

37/82

## SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

**LATTOUF v CARR**

Street CJ, Moffitt P and Cantor J

21, 22 June 1979; 13 March 1980 — (1980) 2 A Crim R 65

**EVIDENCE – RECONSTRUCTION OF INCIDENT – ADMISSIBILITY OF PHOTOGRAPH OF – CONFESSIONS – ADMISSIBILITY OF – INTERROGATION AS TO MATTERS ALREADY KNOWN TO POLICE – CREDIT – CROSS-EXAMINATION AS TO – CROSS-EXAMINATION AS TO POLICE PRACTICE (USE OF TAPE RECORDERS) – ALIBI – FAILURE TO RAISE PRIOR TO PRESCRIBED PERIOD FOR GIVING OF NOTICE – VOIR DIRE EXAMINATION – NECESSITY FOR: CRIMES ACT 1900 (NSW), S405A.**

In a trial for armed robbery, evidence was given that some months after the offence, police stopped L, one of the accused, at the wheel of his car. L alighted, but when told by police that they wanted to speak to him, he rushed back to his vehicle and reached inside. He was subdued after a violent struggle and a loaded pistol was found on the floor of the car. Later, police put the pistol back inside the car in the position in which they had found it, and took a photograph of it *in situ*.

**HELD:**

1. That the photograph was admissible, so long as it was made clear to the jury that it was a photograph of a reconstruction.

2. The passage in *Burns* [1975] HCA 21; (1975) CLR 258 at p264; 6 ALR 95; 49 ALJR 248 (per Barwick CJ, Gibbs and Mason JJ) does not mean that where questions and answers in an interview relate to matters which were known to the police before the interview started, those questions and answers should not be admitted (per Moffitt P) though the fact that the police had such knowledge may be relevant on the question of whether the confession was made by the accused or was fabricated by the police.

*Burke* (unreported, Court of Criminal Appeal (NSW), 17th November 1978) followed.

3. Examination of police on the *voir dire* as to the state of their knowledge prior to the interview should generally not be permitted.

4. (per Street CJ and Cantor J) Defence counsel should be permitted, in seeking to impugn a police witness' credit, to ask him why he did not record the accused's confession on a sound recorder, even though the use of sound recorders has not been adopted by NSW police.

(per Cantor J) However, the non-availability of a sound recorder at the time of the interview, and the fact that, as here, the police officer cross-examined was not in charge of the case and not in a position to choose one method of recording rather than another, would be fundamental impediments to the successful pursuit of this line of cross-examination.

(per Moffitt P, dissenting on this point) Cross-examination of police based on failure to adopt a particular procedure depends upon the procedure being standard police practice, or at least, available to the officer in charge of the investigation and appropriate in the circumstances.

5. Section 405A of the *Crimes Act 1900* (NSW) does not confer upon an accused a right to withhold disclosure of an alibi until the expiry of the prescribed period, but rather denies him the right to rely upon an alibi unless he can bring himself within the terms of the section.