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

B E T W E E N:

HIGH COURT OF AUSTRALIA
FILED
13 MAY 2014
THE REGISTRY SYDNEY

ANTHONY CHARLES HONEYSETT
Appellant
and

THE QUEEN
Respondent

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RESPONDENT'S ANNOTATED SUBMISSIONS

Part I: Publication

This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

20 1. Whether an expert in Anatomy and Biological Anthropology can give evidence describing anatomical characteristics depicted in CCTV footage and still images to assist the jury in observing those characteristics in the footage and still images.

Part III: Section 78B of the Judiciary Act

This appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

30 ### Part IV: Statement of contested material facts

4. 1 It was not contested that 3 armed men robbed the Narrabeen Sands Hotel and stole $4,800 in cash.

4. 2 One of the 3 men was armed with a pink handled hammer and had what looked like a white T shirt wrapped around his head. The hammer was

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left at the scene and DNA found on the hammer matched that of the appellant. DNA found on a white T shirt found in the getaway car also matched the DNA of the appellant.

4. 3 The material referred to at [15] to [22] of the appellant's statement of relevant facts was admitted in the voir dire but it was not adduced in the trial itself.

PART V: Applicable Legislative provisions

The respondent agrees with the appellant's list of legislative provisions.

PART VI: Statement of Argument

Ground 1 Specialised knowledge

6. 1 In his report Professor Henneberg expressed the opinion that there was a "high degree of anatomical similarity" between the offender and the appellant. The reports of the defence experts, Dr Sutisno and Mr Porter, were largely concerned with criticising that opinion.

6. 2 That opinion was not adduced in the trial.

6. 3 Professor Henneberg's evidence in the trial was confined to the description of some basic anatomical characteristics observable from the CCTV footage of the robbery and from footage of the appellant at the police station. This rendered most of the criticisms by Dr Sutisno about the methodology and the lack of empirical or scientific validation irrelevant. Nevertheless, those criticisms have been repeated in this Court even though the opinion to which they relate was not evidence in the trial.

6. 4 The appellant's contention that Professor Henneberg had no specialised knowledge in the field of image comparison (AWS [26], [28] – [29], [38], [40], [50]) mischaracterises his field of expertise and the nature of his evidence.

6. 5 Professor Henneberg's field of expertise was not the comparison of images. His expertise was in Anatomy and Biological Anthropology. His

specialised knowledge equipped him to describe features of the human form whether observed in person or depicted in moving film or still images, or from examining human remains (through his experience in identifying bones of victims of crimes (see [6.7] below)). Similarly, his expertise in handedness qualified him to analyse patterns of hand usage observed in person or from a moving image. His expertise was in identifying and describing the pattern of use of the hands not in analysing the particular medium in which that pattern may be depicted.

6. 6 Professor Henneberg held a graduate degree in Anatomy and post graduate degrees in Anthropology and Biological Anthropology (1AB 163.25). This was set out in his Expert Certificate under s 177 *Evidence Act*. His master's thesis was on handedness and he had published papers on handedness (1AB 185.60). He had held teaching positions at universities in Australia and abroad for about 37 years in Anthropology and Anatomy and was, at the time of the trial, a Professor of Anatomy at the University of Adelaide, a position he had held for 15 years. He published extensively in peer reviewed journals (1AB 191.20), including 7 books and over 200 journal articles on Anatomy and Anthropology.

6. 7 Professor Henneberg also had experience in identifying bones of victims of crime with the Texas Department of Public Health and identification of deceased persons by facial superimposition of images in Capetown (1AB 166.15).

6. 8 Professor Henneberg explained that Biological Anthropology is part of the broader science of Anatomy which explores variation in human biological characteristics (1AB 163.35). He currently teaches an undergraduate course in Anthropological and Forensic Anatomy at the University of Adelaide.

6. 9 It was clearly established, and not disputed (AWS [26]), that Professor Henneberg, was eminently qualified to express opinions about anatomy, human biological variations and handedness.

