The Hooded Bandit: Aboriginality, Photography and Criminality in Smith v The Queen

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The hooded bandit

A series of black-and-white photographs was tendered in the District Court of NSW in 1998 in the matter of *R v Mundarra Smith* (97/11/0742). Gritty and grainy, they illustrate – we are told – the robbery of the National Australia Bank in Caringbah, a suburb of Sydney. They give a scene-by-scene, second-by-second account of several minutes in which four male youths launch themselves into the bank at midday. In many of the photographs we see a woman lying curled on the floor, ardently not looking at what is happening around her. We see one bandit, tracksuited and baseball-capped, pushing an elderly man to the floor as another man watches. This second elderly man – each frame represents his hands moving incrementally, first to protect his head, then to break his fall – is pushed to the ground as his spectacles fall from his face.

The security screens are down. We do not see the alleged 'wrestle' between a bandit and a teller. We do not see the alleged shouting and swearing that accompanies the robbery. We do not see the stolen $16 610. In the final frames, three bandits walk out of the bank in what appears to be a casual stroll; three young men in tracksuits and caps, unremarkable but for their white gloves and, perhaps, their collective presence in a financial institution. The fourth bandit, his face almost entirely concealed by the hooded top he wears, stands beside the automatic teller machine. This man is alleged to be Mundarra Smith.

Reading the judgment of the High Court on Smith's subsequent appeal in *Smith v The Queen* [2001] HCA 50, what occurred to me first was the irresolvable problem of how to look at photographs of an Aboriginal youth robbing a bank without feeling uneasy about this uncontested conflation of blackness and criminality. Decades of criminological, historical, and cultural inquiries into race and representation, dispossession and deviance, irrevocably unraveled as the Court perused a series of photographs taken from a bank security camera. It is as if critical scholarship is a meticulous deception, because the black man *is* a criminal.[1]

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The difficult black man resisting classification and management invoked, for me, Ghassan Hage's (1998) work in *White Nation*. Hage interprets the construction of Australia as a fantasy space, in which the capacity to control and order its inhabitants is vested in the white manager. Difference is accommodated by classifying groups into tolerators and tolerated. Those who possess the power to tolerate also possess the capacity to manage the fantasy in which the white man is in charge. The dangerous and unmanageable black man, I suggest, occupies a third position; his crimes and his silence elude control, a perpetual reminder that white managerialism is nothing more than a racist fantasy.

What occurred to me next was the difficulty of making jurisprudential use of these surveillance photographs without even a cursory glance at the volumes of scholarship on documentary photography. A photograph is necessarily different from an eyewitness account or a video film and looking at an image is not at all like listening to testimony. Thus, a photograph of a bank robbery is not, itself, a bank robbery. The assumption that a photograph is synonymous or analogous with 'truth' was wholly uncontested and unexamined by the judges. I was troubled - not entirely facetiously - that the High Court wasn't reading Susan Sontag.

Early in Smith's trial, the Crown conceded that the photographs were too unclear simply for the jury to make their own comparison between the image of the bandit and the defendant in the dock. For this reason Mundarra Smith was 'identified' from the security camera photographs by two police officers who had worked on the Redfern patrol. Those police officers gave evidence in the District Court that they knew Smith through their work duties and that they recognised him as the hooded bandit in the photographs. The prosecution argued that a person sufficiently acquainted with the accused would be able to make a recognition that - to the person unacquainted - would be impossible. This was the whole of the substantial case against Smith. He was found guilty by a jury of eleven, and sentenced to a minimum prison term of 3 years and 10 months. His appeal to the Court of Criminal Appeal ([1999] NSWCCA 317) was dismissed unanimously. Granted special leave to appeal to the High Court, Smith argued that the identification evidence of the police officers was irrelevant and inadmissible under the *Evidence Act* 1995 (NSW).

A majority of the Court concurred that the evidence was irrelevant and therefore inadmissible under s55 of the *Evidence Act*. Smith's conviction was quashed and a retrial was ordered. The majority judges, Gleeson CJ, Gaudron, Gummow and Hayne JJ, in a joint judgment, noted parenthetically, 'Having regard to the quality of the photographs we saw, it is not clear that the jury could not have compared them with the accused' (at 9). Kirby J, in a separate judgment, found that the evidence of the police officers was relevant under s55, but inadmissible for reasons of it being opinion evidence for which no statutory exception had been established under Part 3 of the Act. In his judgment, Kirby J stated, obiter, that only one of the photographs was clear enough to make a proper identification: 'At least one of the photographs before the jury depicted the face of the person alleged to be the appellant from an angle where it was better lit and more clearly discernible' (at 43). On the basis of these judicial comments, the Director of Public Prosecutions determined that a re-trial be held.

