HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY AND HAYNE JJ

MUNDARRA DOOLAN SMITH APPELLANT

AND

THE QUEEN RESPONDENT

Smith v The Queen [2001] HCA 50
Date of Order: 21 June 2001
Date of Publication of Reasons: 16 August 2001
S233 and S234/2000

ORDER

1. *Appeals allowed.*

2. *Order of the Court of Criminal Appeal of New South Wales of 21 October 1999 set aside. In place thereof order that the appeals to that Court be allowed, that the conviction and sentence be quashed, and that there be a new trial.*

On appeal from the Supreme Court of New South Wales

Representation:

P Byrne SC with M D Austin and T S Corish for the appellant (instructed by Sydney Regional Aboriginal Corporation Legal Service)

M G Sexton SC, Solicitor-General for the State of New South Wales with R D Ellis and B K Baker for the respondent (instructed by S E O'Connor, Director of Public Prosecutions (New South Wales))

CATCHWORDS

Smith v The Queen

Criminal law – Evidence – Relevance – Identification – Evidence of recognition by police officers of the accused in photographs from bank security cameras – Police officers in no better position than jury to compare appearance of accused with photographs – *Evidence Act* 1995 (NSW), s 55 – Whether evidence could rationally affect the assessment by jury of probability of the existence of a fact in issue – Whether admissible as opinion evidence.

Evidence – Relevance – Opinion or fact evidence – *Evidence Act* 1995 (NSW), s 55 – Evidence of recognition by police officers of accused in photographs from bank security cameras – Whether relevant – If relevant whether excluded as opinion evidence.

Evidence Act 1995 (NSW), ss 55, 76.

1 GLEESON CJ, GAUDRON, GUMMOW AND HAYNE JJ. On 21 June 2001, the Court made orders setting aside the order of the Court of Criminal Appeal and in place directing that there be a new trial of the appellant. What follows are our reasons for joining in the orders that were made.

2 The appellant was indicted in the District Court of New South Wales on a charge that, on 26 June 1997, being in company with others, he robbed two bank officers of a sum of money which was the property of the bank. To that charge he pleaded not guilty but he was convicted. His appeal to the Court of Criminal Appeal against conviction was dismissed[1].

3 That there had been a robbery of the bank by four young men was not in issue at the appellant's trial. Bank security cameras had taken photographs showing what happened. The prosecution's case against the appellant was that he was the person who was shown in the photographs, standing near the back of the automatic teller machine, apparently keeping lookout while the co-offenders took the money.

4 It was, therefore, a fact in issue on the trial of the appellant whether the appellant, the person standing trial, is the person depicted at the right-hand side of some of the security photographs.

5 Two police officers gave similar evidence at trial, over the objection of the appellant. Each said that he had had previous dealings with the appellant and that he recognised the person depicted in the bank photographs as the accused. Each continued to maintain, in the witness box, that he recognised the person depicted as being the appellant. The question on this appeal is whether that evidence was properly received.

6 As is always the case with any issue about the reception of evidence, identification evidence being no exception, the first question is whether the evidence is relevant. No attention was given to this question in the arguments advanced at trial, or on appeal to the Court of Criminal Appeal, but that question must always be asked and answered. Further, although questions of relevance may raise nice questions of judgment, no discretion falls to be exercised. Evidence is relevant or it is not. If the evidence is not relevant, no further question arises about its admissibility. Irrelevant evidence may not be received. Only if the evidence is relevant do questions about its admissibility arise. These

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1 *R v Smith* (1999) 47 NSWLR 419.

propositions are fundamental to the law of evidence and well settled. They reflect two axioms propounded by Thayer and adopted by Wigmore[2]:

> "None but facts having rational probative value are admissible",

and

> "All facts having rational probative value are admissible, unless some specific rule forbids."

7 In determining relevance, it is fundamentally important to identify what are the issues at the trial. On a criminal trial the ultimate issues will be expressed in terms of the elements of the offence with which the accused stands charged. They will, therefore, be issues about the facts which constitute those elements. Behind those ultimate issues there will often be many issues about facts relevant to facts in issue. In proceedings in which the *Evidence Act* 1995 (NSW) applies, as it did here, the question of relevance must be answered by applying Pt 3.1 of the Act and s 55 in particular. Thus, the question is whether the evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment by the tribunal of fact, here the jury, of the probability of the existence of a fact in issue in the proceeding[3].