6. 10 The other major misconception about Professor Henneberg's evidence was that his description of the anatomical characteristics depicted in the

footage was evidence that those characteristics were present. Professor Henneberg's description of what he observed in the footage was not independent evidence of the content of the footage, it was merely an aid to the jury in analysing the footage[1]. The evidence of the presence of those characteristics was the footage itself. For example, Professor Henneberg's observation that the offender was male was not independent evidence that the offender was male. It was merely a description of features he had observed in the footage to assist the jury's analysis of the footage. The evidence indicating that the offender was male was the CCTV footage (and the eye witness evidence). Professor Henneberg's evidence was essentially observational and descriptive (CCA at [52] 2AB 725.30), the relevance of which was to assist the jury in making observations from the footage.

6. 11 Some of the characteristics may have been obvious and may not have required expert assistance. Professor Henneberg acknowledged that the observation of differences in sex was "so obvious" (1AB 230.7) that it did not require explanation, it was a matter which "spoke for itself" (1AB 229.60). He also agreed that no particular expertise was required to assess differences in height (1AB 228.38).

6. 12 However, some characteristics were less obvious and the jury may not have known that features such as head shape, lumbar lordosis, or handedness were relevant and observable variations. They were characteristics which could be pointed out and described by a suitably qualified expert, and once pointed out, were observable from the footage. That was the relevance of Professor Henneberg's evidence.

6. 13 There is a clear distinction, "a significant step"[2], between assisting in the analysis of moving or still images and giving evidence of identity based on a comparison of those images. It is well established that experts may give evidence based on their expertise to assist the jury in 'perceiving and understanding'[3] what is depicted in CCTV footage or still images[4].

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[1] ***Butera v DPP*** (1987) 164 CLR 180 at 188.
[2] ***R v Tang*** (2006) 65 NSWLR 681 at [146].
[3] ***Butera v DPP*** (1987) 164 CLR 180 at 187.

However, where the expert goes further and purports to identify the offender, or express an opinion about the level of similarity, from a comparison of the images, different considerations apply. In those circumstances, questions as to the transparency of the reasoning process and the validity of the methodology may become relevant.

6. 14 The UK authorities have held that experts may give such evidence of identity or levels of similarity using an ascending scale[5], although it is considered preferable that the levels not be ascribed numerical values lest the jury think they represent an established and measurable scale, rather than what they actually are, which is "forms of words used"[6]. The safeguards may lie in the discretion to exclude unfairly prejudicial evidence or in appropriate directions alerting the jury to the limitations of the evidence or the methodology.

6. 15 In NSW a more cautious approach has been adopted and it has been held that in the absence of any objective standard or data base capable of establishing a quantification of the probabilities[7], evidence of identity or levels of similarity based on body mapping techniques are "bare ipse dixit"[8] and should not be admitted.

6. 16 The appellant seeks to raise these issues in the present case (Ground 4) even though no evidence of identity or level of simialrity was given nor purported to be given.

6. 17 Professor Henneberg acknowledged that the literature does not contain scientific studies that offer precise standards for photo anthropometric comparisons (1AB 238.38) and that there were no internationally agreed procedures beyond common knowledge of human anatomical variation described in numerous manuals and textbooks of biological anthropology (1AB 238.60). He agreed that he took no measurements nor did any

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[4] ***Attorney-General's Reference No 2 of 2002*** [2003] 1 Cr. App. R. 321 at [19] – [21]; ***R v Gray*** [2003] EWCA 1001 at [16], 2003 WL 1610342 at [45] – [46]; ***R v Gardner*** [2004] EWCA Crim 1639, 2004 WL 1808904 at [45]; ***R v Atkins*** [2010] 1 Cr. App. R. 8 at [13], [17], [23]; ***R v Shepherd*** [2011] NZCA 666 at [59] – [62]; ***R v Tang*** (2006) 65 NSWLR 681 at [120].
[5] ***R v Atkins*** [2010] 1 Cr. App. R. 8 at [23], [31].
[6] ***R v Atkins*** [2010] 1 Cr. App. R. 8 at [31].
[7] ***R v Tang*** (2006) 65 NSWLR 681 at [143] – [144].
[8] ***R v Tang*** (2006) 65 NSWLR 681 at [154].

particular analysis (1AB 190.30). He said his observation of the anatomical features was similar to that any observer could undertake except that it was based on greater background understanding of human variation (1AB 238.55).