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1 A comprehensive bibliography of critical work on race would be impossible here. Instead, the following represents a selection of influential and important writing on these themes: Williams (1991), West (1993), Gates (1985), Said (1978), Fanon (1991), Bhabha (1994) and (1990), Spivak (1988), Delgado (1995), Wing (1997), Cowlishaw & Morris (1997), Hodge & Mishra (1991), Langton (1993), Attwood & Arnold (1992), Threadgold (1997), Muecke (1992), and writings of Chris Cunneen and Henry Reynolds.

Bank robberies of the kind prosecuted here are common crimes in metropolitan Sydney. So much so that a special police taskforce, Bangarra, was established to investigate bank robberies in which a perpetrator jumped over the counter, as happened in this instance. The robberies were quick, in suburban branches, and the proceeds were usually several thousand dollars. Photographs from bank security cameras were the only evidence left by the bandits. Few victims or witnesses were able to make solid identifications from photographs, and police did not organise line-up parades, as required by s114(2)(a) of the *Evidence Act*. Sometimes, police did not arrange line-ups because, they claimed, there were no witnesses available to make safe identifications. Other times, as in the case with Aboriginal or 'Islander' suspects, police claimed that they could not find enough volunteers to hold a satisfactory line-up parade.

Police investigative techniques developed whereby police officers themselves made identifications from photographs. Recognising in the photographs young men they knew from their street patrols, or from prior investigations or arrests, they made statements for the Police Brief and repeated that evidence in court. Witnesses or victims of the crimes were eliminated almost entirely from the criminal justice process. Juries were shown the photographs and asked if, having heard the police testimony, they believed the officers had correctly identified the defendants as the people portrayed in the photographs and, since the photographs illustrated the crime in progress, to conclude that the defendants were, therefore, the bandits. Juries were shown the photographs for the limited purpose of assessing the police testimony, and not for the purpose of making their own identifications. Such investigations had a high conviction rate.

These policing techniques required immediate reconsideration in the wake of the High Court's decision in *Smith*. Smith's High Court appeal was brought together with two other matters, *Jason Bradley Morris v The Queen* and *Lee West v The Queen*. All three were matters in which Aboriginal men were convicted of participating in bank robberies where the primary evidence against them came from police officers who recognised them from security photographs. Following the High Court's decision in *Smith*, the Court also quashed the convictions of *Morris* and *West* and ordered that they be re-tried (S200/1999 and S202/1999, both 20 November 2001).

Anecdotal evidence from the Sydney Regional Aboriginal Corporation Legal Service suggests that at least one in five Aboriginal defendants – adults and juveniles – are prosecuted for offences arising out of photographic or CCTV surveillance evidence. In a very large number of those cases, recognition evidence by police officers was substituted for any participation in the criminal proceedings of the victims of the crimes. Prior to *Smith*, recognition evidence from photographs often replaced the use of police line-ups, photo books, and witness testimony from victims in courts.

These cases trouble me. They are filled with silence. The photographs are silent. The defendants, none of whom enter the witness box in their own defence, are silent. The witnesses to the crime are largely silent. There is no inquiry into the uses of photography as a method of truth-seeking; no acknowledgement that this technology *has become law*, with all of the fraught claims to objectivity that flow from this shift. Nothing is said about the difficulties and dangers that arise when a jury looks at a silent black man in the dock and compares him with a photograph of a hooded black man in a bank and, from that comparison concurs with two police officers that *this* black man is *that* bandit. Absent from the judgment, or from any of the documents associated with the trial and subsequent appeals, is any discussion or analysis of the use of photographic technologies in the policing and criminalisation of Aboriginal individuals and communities.

Susan Sontag (1971:3), the American intellectual and essayist, wrote 30 years ago in her landmark text, *On Photography*, that photographs give us an 'ethics of seeing'. But the Smith case is built around an ethical silence and an epistemological vacuum. Mundarra Smith may or may not be the robber in the photographs. I am not especially interested in whether or not Smith *is* the robber. What interests me is this: why are we talking only about the *Evidence Act*? Photographs of Aboriginal people perpetrating crimes, even when examined solely for the limited purpose of establishing guilt in criminal litigation, are problematic socio-legal texts. The photographs and their meaning for a jury are, I suggest, ungovernable by the *Evidence Act*. Whilst for the courts they raise important legal questions requiring legal mechanisms to control them, they also invoke unspoken cultural and historical questions, and it is these unasked questions and their unacknowledged answers that I wish to restore to these cases.

If these photographs were to 'prove' that Mundarra Smith robbed this bank, then they also say something else: about his racial identity, about his criminal conduct, about banking and policing and surveillance. They offer a kind of visual confirmation of a psycho-social assumption that conflates blackness with deviance. These could be photographs of suburban Sydney under late-capitalism, not-quite-post-colonialism, neo-liberalism; these images may illustrate the evacuation from the inner cities and the ex-urban fringes of social services, networks of family support, educational infrastructure, all replaced with an increasingly threadbare welfare safety net and an increasingly fortified network of institutions dedicated to the supervision and interception of proscribed misconduct. These photographs could be evidence of adolescent misadventure, of misguided masculinity, disrespect for the elderly, for authority, for work, for other people's possessions. They may be images of boredom, poverty, and a craving for adrenaline. These may be Beatrix Campbell's (1993) 'marauding men', boys from impoverished housing estates managed – without support and with little effect – by their mothers. And, of course, by the police.

