IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **No S 57 of 2014**

BETWEEN: **ANTHONY CHARLES HONEYSETT**
Appellant

And

The Queen
Respondent

APPELLANT'S REPLY

1. The appellant certifies that this reply is in a suitable form for internet publication.
2. The issues set out in the RWS at [1] do not properly detail the issues presented by this appeal. The issues raised by this appeal are those identified in the AWS at [2] – [7].

Ground 1

3. At RWS [6.3] it is said that because Prof Henneberg's evidence was limited in scope it rendered 'most' of the criticism of his methodology and lack of empirical and scientific validation irrelevant. The requirements of s79 of the Evidence Act are immutable in that opinion evidence must be based upon 'specialised knowledge' and evidence either meets or fails that test.
4. The respondent states the basis of admissibility of the opinion evidence of Prof Henneberg regarding the common features of an offender from CCTV images and the features of a person of interest was his specialized knowledge as an anatomist. At RWS [6.4] - [6.5] it is said that Prof Henneberg's field of expertise was Anatomy and Biological Anthropology, not the comparison of images, and 'his specialized knowledge equipped him to describe features of the human form whether observed in person or depicted in moving film or still images…'
5. This submission mischaracterizes the evidence as it was presented and relied on at trial, where it is clear that the significance of Prof Henneberg's evidence was his asserted identification of relevant similarities between the CCTV images of the offender and the reference images of the appellant. It is not in dispute that Prof Henneberg had extensive anatomical knowledge, however the relevant specialized knowledge he purported to exercise involved the interpretation and comparison of images of an offender from CCTV footage and a suspect from photographs taken upon his arrest.
6. Prof Henneberg's anatomical training was not linked to an ability to accurately compare and interpret CCTV images with images of a suspect. He used anatomical terms and concepts, but this anatomical input was incidental to his evidence regarding his comparison and interpretation of the footage and images.
7. In this respect there was no evidence that he possessed 'specialised knowledge' relevant to image comparison and interpretation and no evidence that the technique he

Filed on behalf of the Appellant
The appellant's solicitor is: Michael Blair
Solicitor
PO BOX 20664
WORLD SQUARE NSW 2002
Tel: (02) 92676255
Fax: (02) 92676455
Ref: Michael Blair

used, even if merely descriptive, was valid or reliable. There was no evidence that Prof Henneberg was able to consistently or accurately identify anatomical features from images and no evidence that he was any more able to perform this task than a jury. Previous experience comparing images and experience as an anatomist reveals nothing about the possession of specialized knowledge in the comparison and interpretation of images from CCTV and of suspects. This limitation is accentuated by the poor quality of the images and the fact that the offender was heavily disguised.

8. Prof Henneberg's purported expertise in image interpretation and/or comparison has never been evaluated. As noted by Glenn Porter at [24] of his report tendered on the voir dire, (2AB525.40) there was no evidence of any studies conducted on Prof Henneberg's method. His report was silent as to whether his method had been validated or proven to be reliable. A capacity to describe the various distortions apparent in the footage does not equate to possession of a scientific method for accounting for the distortions themselves. (2AB285.40)

9. In the absence of validation by a recognized scientific process, it was not possible to know whether Prof Henneberg's opinions were reliable. The evidence and reports of Dr Sutisno and particularly Mr Porter went well beyond criticism of Prof Henneberg's conclusions in his report [RWS 6.1] and extended to a powerful attack on the methodology he used and the admissibility of his evidence.

10. Prof Henneberg's evidence was not merely an aid to the jury in analyzing the footage. RWS [6.10] Reliance on *Butera v DPP* (1987) 164 CLR 180 is misconceived. Prof Henneberg's evidence was admitted under s79 of the Evidence Act as evidence of the facts. His evidence was available to the Crown to prove their case and was not limited pursuant to s77 or otherwise. His evidence was presented, and to be understood, as independent evidence that the appellant and the offender shared similar physical features and that there were no apparent differences between them. The jury was not told that his evidence was some form of aid or that it was adduced merely for the purpose of assisting them to interpret the images. The evidence was presented as independent circumstantial evidence in conjunction with the DNA material to support the Crown case that the appellant was the offender.

11. At RWS [6.13] – [6.14] reference is made to various English decisions such as *Attorney-General's Reference No 2 of 2002* [2003] 1 Cr App R 321 at [19] – [21]. These cases are unhelpful, as the requirement that a witness base an opinion upon 'specialised knowledge' is absent from the English requirements for the admissibility of expert evidence. Further, in *Attorney-General's Reference No 2* it was accepted that the opinions of police officers about the identity of persons captured on CCTV images was admissible where it was said there was some familiarity with the suspect or repeated viewing of the images. This position is inconsistent with the approach adopted by this Court in *Smith v The Queen* (2001) 206 CLR 650.