6. 18 It was thus made clear to the jury that Professor Henneberg was merely using his expertise in anatomy to assist them by pointing out and describing certain general characteristics observed from the footage. This was illustrated in the way Professor Henneberg gave his evidence. The CCTV footage was played to the jury and Professor Henneberg provided a commentary at the relevant stages where certain characteristics could be observed. No evidence of identity, nor of an ascending scale of similarity was given (CCA at [57] 2AB 726.40, [67] 2AB 729.60).

Grounds 2 & 3 Ad hoc expertise

6. 19 The appellant submits that ad hoc expertise has not "survived" the enactment of s 79 because ad hoc expertise is not specialised knowledge, indeed, the need to "resort" to ad hoc expertise is said to demonstrate that there is no specialised knowledge (AWS [50]).

6. 20 The appellant's definition of "knowledge" is that "knowledge" requires "training, credible validation" and "reliability studies" whereas ad hoc expertise is said to mean only "the use of similar techniques in the past" (AWS [49]). On this view, ad hoc expertise is necessarily excluded from the definition of specialised knowledge because "knowledge" is said to involve a body of known facts or body of ideas inferred from known facts on good grounds (AWS [31]) with "appropriate validation" such that the word establishes "a standard of evidentiary reliability" (AWS [32]). This definition of "knowledge" yields the proposition that "***because*** *the category of expertise is 'ad hoc' and not based on 'knowledge' or closely linked to proven techniques from a validated discipline or field, it is not possible for the evidence to be equated with specialised knowledge*" (AWS [48]) (emphasis added). Ad hoc expertise is thus, by definition, necessarily excluded from specialised "knowledge".

6. 21 The terms of s 79 do not confine specialised knowledge to known and validated disciplines, rather, like the common law, they reflect the truism that a significant period of study or experience may yield greater information or knowledge of a particular subject than may be available to the lay observer on an initial or brief acquaintance with that subject. Thus in ***Butera*** it was noted that an indistinct recording may not yield its full content on first listening, it may need to be played over repeatedly before the listener's ear became attuned to the words or sounds recorded[9]. A person who has undertaken that task may become a "temporary expert" and may give evidence of what he or she has been able to discern from the recording. This evidence was said not to be independent evidence of the contents of the recording, it is "merely an aid to the jury's understanding" of the recording played in court[10].

6. 22 The Australian Law Reform Commission considered that confining knowledge to known or validated disciplines presented "major difficulties"[11] and that such an "area of expertise" requirement, referred to as the "***Frye***"[12] test, should not be imposed[13]. The terms of s 79, as eventually enacted, embodied this broader approach and included within the categories of specialised knowledge knowledge based on experience.

6. 23 The question of the status of ad hoc expert evidence under s 79 does not arise in the present case because Professor Henneberg did not purport to be an ad hoc expert. He did not claim "temporary expertise" based on his repeated viewings of the footage. He said his ability to identify and describe anatomical characteristics was based on his expertise in Anatomy. Similarly, his ability to observe right-handedness was based on his expertise in handedness. His training, qualifications, professional standing and list of publications established his undoubted expertise in the well-known and accepted field of Anatomy. He said he relied on his

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[9] ***Butera v DPP*** (1987) 164 CLR 180 at 187.
[10] ***Butera v DPP*** (1987) 164 CLR 180 at 188.
[11] *Australian Law Reform Commission Report* 26, vol 1, [743]; ***R v Tang*** (2006) 65 NSWLR 681 at [152].
[12] ***Frye v United States*** 293 F 1013 (1932).
[13] *Australian Law Reform Commission Report* 26, vol 1, [355] – [358], [743] – [748]; ALRC Report 38 [148].

entire professional background and his understanding of human variation to observe the anatomical features in the images (1AB 238.15).

Ground 4 No evidence of similarity

6. 24 Contrary to the appellant's assertion Professor Henneberg did not give evidence "that there was a level of anatomical similarity" between the offender and the appellant (AWS [56]). That is a reference to the opinion expressed in his report but it was not evidence in the trial itself.

6. 25 Professor Henneberg's evidence was that the offender depicted in the CCTV footage could be observed to be an adult male, of skinny body build (1AB 179.25), medium height compared to the other persons depicted and familiar objects like doorways, who carries himself very straight with the small of his back well bent and overhung by the shoulder area, short hair, elongated as opposed to round brain case (1AB 185.15), right handed (1AB 185.38) and darker skin colour than the female hotel employee next to him in the footage (1AB 186.20).