The streets of Redfern: the scene of the crime

Crucial to the imagination of the man in the dock as the hooded bandit in the photograph is the (re)construction of the crime scene, for the benefit of the jury, creating a space in which Mundarra Smith seems likely to be a perpetrator. The bank is a dangerous space, and the Court attempts to limit our capacity to enter and to inspect that space. Whilst the *Evidence Act* purports to prefer the testimony of people who occupied that space during the commission of the crime (eyewitnesses), in *Smith* we find that the crime scene is a scene of contested accounts and conflicting observations. The facts as they are adduced from the eyewitnesses cast a reasonable doubt over the identities of the perpetrators.

Further, the crime scene does not offer up the clues that enable the police to proceed with their investigation. Beyond the photographs themselves, the police found none of the money, clothing nor fingerprints in the homes of the defendants or in the stolen getaway car. The crime scene in Caringbah is silent. To build their case, the police must construct another crime scene. They build it in Redfern and cast themselves as the key characters. As Walter Benjamin wrote in 1931, 'Not for nothing were the [photographs by] Atget compared to those of the scene of a crime. But is not every spot of our cities the scene of a crime? every passerby a perpetrator? Does not the photographer – descendant of augurers and haruspices – uncover guilt in his pictures?' (cited in Trachtenberg 1980:215) The streets, the back lanes and the other public spaces of Redfern and Waterloo, in *Smith's* case, become scenes of crime and of potential crime. The danger is apparent always; the young people recognised by Redfern's police are already trouble. Being known to the police is the indelible mark of guilt.

In this trial, where the knowledge of police becomes more central than the knowledge of the witnesses in the bank, there is far more discussion about the streets of Redfern and Waterloo than about the bank in Caringbah. Far more testimony is entered about the extent to which Smith and his co-accused, Jason Nicholas, are known to Redfern Police, and why. Counsel for both sides adduce the extent to which the police are well-positioned to recognise Smith and Nicholas from a surveillance photograph. And adducing that evidence requires them to speak about the extent to which young people are policed in Redfern; this is their implied 'expertise'.

Alison Young (1996:16) wrote, 'As Derrida's reading of Plato informs us, the scene of representation is the scene of a crime. While re-presenting the crime, a responsive imagination also constructs the event of crime'. This sentence I find enormously helpful in thinking about what happens in Mundarra Smith's trial. Because the scene of representation (the security photograph) is the scene of the crime (the bank robbery); no one attempts to argue that the photograph does not portray a crime, nor does anyone suggest that the hooded figure is not a perpetrator. So far, this much seems given. It is the 're-presentation' of the crime - the narrative constructed for the jury - that takes place in the courtroom, presenting a catalogue of events, opinions, directions and images in order to present *the crime* anew, for the tribunal of fact. It is here that the 'responsive imagination' is invoked, because the re-presentation of the crime for the jury seems less concerned with what happened in the bank, and more concerned with what the police knew about Smith and Nicholas from the streets of Redfern.

Smith's counsel at first instance, Ms Black, argues with Judge Latham about the prejudicial danger to her client of cross-examining the police about their relationship with Smith. Overtly, she is concerned that adducing too close a relationship between Smith and the police would lead the jury to infer that Smith has a close nexus with criminality. Unspoken, however, is the suggestion that the word 'Redfern' is itself prejudicial. For decades associated with poverty, crime and Aborigines, and also - following the broadcast of the *Cop it Sweet* documentary (1991) - associated with gut-churning police racism, 'Redfern' is the terrifying zone of trouble and danger in the social imaginary of Sydney. Locating Mundarra Smith in Redfern, and placing him in close and regular proximity to Redfern's police, puts him always and already in a crime scene.

Judge Latham, responding to Ms Black's concerns, says, 'I appreciate that but can I just say, I've just finished a trial, totally unrelated to this. ... It all occurred in the Redfern area and what seemed to be clear from what everybody said is that everybody knows everybody' (DCt transcript:7). Of course, this is an exaggeration. It might be true to say that, in Redfern, most of the police know many of the regular local offenders, and that some of the regular local offenders are likely known to each other. Further, it might be true to say that the Aboriginal people who lived on or around The Block (the streets forming a block around Eveleigh Street near the train station) would know each other and their families. But this is not Redfern's *everybody*. This is Redfern's excessively scrutinised and supervised *spectacular* community. This is the Redfern that we see and read about in news and current affairs programs, exposing the latest scandal of extreme poverty, the mismanagement of community organisations, the alleged inadequacies of law-and-order practices, and the media's criminalisation of urban Aborigines.