Grounds 2 and 3

12. At RWS [6.23] it is said that Prof Henneberg did not purport to be an ad hoc expert. That is hardly surprising, as the expression is a legal term. It is plain that the CCA considered him to be an ad hoc expert as a consequence of his repeated viewing of the images. CCA [60]

13. The reliance on experience by way of repeated viewing, interpreting and comparing images makes the requirement for 'specialised knowledge' in s79(1) of the *Evidence Act* redundant. Specialised knowledge must refer, in the context of this case, to the application of a recognized and validated scientific process, not answered by reliance on previous experience as an anatomist or by anatomical knowledge or by previous experience in comparing images. To be admissible, Prof Henneberg's opinion needed

to be based upon 'specialised knowledge'. There was a need to identify and explain that knowledge and its relationship to the expressed opinion.[1]

14. Prof Henneberg's review of the material provided to him by investigating police involved an interpretive exercise that did not form part of anatomy, given anatomy is not concerned with the interpretation of CCTV images, persons suspected of involvement in crime or persons in disguise.
15. The CCA conclusion grounded the admissibility of the evidence on no more than Prof Henneberg's 'training, study or experience'. As noted by Glenn Porter at [29] of his report and in his evidence before the jury (2AB278.40), when it comes to assessing techniques such as image comparison and interpretation, the training, study and experience of the witness cannot overcome the failure to have the technique validated and proven to be reliable. (2AB527.40) In the absence of evaluation, it is not possible to know if the technique works or, if it does, how accurate it is. It is also not possible to know if the witness is actually proficient, regardless of any formal training and qualifications in the cognate domain, and regardless of experience doing the same or similar things. Long experience cannot be a proper basis for the admission of techniques that have not been formally validated. Where techniques such as image comparison and interpretation are in regular use, experience, whether in courts or elsewhere, should not circumvent the fundamental need for validation, so as to demonstrate that the opinion is actually based upon specialized knowledge.
16. 'Specialised knowledge based on the person's training, study or experience' should mean that the witness is conversant with and able to identify the 'specialised knowledge' that supports the opinion.
17. That Prof Henneberg may have performed the task before speaks only to 'experience', but as is clear from the structure of s79, experience is not in and of itself 'specialised knowledge'. Experience is important provided a technique has been shown to be demonstrably reliable. The utility of being experienced or qualified in the application of an untested technique is unclear.

Ground 4 and 5

18. At RWS [6.24] complaint is made that the appellant at AWS [56] misrepresented the evidence given by Prof Henneberg regarding 'similarity'. Each of the eight physical features said by Prof Henneberg to be shared between the offender and the appellant were plainly points of similarity. The whole of his evidence was directed at establishing similarities in appearance between the offender and the appellant. In submissions to the jury the Crown Prosecutor stated: "...I'd suggest you would accept his evidence as being of assistance to you, because it's reliable science and it is something that he can explain, even though you may not be able to see all of the things that he's been able to see." (1AB 320.35) The appellant relies on AWS [51] – [60].
19. The use of the expression 'similarities' by both the trial prosecutor and the trial judge was, for the reasons set out at AWS [51] – [60], not 'a convenient shorthand'. If the position was as suggested at RWS [6.29] and the evidence was not capable of establishing the proposition that the offender and the appellant possessed similar physical features then, as set out at AWS [70] – [73], Prof Henneberg's opinion, even if admissible pursuant to s79, was not relevant and should have been rejected.

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[1] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85] - [87]; *Ocean Marine Mutual Insurance Assn (Europe) OV v Jetoplay Pty Ltd* (2000) 120 FCR 146; [2000] FCA 1463 at [23]; *Pan Pharmaceuticals Ltd (in liq) v Selim* [2008] FCA 416.