6. 26 He described the appellant as depicted in footage taken at the police station as an adult male of thin ectomorphic build, with a straight stance with well marked lumbar lordosis (1AB 188.38). His skull shape was dolichocephalic (1AB 189.13), he was right handed and his hair was short and "fluffy" (1AB 189.25). Professor Henneberg made no estimate of height because there was nothing in the photographs against which to compare height (1AB 190.5).

6. 27 It was evident that these basic descriptions did not purport to indicate any level of similarity between the two individuals, nor was an opinion as to any level of similarity between them offered.

6. 28 The appellant is correct that Professor Henneberg said he found no dissimilarities but in this context where he acknowledged that there were relatively few characteristics visible that would have been understood as reflecting more about the fact that the offender was fully covered and the limitations of the footage than that no dissimilarities were present. Failure to observe dissimilarities was not evidence of absence of dissimilarities

and that would have been well understood in the circumstances of this case.

6. 29 It was also true, as the appellant contends, that counsel and the trial judge in the summing up referred to Professor Henneberg's evidence as evidence of similarities but that was clearly a convenient shorthand expression to refer to the general characteristics the two individuals had in common not a statement that their appearance was similar. Professor Henneberg's descriptions was not evidence of their similarities for two reasons. Firstly, Professor Henneberg's evidence was not evidence of how the offender appeared at the robbery, nor that any particular similarity existed and secondly, the terms used were so general that no similarity of appearance was indicated.

6. 30 The references to Professor Henneberg's evidence of similarities should not obscure the fact that his evidence was of a different nature to that of the witnesses to the event. He was not in a position to give evidence of the presence of cerain features of the offender. His evidence was concerned with explaining what he had observed in the footage to assist the jury in their viewing of the footage. The evidence of the existence of any similarities came from the CCTV footage itself.

6. 31 Further, Professor Henneberg described only general characteristics of broad application such that no comparison of the specific appearance of the two particular individuals was indicated. For example, the description of the offender as male and of the appellant as male neither stated nor implied that they were of similar appearance. The same could be said of most of the other characteristics described; short hair, thin build, oval head, right handed. They were broad features the two individuals had in common but they could not describe any particular appearance for the purposes of identification. They were clearly not precise or distinctive enough for that, as Professor Henneberg's explanations confirmed.

6. 32 He said that medium height meant 1.77 metres plus or minus 6 centimetres, so it covered a 12 cm range and included 68% of Australian males (1AB 183.53). The description "thin build" was one of three basic

types: extramorphic, endomorphic and mesomorphic (1AB 182.25, 1AB 236.25) which encompassed all possible human variations. He said that lumbar lordosis, in the sense in which he used the term, was a "normal anatomical feature" which every human being possesses (1AB 237.25).

6. 33 Similarly, the offender's hair was described as "short" and the appellant's hair was described as "short" and "fluffy". This did not denote a particular style or length and no further explanation of what was meant by those broad terms was provided. The offender's hair was fully covered so the main focus of that description was to point out that the close adherence of the covering to the skull indicated that there was not a large quantity of hair beneath the covering. It was not a comparison of a particular length of hair, nor could it have been for the additional reason that the CCTV footage was taken 4 months before the footage of the appellant at the police station on 16 January 2009 (1AB 206.15) and no meaningful comparison with the appellant's hair as it was at the date of the robbery could have been made after that span of time.

6. 34 Professor Henneberg explained that his view that the offender was an adult was not an indication of age, it was based on size and body proportions (1AB 233.10). Dr Sutisno said this description was unfounded. Although she claimed that the offender's adulthood could not be observed from the footage she agreed that the footage showed that the offender was clearly not a child but she said it was not possible to say "exactly which range of adult" (1AB 258.33). This appeared to acknowledge that the description "adult" was available but not indicative of age. As Professor Henneberg had said it was not based on age the jury would have understood that "adult" meant only an indication that the person was of similar proportions to the other adults depicted in the footage.

6. 35 Professor Henneberg also acknowledged that his description of right handedness applied to about 80% of the population (1AB 223.25).