When Mr Philpot, counsel for the co-accused, Nicholas, cross-examines Constable Trevallion on the *voir dire*, he seeks to establish something about the Redfern and Waterloo areas that he polices. He asks, 'I think in Redfern there's a fairly close knit community, isn't there?' Trevallion answers, 'Yeah, you could say that. ... Yeah, yeah. If you talk about

Redfern and close knit community I think most people would be talking maybe the Aboriginal community. Jason [Nicholas] wasn't a member of the Eveleigh Street area and he didn't hang out in that area, if that's what you're referring to' (DCt transcript:31). Embedded in the words of Judge Latham and Constable Trevallion is that the 'Redfern' under scrutiny in this trial is an Aboriginal place and a criminal place, where *everybody* is either policing or policed.

Inaudible in the written transcript, but immediately apparent to the jury, is the knowledge that Jason Nicholas is not Aboriginal, unlike his co-defendant Mundarra Smith. In stating that the accused doesn't hang out around Eveleigh Street, Constable Trevallion makes clear that Jason Nicholas is not an Aborigine, nor does he hang out with *those people*. If Redfern's Aborigines are to be criminalised in the police mind, Jason Nicholas represents *another kind* of Redfern criminal: the pale young troublemaker. The policeman's off-hand remark recalls Alison Young's (1996:19) analysis of the representation of crime which 'can only ever approach the pale criminal as a chiasmus of fear and desire'. Young (1996:fn28) borrows the term 'pale criminal' from Niezsche, writing 'I intend the pallor of the criminal to suggest the ways in which ... the criminal is bloodless, insubstantial, a pale, unmarked reflection in the victim's eye of fear, able to re-present whatever the fear seeks to displace: the city, racial difference, sexual difference'. Invoking Young here suggests that the policeman and the judge have affirmed the jury's imagination of 'Redfern' and the rampaging youths it harbours, reminding the jury – and us – that *we* are the victims of these brazen bank robbers. Caught in the victim's eye of fear are Jason Nicholas, Mundarra Smith, and hundreds of dangerous men *just like them* sitting squarely in the dock but located always in the criminogenic heart of Redfern.

Constable Trevallion discloses in his testimony that, even when not perpetrating crimes, Redfern's young people are constantly in his sights. Describing his knowledge of Jason Nicholas, Trevallion said, on the *voir dire*:

> I saw him numerous times in my time [at Redfern]. Many, many times in my time in Redfern while on patrol. As well as that for some time he was reporting on bail at the station. ... In - in the street and - and at the station but on patrol. He used to - he lived in Wellington Street but he spent a lot of his time in that area with some of the guys which I presume are his friends. The Hayes boys and the Hughes boys and Kelly Beddoni, he lived with. I think Kelly's his cousin, I think. But they used to hang out around Lenton Parade and Wellington Street, Elizabeth Street, that sort of region of Waterloo. ... I'd physically see Jason on average over a long period of time maybe every second day and I may have spoken to him every second time I saw him. May - may not have spoken to him for a policing reason. Just had a conversation to talk to. He - he always was happy to speak to you. He was generally relatively polite (DCt transcript:23).

It was Constable Trevallion whose identification of Jason Nicholas from the security photograph constituted the whole of the case against Nicholas. Mundarra Smith was identified by two police officers, Senior Constables Peterson and Crampton. Peterson, describing his knowledge of Smith from the Redfern area, examined on the *voir dire*, said:

> I've spoken to Mr Smith a number of times while working at Redfern. ... Oh, five to six times, maybe. Arrested him a couple of times. ... From memory, maybe two times. ... He was a witness to a suspicious death in early '97. I didn't actually speak to him about that. That was dealt with by Redfern Detectives (DCt transcript:16).

Senior Constable Crampton, on the *voir dire*, describes several incidents when he dealt with Mundarra Smith in the Redfern area.

Crampton: First time I spoke to him was in - I believe it was in Walker Street at Waterloo when he was with Kelly Beddoni and they caused to stop and--

Black: Why did you speak to him then? Why did you have occasion to speak to him?

Crampton: We had a complaint of vehicles being broken into around that area and as part of a patrol we -- we stopped and spoke to Kelly Beddoni and Mundarra, who, at that time, gave me the name of Wanjon Murray.

Black: Was that the first time you'd ever met him?

Crampton: Yes.

Black: On what other occasions did you meet him?

Crampton: Oh, I've seen him on a number of other occasions around the Redfern area. ... On 21 January '97 I spoke to him and Kelly at the rear of 43 Wellington Street. They were in a vehicle at the time that was parked at that -- at the rear of them premises, and also on --

Black: Why did you speak to them on that occasion?

Crampton: I can't remember the exact reasons why. There was a number of police present at that time. I can't remember the exact incident. ... Second time [we spoke] it was daylight and on a third occasion ... [was] on 10 April at Redfern Railway Station. We were doing a -- an infringement enforcement at the railway station and once again -- ... And we had occasion to stop Kelly Beddoni and Mundarra for not having a ticket at the railway station and they were issued an infringement notice. ... There have been other occasions when I've seen him and not spoken to him (DCt transcript:13-14).