8 The issues which arose on the appellant's trial were very narrow. There being no dispute that there had been a robbery, the only disputed fact was whether the appellant *is* depicted in the bank photographs. It is important to notice that the question is framed in the present, not the past, tense. Having regard to the fact that the photographs which were tendered in evidence at trial depicted the occurrence of the robbery with which the appellant was charged, the question for the jury was whether they were satisfied, to the requisite standard, that the person *then* standing trial before them *is* shown in those photographs.

9 The only evidence led against the appellant in relation to that disputed fact was the evidence of the two police officers and the evidence that demonstrated that the photographs which were tendered in evidence had been taken by the bank's security cameras during the robbery. Neither police officer suggested that he had any basis for concluding that it is the appellant depicted in the bank

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2 Thayer, "Presumptions and the Law of Evidence", (1889) 3 *Harvard Law Review* 141 at 144-145; Wigmore, *Evidence in Trials at Common Law*, (Tillers rev) (1983), vol 1, §§9, 10.

3 *Evidence Act* 1995 (NSW), s 55(1).

photographs other than the knowledge that he had gained of the appellant's physical appearance during those earlier encounters and whatever was revealed to a person who looked at the photographs that were produced in evidence. There was no suggestion that the physical appearance of the appellant had changed materially between the time when the photographs were taken and the time of the trial, or that the police, by reason of their previous observations of the appellant, were at some advantage in recognising the person in the photographs. It was acknowledged by counsel, in the course of argument in this Court, that, by the time the evidence had concluded, the jurors had probably spent more time in the presence of the appellant than had the police witnesses before they gave their evidence. The police witnesses were in no better position to make a comparison between the appellant and the person in the photographs than the jurors or, for that matter, some member of the public who had been sitting in court observing the proceedings. If such a member of the public had been called as a witness, the same question of relevance would have arisen. Thus, not only was the issue that was raised a very narrow issue, the data available to the jury for its resolution was no different in any significant way from the data upon which the police officers based their asserted conclusion. The police officers' conclusions and the jury's conclusion both depended upon combining their observation of the appellant's appearance with their observation of the photographs. (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.)

10 The question of the relevance of the evidence of the police officers may be approached in this way. The fact in issue was, as we have earlier said, "Is the person standing trial the person who is depicted at the right-hand side of some of the photographs tendered in evidence?" Is an assertion, in evidence, by a witness that he now recognises, or has previously recognised, the person who is depicted in those photographs as the accused, relevant evidence? That is, in the language of s 55 of the *Evidence Act*, could that evidence, if accepted, rationally affect the assessment by the jury of the probability that it is the person standing trial who is depicted in the photographs?

11 Because the witness's assertion of identity was founded on material no different from the material available to the jury from its own observation, the witness's assertion that he recognised the appellant is not evidence that could rationally affect the assessment by the jury of the question we have identified. The fact that someone else has reached a conclusion about the identity of the accused and the person in the picture does not provide any logical basis for affecting the jury's assessment of the probability of the existence of that fact when the conclusion is based only on material that is not different in any substantial way from what is available to the jury. The process of reasoning from one fact (the depiction of a man in the security photographs) taken with another

fact (the observed appearance of the accused) to the conclusion (that one is the depiction of the other) is neither assisted, nor hindered, by knowing that some other person has, or has not, arrived at that conclusion. Indeed, if the assessment of probability is affected by that knowledge, it is not by any process of reasoning, but by the decision-maker permitting substitution of the view of another, for the decision-maker's own conclusion.

12 In this case the evidence of the police was irrelevant and should not have been received. No question of admissibility had to be considered.

13 This is not to say that it will never be relevant for a witness to give evidence that the witness recognises who is depicted in a photograph. The obvious case in which that will be relevant is where the witness deposes to having identified someone from a photograph, or collection of photographs, shown to the witness and the identity of the person depicted is proved in some other way[4]. Difficulties may arise, however, when the photograph which is used for identification and is tendered in evidence is, as was the case here, a photograph taken of an incident which is the subject-matter of the proceeding. Even in such a case, a witness's evidence of recognition of the person depicted may be relevant.