6. 36 These descriptions of relatively common features were not tantamount to an identification or to a specific level of similarity. If the jury observed

those features in the footage, they established no more than that the offender and the appellant had some general characteristics in common and that was relevant as part of the circumstantial case[14].

Ground 5 Relevance

6. 37 The appellant submits that Professor Henneberg's evidence was irrelevant because it "did not rise above the subjective" and "brought nothing to the tasks" the jury had to undertake (AWS [73]).

6. 38 Professor Henneberg acknowledged that the characteristics he described were observable by a lay person which was not to deny the utility of his descritpions in viewing the footage. The characteristics may have been visible but, without assistance, the jury may not have known how to look for the anatomical variations Professor Henneberg described. Sex, height and build may have been obvious, but without assistance, lumbar lordosis, head shape, and handedness may not have been identified as relevant variations.

6. 39 The utility of the process of analysing the footage closely and directing attention to specific characteristics was demonstrated in the cross examination of the defence expert Dr Sutisno (CCA at [60] 2AB 727.50).

6. 40 Dr Sutisno said that no skin was visible in the images: "*I could not see any, the was no visibility of skin.*

Q. No visibility at all?

A. From the images." (1AB 262.57).

6. 41 On further questioning, after being referred to a particular still image which showed exposed skin on the offender's wrist ((Exhibit C) 1AB 263.30), Dr Sutsino agreed that there was exposed skin there and that it was darker than the skin on the arm of the woman depicted next to it in the image. Dr Sutisno attributed the different tones to a "variation due to light" (1AB 263.48).

6. 42 Unfortunately, at that point Dr Sutisno's evidence became focussed on showing why Professor Henneberg's "determination of dark skin" was

[14] ***Festa v R*** (2001) 208 CLR 593.

impossible (1AB 263.20) which was not relevant as Professor Henneberg had not said that the offender had dark skin, merely that the skin was darker than the skin on the arm next to it. His evidence was that he could not say to what extent it was dark (1AB 177.18, 186.10) and later explained that the colours on the footage were not precise and it was difficult to determine the colour of the skin of the woman in the footage. He said it appeared as light but "how light and to what extent it may have been pink rather than tan, is difficult to tell from the image, the colours are not precise." (1AB 215.5). This explanation together with the earlier qualification that the comparison was only about the relative darkness showed that he was not purporting to describe any particular skin colour.

6. 43 However, even though the features were not precise or distinctive, this close examination drew attention to particular features and was potentially of real assistance to the jury in observing the features depicted in the footage. Professor Henneberg's evidence about the difficulties presented by the lighting and distortion in the footage, emphasised by Dr Sutisno, would have alerted the jury to the need for caution before too readily drawing an inference as to skin colour despite the apparent obvious differences.

6. 44 Similarly, Dr Sutsino initially claimed she could not determine the appellant's head shape from the forensic procedure photographs (1AB 270.40). On further cross-examination Dr Sutisno agreed that it was possible to determine whether his head was more oval or round shaped from those photographs (1AB 271.18).

6. 45 The fact that even Dr Stuisno discerned features which she had first said were not observable demonstrated that it was not simply a matter of the jury looking at the footage for themselves. There was a benefit to closer examination and analysis by an expert in anatomy drawing attention to the observable anatomical features in the footage.

6. 46 Handedness raised different issues to the other characteristics as Dr Sutisno appeared to accept that it was possible to discern handedness from the footage. In her opinion the footage showed that the offender

used his hands interchangeably and he was more likely to be ambidextrous (1AB 251.25, 264.38). She conceded that she was not an expert in handedness (1AB 264.15) but maintained her view that the offender appeared to be ambidextrous.

6. 47 This was clearly an area in which no question of relevance arose as it was acknowledged that it was possible to make observations and offer an expert opinion. Professor Henneberg was an expert on handedness and his opinion as to the patterns of use of the hands of the offender and the appellant was relevant to the issue of whether the offender and the appellant were right handed. The difference of opinion between the experts was a matter for the jury to determine.

6. 48 There was an unavoidable element of subjectivity in Professor Henneberg's description of the anatomical variations, as he acknowledged. It was, after all, an opinion, an assessment based on his training and experience as an Anatomist and Biological Anthropologist and was expressed as such.