The vigorous and uninterrupted supervision of Smith by police stands in marked contrast to the testimony of his mother, who is called to give alibi evidence but is unable to recall precisely when her son was home. Obviously assisted by notes and other aids to recollection, the policemen who testify to their knowledge and recognition of these defendants are able to place them in particular sites in Redfern on many occasions. These police know what they've been up to and who their friends are. They are engaged in a protracted exercise in which young people are observed, accounted for and disciplined.

'How dark?' The epidermal examination

I'd like to examine the kind of 'knowledge' about the perpetrators of the bank robbery that is adduced by the eyewitnesses, and then to examine what is said about the perpetrators by the people who look at the photographs. First is the testimony of Graham Bowrey, a witness who saw the robbery from the street outside the bank.

Bowrey: I can only describe three of them. One had a hood on, and he was taking the hood off as he came out of the bank. The other three were all just young white boys, and the other one was an Aboriginal. ...

Crown: Can you describe his face?

Bowrey: I can only describe it as dark-skinned.

Crown: Can you put some sort of nationality?

Bowrey: I would have said Aboriginal, mainly because his build was smaller than what – I would consider Islanders are usually bigger people. That's how I'd describe him. ... Out of the other three ... I know they appeared young because they had like fresh skin. It's a bit red and it's not as though they're every-day shavers. Now whether that's a wrong assumption or not, it's not to say. All I know is they all had very very – they were very neat with their hairstyle, the three of them, I noticed because there was no long hair hanging out the back of the hats or whatever, and they were all dressed in what looked good gear for younger people these days (DCt transcript:83-84).

Bowrey's testimony here reveals the impact of knowledge upon vision. In the world available to, or known by, Bowrey, it seems that dark-skinned bank robbers will be either Aboriginal or 'Islander', and that the distinction is made on a 'smaller'/'bigger' scale. Further, Bowrey 'knows' that these perpetrators are young because of the perceived effects of shaving (or not shaving) upon their skin. Redness of skin becomes certainty of youth. 'Neatness' of appearance is known when he sees 'good gear' and 'no long hair'. Inverting the 'knowledge' paradigm for a moment, *we know* something about Bowrey the moment he uses the phrase 'younger people these days'.

Another witness on the street, Clare Ayers, gave evidence about the appearance of the perpetrators:

> Crown: What did he look like? What did you see?
>
> Ayers: Coffee-coloured skin, I'd call it, I think it was.
>
> Crown: Coffee coloured skin?
>
> Ayers: Mmm.
>
> Crown: Can you place a nationality on who he might have been?
>
> Ayers: No.
>
> Crown: How dark was his skin?
>
> Ayers: Well all I could say it was a coffee-colour. Like not real dark, not black. ... As I said, the hat was floppy all round his face. ... Five foot eleven, twelve, six foot. He looked tall to me. He was the tallest of the four. ... He was doing a lot of singing out, shouting and swearing and telling the others to hurry up. ...
>
> Crown: Are you able to describe any of the other—
>
> Ayers: No – there was another one the same colour as this chap, and two – they looked like Australian.
>
> Crown: Can you describe them any further, their heights or build?
>
> Ayers: Much shorter than he was (DCt transcript:88-89).

For Ayers, it seems, two of the perpetrators are of a 'coffee-colour' and 'not black' unlike the other two perpetrators who look 'like Australian' (sic). Assuming that two of the perpetrators are Aboriginal, or only one (as Bowrey testified), Ayers is not alone in thinking that Aborigines are 'not Australian' and that 'Australianness' is to be conflated with whiteness.[2] Like Bowrey, she is responding to the Crown's insistence that the witnesses attempt to attribute a 'nationality' to the perpetrators, as though this kind of knowledge were available to an eyewitness; as if looking at someone would enable you to know where they come from, or where they belong. Once again, the primacy of vision, of looking, of inspection becomes the crucial tool in the management and disciplining of the troublesome black man.

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2 Apart from the joint trial of Smith and Nicholas, both of whom pleaded not guilty, a third defendant, Richard Murchie, pleaded guilty to participating in this robbery and ancillary offences: *R v Murchie*, District Court of New South Wales, 97/11/0693 (unreported); *Regina v Murchie* [1999] NSWCCA 424 (appeal on sentence). He is not identified as Aboriginal in any of the texts on his case. A fourth defendant was a juvenile, about whose identity and criminal procedures we cannot access information. Ghassan Hage (1998) undertakes a critical analysis of the conflation of Australianness with whiteness in *White Nation: Fantasies of White supremacy in a multicultural society.*

A lending officer in the bank, Martin Collins, was inside the bank during the robbery. He describes three perpetrators, but not the one alleged to be Mundarra Smith, who was standing beside the doorway to the street, sometimes wearing a hooded top. The man who jumped over the counter was 'probably around six foot, of very similar build to me, probably between 80 and 90 kilos'.[3] The man with a knife was also 'about six foot and pretty much a similar build to myself, so that's between 80 and 90'.[4] A third man, armed with a screwdriver, is described in the following examination:

> Crown: Are you able to describe the man who had the screwdriver?
>
> Collins: He was dark-skinned, and that was pretty much as I can tell you because I was focussing on the person who jumped the counter.
>
> Crown: When you say dark-skinned, are you able to place some sort of nationality on him?
>
> Collins: At the time I though he was South American or that sort of colour (DCt transcript:81).