14 Sometimes the facts in issue will extend beyond the narrow question whether the accused is the person depicted in the photograph. In *R v Goodall*[5], the questions included whether the accused owned a jacket of the kind that the offender depicted in security photographs of a robbery was shown to be wearing. A jacket, which was tendered in evidence, had been found with other incriminating items. Two police officers gave evidence that they had seen the accused wearing this kind of jacket before the robbery. They gave further evidence that the man who was depicted in the security photograph was the accused, and that he was wearing a jacket of the kind they had seen him wearing before the robbery. The evidence was, therefore, relevant to link the accused to the jacket. It went beyond the bare assertion of recognition of the person on trial as the person shown in the photograph.

15 In other cases, the evidence of identification will be relevant because it goes to an issue about the presence or absence of some identifying feature other than one apparent from observing the accused on trial and the photograph which

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4 *Alexander v The Queen* (1981) 145 CLR 395.

5 [1982] VR 33.

is said to depict the accused. Thus, if it is suggested that the appearance of the accused, at trial, differs in some significant way from the accused's appearance at the time of the offence, evidence from someone who knew how the accused looked at the time of the offence, that the picture depicted the accused as he or she appeared at *that* time, would not be irrelevant[6]. Or if it is suggested that there is some distinctive feature revealed by the photographs (as, for example, a manner of walking) which would not be apparent to the jury in court, evidence both of that fact and the witness's conclusion of identity would not be irrelevant[7]. Similarly, if, as was the case in *R v Tipene*[8], there is an issue whether photographs of different incidents depict the same person, evidence given about the identity of the person depicted may not be irrelevant.

16 Of course in any such case, further questions of admissibility would then arise. Those questions would very likely include questions about the application of the opinion rule (s 76) and the questions presented by the general discretion to exclude evidence under s 135, and the direction, in s 137, to exclude prejudicial evidence. It is, however, not necessary to consider those questions in this matter. Answers to them may depend, in part, upon the precise nature and form of the evidence.

17 For reasons that are not clear to us, there were two separate notices of appeal by the appellant in the Court of Criminal Appeal. The Court of Criminal Appeal made one order but there have been filed two separate but identical notices of appeal in this Court. That was neither necessary nor appropriate. Nevertheless, it was necessary to deal with both and the orders that have been made reflect that.

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6 *R v Palmer* [1981] 1 NSWLR 209.

7 cf *Morrison v The Queen* unreported, Court of Criminal Appeal of New South Wales, 30 November 1995.

8 Unreported, Court of Appeal of New Zealand, 30 May 2001.

18 KIRBY J. This Court has set aside orders of the Court of Criminal Appeal of New South Wales[9] and ordered the retrial of Mr Mundarra Smith ("the appellant")[10]. I joined in the making of those orders. It remains for me to state my reasons. Because I reach my conclusion by a route different from that taken by the other members of the Court[11], I am obliged to say why.

19 The joint reasons decide that the evidence of two police officers, to which the appellant objected, was not admissible because it was irrelevant to the fact for the proof of which the evidence was tendered. Both by the common law[12] and under the *Evidence Act* 1995 (NSW) ("the Act")[13], a demonstration of relevance is the first prerequisite to the admissibility of evidence.

20 Neither at trial nor on appeal had it been disputed that the evidence of the police officers was relevant. The grounds filed in the Court of Criminal Appeal complained only (1) that the evidence should have been excluded as "opinion evidence" of a kind which the jury should not have taken into consideration; and (2) that the conviction was unreasonable and could not be supported having regard to the evidence. The Court of Criminal Appeal decided the matter on that basis[14]. After special leave to appeal to this Court was granted, the appellant's written submissions appeared, as I read them, to treat the issue of relevance only as a conduit for the primary argument. This argument, pursued on the application for special leave and orally before this Court, concerned whether the evidence of the police officers was evidence of a "fact" or of an "opinion". If the evidence was properly classified as opinion evidence, serious questions would arise as to whether it fell within the provisions of the Act permitting its reception[15]. Even if it did, questions would remain as to whether such evidence

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9 *R v Smith* (1999) 47 NSWLR 419.

10 Such orders were pronounced by the Court on 21 June 2001.

11 Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ ("the joint reasons").

12 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 265, 530; *Wilson v The Queen* (1970) 123 CLR 334.

13 s 56; see also s 55(1); reproduced below at [24]-[25].

14 Had the point upon which the appellant now succeeds been raised before the Court of Criminal Appeal, it would have required an application to amend the grounds of appeal that would have enlivened the exercise by that Court of its discretion to grant or refuse such application: Criminal Appeal Rules (NSW), r 4; *Crampton v The Queen* (2000) 75 ALJR 133 at 143-144 [54]-[57]; 176 ALR 369 at 382-383; *R v Hines* (1991) 24 NSWLR 737 at 742-744.

