle on his vision at the time. The position of the Commodore in relation to the pole is admittedly different from that which Cohen saw, and from the evidence which Cohen has given in the presence of the jury, it is clear that the jury would be entitled to say that the impact of the Commodore's headlights on his vision, taken with his own defective headlights, might well have affected the view open to the retina of Cohen. For those reasons I am very much in doubt whether it is admissible at all and I am inclined to think it is not. Now Mr. Wright do you want to say anything about that?

After further submissions the photograph held inadmissible, and the jury discharged.