Collins compares the two 'white' perpetrators to himself, identifying their heights and builds as 'similar' to him. But when describing the not-white perpetrator, the Crown probes him about 'nationality', and the witness responds that, in his own private taxonomy of dark-skinned-ness, this colour is a 'South American' colour.

Mark Graham, another witness who saw the robbery from the street, gives evidence about the appearance of the perpetrators.

> Crown: Can you describe the four persons that you saw?
>
> Graham: Only that they were all wearing like jeans and maybe baseball – running shoes and jackets of some sort and baseball hats. No identifying features at all, no.
>
> Crown: The man you saw inside, next to the ATM and you've described as a hood, was he one of the four men?
>
> Graham: Yes.
>
> Crown: Are you able to say what colour their skin was?
>
> Graham: All I can remember is just white people, that was all (DCt transcript: 87).

Despite the prompt from the Crown, this witness recalls seeing only 'white people'. There is no attempt to explain why Graham's view of the perpetrators is different from the three previous witnesses who saw another colour: 'Aboriginal', 'coffee-colour' and 'South American'. Nor is there any attempt to justify why four different – sometimes inconsistent – eyewitness descriptions – Aboriginal, coffee-colour, South American, white – are supposed to point to the complicity of the man in the dock, Mundarra Smith.

Homi Bhabha (1994:78) writes, 'Skin, as the key signifier of cultural and racial difference in the stereotype, is the most visible of fetishes ... and plays a public part in the racial drama that is enacted every day in colonial societies'. The probing by the Crown Prosecutor confirms this institutionalisation of the epidermal fetish: 'Can you place a nationality...?', 'How dark...?', 'What colour...?', 'Coffee-coloured...?' Her questions reveal a fascination with blackness as the colour of criminal deviance.

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3 Richard Murchie admitted having jumped over the counter: *Regina v Murchie* [1999] NSWCCA 424, at 6.

4 In Murchie's appeal on sentence, Simpson J said, 'Another witness thought that one of the men had a knife but this was not supported by any other witness and as no finding of fact was made in this respect by the sentencing judge it should not be taken into account as an aggravating factor': *Regina v Murchie* [1999] NSWCCA 424, at 7.

I'd like to compare this kind of eyewitness testimony with that adduced from the police officers, whose evidence was in two parts: firstly, that they were sufficiently acquainted with Smith to recognise him from a blurry security camera photograph, and, secondly, that when they looked at the photographs they recognised in them Mundarra Smith.

When it comes to recognising the bandits from the bank robbery, the eyewitnesses to the crime and the police who examined the photographs, were unable to make any meaningful connection between the 'pertinent characteristics' they nominated and the 'recognition' they claimed to have made. As becomes apparent from an examination of the witness testimony, when they *saw* bandits in caps or a hood, they *knew* who they were looking for, but they couldn't articulate *why*. This certainty without specificity is apparent when two police officers are called to testify to their recognition of Mundarra Smith from the security photographs. Senior Constable Crampton, who was a member of the Redfern patrol at the time, is cross-examined by counsel for Smith.

> Black: How long did you spend looking at the photographs?
>
> Crampton: Oh, not long at all.
>
> Black: How did you know [Smith]?
>
> Crampton: I've spoke to him a number of occasions (DCt transcript:13-14).

When probing the qualities of Senior Constable Crampton's recognition, the following exchange took place.

> Black: But you do accept that there's a lot of young men of his [Smith's] age, some with some Aboriginal blood perhaps, around Redfern?
>
> Crampton: Of course, yes.
>
> Black: What is it particularly about him that gives you so much confidence that it's him?
>
> Crampton: His facial features stand out.
>
> Black: Why do you say that?
>
> Crampton: He's got a very prominent nose and his face just jumps out of a photo at you (DCt transcript.44).

Here the identification is described as though the photograph becomes animated at the moment of recognition. A blurry security photograph reveals Mundarra Smith to the policeman because he stands out, *he jumps out* of the photograph. Senior Constable Crampton's testimony is open to a reading in which what he claims to see is as an eyewitness to *action*, and not recognition from a photograph. When Smith jumps out of the photograph at him, he sees not only Mundarra Smith in a photograph; he sees Mundarra Smith robbing the bank.

Senior Constable Peterson is less emphatic about his recognition.