20. At RWS [6.49] – [6.51] it is said that Prof Henneberg's evidence was no more than an aid to the jury. Even if this was so, his evidence still needed to meet the requirements of s79.
21. It is suggested at RWS [6.50] – [6.51] that whereas the DNA evidence adduced in the trial was of a 'highly technical nature' and unable to be reviewed by the jury, the evidence of Prof Henneberg 'was relatively straightforward and easily understood.' These submissions ignore the issues in play at the trial. Had the accused disputed the methodology or techniques used in identifying and interpreting the DNA material he could have done so.
22. Unlike the evidence from Prof Henneberg, the opinion evidence regarding the DNA results clearly fell within s79: it was the result of the application of demonstrably reliable scientific technique that has been the subject of validation studies, the results were obtained by a person properly trained in accordance with recognized standards, the results of the testing could be the subject of verification and peer review, the processing and interpretation were shielded from gratuitous exposure to information about the case or the accused, the technique is accepted across a range of disciplines, with reporting and testimony transparent so as to enable others to follow what was done and the reasoning behind the results.
23. At RWS [6.61] it is said the characteristics of the offender described by Prof Henneberg that were not apparent from the evidence of lay witnesses were not specific or distinctive enough to establish any similarity of appearance between the offender and the accused. Aside from the barrier of s55 *Evidence Act* to irrelevant material becoming evidence, this submission ignores the additional feature of Prof Henneberg's evidence that he conducted an interpretation and comparison of the physical features of the offender and the appellant and these were presented as relevant similarities. It also omits to note that the expert evidence was presented as consistent with the observations of lay witnesses as to the appearance of the offender. It also downplays the impact upon a jury of hearing this type of evidence from a witness possessing impressive academic credentials.
24. At RWS [6.65] – [6.69] reference is made to the DNA evidence relied on in the Crown case. It was clearly open to the jury to accept that DNA located on the pink hammer was consistent with that of the appellant. As earlier noted, the offender was seen to be wearing gloves during the actual offence, so the DNA must have been deposited at a time before the commission of the offence.
25. More significantly, the DNA located on the t-shirt had almost no probative value in establishing the appellant was the offender in the subject offence. This was because the t-shirt was located more than two months after the subject offence, inside a bag located in a car that was plainly used to commit other offences.[2] This evidence would have had real probative value had the car been recovered immediately after the subject offence or in circumstances where it could be concluded that it had remained undisturbed from that time until it was located by police.
26. The respondent does not submit that this is a case where the proviso applies. Ground 2 of the appeal before the CCA was that the verdict of the jury was unreasonable and unsupported by the evidence. This ground was rejected at CCA [75]. If this appeal succeeds on the basis that Prof Henneberg's evidence was wrongly admitted, the case should be remitted to the CCA for further consideration of ground 2.

Conclusion

[2] The car was actually located in Clovelly after an attempt to blow up an ATM.

27. Regardless of whether the evidence is characterized as complex or merely 'observational and descriptive', techniques in routine use should be formally evaluated. In contrast to the evidence in this appeal, latent fingerprint evidence is based on observational comparison, yet there is a long training process and the techniques have been validated such that fingerprint examiners make relatively few errors (false positive and false negative) when comparing highly similar fingerprints from different persons. Unlike fingerprint evidence, in this case there is no detailed methodology and Prof Henneberg's technique has not been validated to determine whether it works or how well.
28. Focusing on the evidence being a mere aid and not identification or similarity evidence creates highly artificial lines that are not conducive to the rational management and assessment of opinions based on specialized knowledge. It is highly unlikely that lay people will understand the opinions of highly trained individuals such as Prof Henneberg to be merely an aid.
29. While 'validity' RWS [6.52] has a common and a technical meaning, juries cannot be asked to determine whether techniques and conclusions are valid or reliable in circumstances where they are not provided with appropriate information. Here, the jury was denied the details of the 'specialised knowledge' that would have allowed them to make sense of Prof Henneberg's evidence. When the admissibility of expert evidence is challenged, it is the obligation of the proponent to establish the 'specialised knowledge' required under s79.
30. The admissibility of Prof Henneberg's evidence was inconsistent with the terms of s79 and also created unfair prejudice to the accused. Being unable to measure the value or reliability of Prof Henneberg's conclusions, it is likely that the jury attributed more weight to it than it deserved. It is also likely that the jury did not understand the limitations to Prof Henneberg's opinion in the way that the respondents now portray it.

AMENDED ORDERS SOUGHT BY THE APPELLANT

1. That the Orders of the Court of Criminal Appeal of New South Wales made on 5 June 2013 be set aside.
2. The conviction is quashed.
3. The appellant's appeal is also remitted to the Court of Criminal Appeal of New South Wales so that further consideration can be given to Ground 2 of the appellant's appeal before that court.
4. In the alternative: A new trial is ordered.

David Barrow
Forbes Chambers
Tel: (02) 93907777
Fax: (02) 92100564

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