6. 49 The relevance of Professor Henneberg's evidence was to provide a trained eye in anatomy to making observations about anatomy from the footage. It was an aid in viewing the footage but it was for the jury to assess the footage for themselves, having had the benefit of having some of the characteristics drawn to their attention and explained.

6. 50 This was in contrast to the situation in relation to the expert evidence on DNA. Much of the process of extraction of the DNA and the statistical analysis could not be reproduced in court and reviewed. The jury were in the position of having to accept the expert's evidence that the processes had been undertaken in accordance with accepted protocols. No expert evidence was called to challenge the methodology in relation to the DNA. The highly technical nature of the evidence afforded the jury no opportunity to review the methodology.

6. 51 This common feature of expert evidence may surround such opinions with an aura of authority and lead to the evidence being given more weight than it deserves. There was little risk of that in the present case

because Professor Henneberg's evidence was relatively straightforward and easily understood. He explained to the jury how he made his observations from the footage which, unlike the DNA material, was available for the jury to assess themselves.

6. 52 The trial judge's directions also impressed on the jury that the experts were witnesses like any other and they could accept or reject such portions of their evidence as they saw fit. The expert witnesses were not accorded any special status. The trial judge told the jury that the difference between expert witnesses and other witnesses was that expert witnesses could express opinions whereas other witnesses must only state facts (1AB 352.20). He also warned the jury not to accept expert evidence simply because it came from an expert: *"But you should bear in that simply because an expert says something does not of itself make it true or make it an opinion which you should accept. The validity of the opinion is a matter for you and one of the things that you can look at in deciding whether or not you accept the opinion of an expert is the reasoning process, the reasons given."*(1AB 357.30). Those directions were preceded by a reminder that the onus lay on the Crown and that it was not merely a matter of choosing between experts: "*If you think there is a reasonable possibility that the evidence of Dr Sutisno and Mr Porter favouring the accused, when taken in conjunction with the other evidence may be correct, then you should proceed on that basis.*" (1AB 356.60).

6. 53 The suggestion that the admission of Professor Henneberg's evidence gave rise to a miscarriage of justice is somewhat contrived in this case given that most of the characteristics he described were not in dispute. They had been described, without challenge, by each of the 3 eye witnesses.

6. 54 Mr Sim said the offender was a man, about 20 – 30 years of age, skinny build and about 170 – 180 centimetres in height (1AB 55.18, 58.29), with dark skin and dark eyebrows. There was some cross examination about that description (1AB 58 - 59).

6. 55 Mr Nadureira also said the offender was male, dark skinned, medium sized, about 5 ' 2" tall (1AB 65.50). Mr Nadureira was not cross-examined.

6. 56 Ms Copperwheat said he was male, quite thin, not old looking, brown eyes, brown skin around the eyes: "he's not like a white looking guy" (1AB 158.40). Ms Copperwheat was only asked one question in cross examination which concerned her own height.

6. 57 These descriptions were accepted as correct in closing address by defence counsel because if they were correct they excluded the appellant. The witnesses had described a height range of 5' 2" – 6' and as the height of the appellant was said to be about 192 centimetres (1AB 331.20) their evidence was put to the jury as a major reason to acquit (1AB 331.12).

6. 58 The same applied to Professor Henneberg. He said the offender appeared to be of medium height. This evidence, far from being irrelevant, was put to the jury as being consistent with the eye witnesses and, like their evidence, an important reason to acquit (1AB 332.30).

6. 59 It was thus accepted that the offender was an adult male, aged between 20 – 30, with dark skin and a thin build. These were the very characteristics Professor Henneberg described from the CCTV footage, except that he had not specified age.

6. 60 The defence case was that those characteristics were so general as to be "meaningless" (1AB 335.28, 335.50) and did "nothing to prove the identity of the offender" (1AB 336.30), yet it is now said that Professor Henneberg's evidence that those features were observable in the CCTV footage gave rise to a miscarriage of justice.

6. 61 The 4 additional characteristics Professor Henneberg described; short hair, lumbar lordosis, oval shaped head and right handed, were also not, as defence counsel put to the jury, specific or distinctive enough to establish any similarity of appearance between the two individuals (1AB 335.25 – 33.30). That was correct.