> Black: I suggest to you that the photographs just shown to you, they are both very dark, aren't they? The face is shadowed by the hood?
>
> Peterson: He is wearing a hood but you can see his face.
>
> Black: There is a shadow in the face, which is in the shadow, a dark shadow cast over the face?
>
> Peterson: There is a shadow over the face but you can still make out his features.
>
> Black: It is not easy though, is it, to make out the features?
>
> Peterson: I can see them.
>
> Black: There is a light right behind him?

> Peterson: Yes, there is a wall behind him, a white wall.
>
> Black: A light wall and a hood over his face and his face is in shadow?
>
> Peterson: Yes (DCt transcript:50).

Here, counsel for Smith lists all of the obstacles to identification from these photographs: the dark photographs, the hood, the shadow, the light background. Senior Constable Peterson nevertheless testifies that, despite barriers that would prevent identification of features by most observers ('it is not easy'), 'I can see them'. His testimony here suggests either special knowledge of Smith, or special ability to see in the dark.

We do not know whether or not the police were aided in any way when looking at the photographs; the jury's request for a magnifying glass was refused on the assumption that the police viewed the photographs unaided. It is the secrecy surrounding the viewing process of photographs that counsel for Smith – at first instance and on appeal – raises as a significant problem with the use of photographs in this way. The matter of *West*, for which special leave to the High Court was sought together with Smith, raised this problem also. Counsel for West, Mr Zahra, said:

> But there was much cross-examination of the individual police officers as to the circumstances [in which they identified West]. This was a case where there were five police officers who had given evidence of identification. Four of the police officers are said to identify the photo at the Downing Centre [court complex], together.
>
> The cross-examination revealed that none of the police officers could give detailed evidence of the circumstances in which they identified, whether they were with another person or who in fact gave them the photo. There are no procedural safeguards (*Smith, Morris and West v The Queen* S200, S201, S202 and S204/1999, HCA special leave application transcript:8).

Zahra later goes on to argue:

> There was in fact a situation [in *West*] where one of the police officers is said to have identified Mr West from the photograph and he was in fact the same person who had then carried out the identification with other police officers, in other words, showing them the photograph (HCA special leave application transcript:14).

In the same application for special leave, Mr Byrne, appearing for Smith, also questions the procedural inadequacies, or the unknowable extent of the persuasion between policemen when showing the photographs to each other. Because there is no record made of the identification process, and because the identifications of Smith are made by police officers together in a police station, there is no way, Byrne argues, to test whether the policemen are making 'genuinely independent observations'.

> It is not difficult to imagine that one officer would say to the other, 'Well, that looks like Bill Smith, don't you think?' and the officer is then prompted to make the recognition, so-called, of Bill Smith, but there is just no record of any of that material, it is evidence emerging from a police station which has none of the safeguards which are normally required to be attached to evidence of identification before it can be admitted (HCA special leave application transcript:13).[5]

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5 This is not the only time in the matter of Mundarra Smith that, from the bar or the bench, we hear the nominal perpetrator referred to as 'Smith', which seems particularly perilous or careless when the defendant is actually named Smith.

Judge Latham conceded that photographs are less satisfactory than line-up parades in making identifications. Further, Smith agreed to participate in a parade. Nevertheless, the judge accepted the following explanation from Senior Constable Rotsey (who was responsible for this aspect of the investigation) for why a line-up parade was not arranged:

> Because it was my opinion that witnesses to the offence did not have a satisfactory view of the offenders' identifying features to warrant conducting an identification parade. That was the main concern. The second concern is that – and that concern alone would have been enough for me not to conduct the identification. The second concern is that particularly on that task force [Bangarra] which I have been attached to for some time, we were charging a very large number of Aboriginal and Islander offenders and have had numerous attempts at obtaining members of the public to take part in these identification parades and to this date I have not been successful in successfully getting enough offenders with a similar appearance, to successfully hold an identification parade (DCt transcript:23).

Aside from the interesting slip at the end, in which Senior Constable Rotsey confers 'offender' status on members of the public who are Aborigines or 'Islanders', his explanation makes additional disclosures. First, he claims that eyewitnesses to the robbery could not recognise 'identifying features' of the perpetrators. However, none of the police officers who were called to give identification evidence were able to nominate identifying features, apart from the unexplored mention by Senior Constable Crampton that Smith has a 'prominent nose'. Second is his assumption – vindicated in part by the District Court's acceptance of his explanation – that the difficulty in finding volunteers to participate in a line-up parade should disentitle Aboriginal defendants from protections explicitly required by the *Evidence Act*, s114(2).[6]

As Kirby J put it, 'the police officer was being used to top-up the photographs because the photographic evidence was not sufficient for the jury's purpose' (HCA special leave application transcript:13). Unremarked upon is the suggestion that the police officers were also brought in to 'top-up' Senior Constable Rotsey's claim that civilians (whether eyewitnesses or line-up volunteers) were not going to advance his investigation to secure a conviction, and that identifications from policemen would justify his departure from protections to which Smith was entitled under legislation.

'Doesn't look like me': recognising Mundarra Smith

Perhaps the most interesting interpretation of the photographic evidence in this case comes from Mundarra Smith himself. Although we do not know what – if anything – Smith knows about the crime committed in the bank that day, his comments give an entirely different view of what the photograph might reveal. Smith's only comments are made in his police record of interview, which he gave voluntarily, without legal advice. The transcript was included in the Police Brief and Smith did not testify at his trial. Smith was questioned at Redfern police station by Senior Constable Rotsey, who showed him a photograph taken from the bank security camera.

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6 S 114(2) states: 'Visual identification evidence adduced by the prosecutor is not admissible unless:
an identification parade that included the defendant was held before the identification was made, or
it would not have been reasonable to have held such a parade, or
the defendant refused to take part in such a parade,
and the identification was made without the person who made it having been intentionally influenced to identify the defendant.'
The *Evidence Act*'s preference for identification parades followed the Australian Law Reform Commission's Report on Evidence (Report No 26).

> Rotsey: Can you tell me who that person is?
>
> Smith: No, I can't. His face is all scrunched up. Looks like he's cryin'. ...
>
> Rotsey: Well, I suggest to you that the person in that photograph is in fact yourself. What can you tell me about that?
>
> Smith: Doesn't look like me.
>
> Rotsey: Do you have any clothes similar to that?
>
> Smith: No, I haven't got any clothes similar to that, see I've only got two sets, three sets of clothes, I've hardly got any clothes myself (Interview transcript, in Appeal Book:282).

Describing the photograph before him, Smith says it looks like the subject is crying, his face distorted. For an image purporting to represent a bank robbery in progress, his comment is startling. If he is aware that this picture shows a bank robbery, his suggestion that the man in the photograph is crying raises the possibility for a visual interpretation that either the man is not a perpetrator but a victim, or else that his participation in the robbery is somehow traumatic. Or else that the man in the photograph, the hooded bandit, has been overcome by some inexplicable sadness. Whilst none of these interpretations arising from Smith's explanation seem likely, the knowledge that Smith himself has viewed the images and offered such an unusual account of what they represent demonstrates the limitless and troubling possibilities of photographs when used as evidence.

Roland Barthes (1981:32), the French semiotician and literary critic, offered an additional and alternative reading, enlivened by the element of candour or surprise that accompanies the 'perfect' image, which captures a gesture 'when it is performed unbeknownst to the subject being photographed'. Here Barthes writes that the element of 'shock' in photographs 'consists less in traumatizing than in revealing what was so well hidden that the actor himself was unaware or unconscious of it'.

Kirby J's suggested that the identity of the hooded bandit 'is known to God and maybe to the appellant', containing the inference that the fact is known to the camera (HCA transcript:35). In showing the camera's 'knowledge' to Mundarra Smith, the intention is to 'shock' him into an admission. Instead, it prompts him to offer an unanticipated reading of the image. Of course, applying Barthes' reading of 'shock' into Smith's own interpretation of the photograph opens out (at least) two possibilities. Either Smith is able to identify a crying bandit in a photograph that to other observers represents a bank robbery, which already serves to undermine the assumptions about authority, agency and violence that accompany criminal offences of this nature. Or Smith, recognising himself in the photograph, describes or deflects that recognition by inferring sadness or regret or vulnerability in the bandit.

I'd like to compare the scene in which Smith inspects the photograph with the scene in which Roland Barthes (1981:85-86) is shown a photograph of himself which he does not recall being taken. Barthes recognises himself and his clothing, but he does not recognise or remember the moment of photography: 'And yet, *because it was a photograph* I could not deny that I had been *there* (even if I did not know *where*). The distortion between certainty and oblivion gave me a kind of vertigo'. We cannot know if Smith saw himself in the photograph; we do know that he has denied being *there*. And we may infer that, since someone else has 'recognised' him, he experiences nevertheless the vertigo that Barthes locates between certainty and oblivion.

This is precisely the location of the black defendant in the criminal justice system. The power to recognise himself is denied Smith; the recognition is taken over by police officers, leaving him floating in the dangerous zone between certainty and oblivion that is occupied by all defendants. The power to define acceptable conduct, the power to supervise and police conduct, the entitlement to impose sanctions for deviance, these are the trappings of a white managerialism that constructs for itself the fantasy of being in charge. These powers vest in the prosecutorial position and its accomplices: judge, jury, witness. The black defendant waits, silently, and under perpetual scrutiny.

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R v Mundarra Smith, District Court of New South Wales, 97/11/0742 (unreported).

R v Murchie, District Court of New South Wales, 97/11/0693 (unreported).

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This article refers to the District Court transcript, the police record of interview, and copies of the photographs tendered in evidence. These appear in the Joint Appeal Book (2 volumes) in the matter of Mundarra Smith (appellant) and The Queen (respondent).