6. 62 The 4 characteristics Professor Henneberg identified in addition to those described by the witnesses may arguably have been "weak" evidence, as McHugh J described it in ***Festa***[15], but it was nevertheless relevant as part of the circumstantial case. One description, height, was particularly relevant.

6. 63 The generality of this evidence may have limited its probative force, but it also meant that there was no unfair prejudice for the purposes of the discretion to exclude unfairly prejudicial evidence under ss 135 and 137 of the *Evidence Act*. There was no risk that the jury would use it improperly or give it more weight than it deserved as it was clearly explained how the features were observed and the jury had the footage to assess for themselves.

6. 64 This circumstantial evidence could not link the appellant directly to the robbery. That link was provided by the DNA.

6. 65 The DNA found on the pink handled hammer matched the appellant. It was a profile expected to occur in fewer than 1 in 10 billion in the general population (1AB 121.55).

6. 66 The criticism made of this evidence was that it could not truly be proved to be the appellant's DNA because the value of allele 1 at the first region did not match that of the appellant at that position. Dr Beilby was emphatic that the difference in the reading at that position did not mean that the appellant was excluded (1AB 131 - 138). She explained that the discrepancy at that location was a "well known phenomena" and "very consistent with what you would expect" (1AB 151.10).

6. 67 The suggestion that his DNA may have been deposited on the hammer at some other time (1AB 125 – 126.10) was somewhat undermined by the appellant's evidence that he had never seen, owned or touched a pink handled hammer (1AB 296.50).

6. 68 Some reliance was also placed on the fact that the ratio of a full brother having the same DNA profile dropped to 1 in 3,654 (1AB 149.45) but Ms Beilby explained that by saying "if there were 3,654 brothers in one family

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[15] ***Festa v R*** (2001) 208 CLR 593 at [

there is a chance that one of them would have the same profile" (1AB 150.15).

6. 69 When the appellant was asked about the other people staying at his father's house at that time he listed: "Permanently was my cousin, her boyfriend, one of my dad's friends... ... ...Friends of dads friends of my cousins, visitors, people from in the country, because we're actually from Wellington originally and there's always family members, cousins always coming down from the country to the City if they need somewhere to stay there."(1AB 290.45). There was no mention of a brother. His father, Mr Honeysett, gave similar evidence and listed a number of people including a niece or cousin, friends, and people associated with a football team he was couching at the time (1AB 300.32).

6. 70 The DNA on the white T shirt found in the getaway car also matched the appellant with a profile expected to occur in fewer than 1 in 10 billion individuals in the general population (1AB 196.30). The "sheer amount" of DNA found was inconsistent with the DNA being placed there by secondary transfer (1AB 196.50).

6. 71 The criticism of this evidence was that the car was found two months after the robbery and may not have been the getaway car. It was also suggested that the appellant came from a culture where family members and friends used each other's belongings and it was possible that someone had borrowed his T shirt or that he had come into contact with the T shirt at some other time and somehow deposited his on it (1AB 339.50).

6. 72 The implication was that, if the jury accepted that the T shirt was the T shirt worn during the robbery, the robbery had been committed by a family member or friend of the appellant. That would have been an extraordinary coincidence in itself. It would have meant that of all the possible perpetrators of the armed robbery in Narrabeen it happened to have been a family member or friend of the appellant and that person happened to be wearing a white T shirt on his head which contained large amounts of the appellant's DNA. This possibility was considerably

undermined by the appellant's evidence that he had never seen the T shirt before (1AB 291.32). He said he had a few white T shirts but he did not recognise that brand (1AB 297.47).

6. 73 In that context, the uncontested evidence that the offender was male, with dark skin, aged between 20 – 30 (the appellant was 25 at the time) was important circumstantial evidence. The additional features described by Professor Henneberg, that the offender and the appellant had oval shaped heads, pronounced lumbar lordosis and were right handed added some, but arguably limited weight to that circumstantial evidence.

10 6. 74 Whatever feasibility the innocent explanations might have had for the presence of the DNA on any one item, it evaporated in the face of the coincidence of finding his DNA on both items. It was that combination of finding his DNA on both the hammer at the scene and on the T shirt in the getaway car that made the DNA evidence so compelling and the inference of his involvement inevitable.

PART VIII: Time Estimate

20 It is estimated that oral argument will take 1 hour.

Dated: 13 May 2014

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