15 The Act, ss 76, 78, reproduced below at [48], [59].

ought to have been excluded from consideration by the jury on grounds of prejudice[16].

A new point arises in the High Court

21 When oral argument began, questions were raised by this Court as to whether the threshold issue of relevance had been overlooked by everyone. If it had, and the evidence was found to be irrelevant, it would relieve the Court of having to consider the classification of the evidence as being of fact or opinion and the consequential questions that, only then, would fall for decision.

22 There is no constitutional reason forbidding this Court, perceiving for the first time a flaw in the earlier conduct of proceedings, to permit a party to an appeal to the Court to raise a completely new legal proposition not previously advanced, whether at trial or on appeal[17]. Sometimes a fresh look at a problem can uncover a point that everyone has overlooked or mistaken and so prevent an injustice[18]. Such a new argument is only forbidden where procedural unfairness is caused to a party, such as might arise if a party could have met the point, if raised earlier, by tendering additional or different evidence[19]. There is no suggestion in the present case that, had the issue of relevance been raised at trial, additional, or different, evidence would have been given by the police officers. It is possible that they might have proffered more detailed evidence of their earlier acquaintance with the appellant; but I shall assume that this would not have been material, or at least not determinative.

23 Yet there remain reasons for caution in permitting a case to take on a completely new complexion, especially where the new point concerns the relevance of evidence. Questions of relevance raise the logical connection between proof of a propounded fact and a conclusion about a matter having persuasive significance for an issue for trial. Notions about the relevance of particular facts to ultimate conclusions in a trial can vary as between the parties, who may see the issues differently. Perspectives of relevance may also develop during the course of a trial as the issues become clearer, as immaterial issues fall

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16 The Act, ss 135, 137.

17 Constitution, s 73; *Pantorno v The Queen* (1989) 166 CLR 466 at 475; *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 154-155 [138], 161 [164]; *Eastman v The Queen* (2000) 74 ALJR 915 at 966 [280]-[281]; cf at 943-944 [166]-[167]; 172 ALR 39 at 108; cf at 76-77.

18 *Crampton v The Queen* (2000) 75 ALJR 133 at 141-143 [47]-[57], 152-156 [105]-[121]; 176 ALR 369 at 380-383, 394-400.

19 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

away and as understandings of the applicable law become more certain. This is why appellate courts ordinarily defer to the rulings of trial judges about the issue of relevance. Such deference also rests upon a recognition of the fact that practical considerations usually require such rulings to be made on the run and sometimes, as here, in a preliminary decision, before all, or most, or any of the evidence is adduced. Rulings as to relevance therefore depend substantially upon judicial impression. In the face of the fact that relevance is, in part at least, determined by impression, it is significant that neither the trial judge, nor the appellate judges nor counsel earlier perceived the evidence in question to be irrelevant. In now expressing an opinion about relevance, this Court has neither the advantages of an express ruling on the point by the trial judge nor analysis and opinion of the Court of Criminal Appeal which, under the Constitution, is the ordinary place in which points of criminal and evidence law (and appeals against conviction and sentence) are to be determined.

24 The parties' disinclination to argue the point of relevance is, in my view, well founded. As I will attempt to show, the evidence of the police officers was relevant according to the undemanding test provided by the Act. That test requires no more than that the evidence "if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding"[20]. Other provisions reinforce the impression that the Act's test of relevance is not a stringent or narrow one[21]. A broad interpretation is also consistent with the purpose of the Act, which is to aid the court process rather than delay it[22].

25 Section 56 of the Act states:

> "(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> (2) Evidence that is not relevant in the proceeding is not admissible."

The effect of s 56 is that relevant evidence is admissible unless it is excluded by another provision of the Act[23]. The large number of statutory exceptions also

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20 The Act, s 55(1).

21 ss 57, 58.

22 *Nodnara Pty Ltd v Deputy Commissioner of Taxation* (1997) 140 FLR 336 at 339-340 per Young J.

23 eg *Papakosmas v The Queen* (1999) 196 CLR 297 at 307-309 [23]-[33], 311-312 [44]-[48], 320-322 [77]-[82].

suggests that the scheme of the Act (like the common law before it) envisages that the major battleground of exclusions will lie in applying the various exceptions once evidence is accepted as relevant. To explain why, in my view, the evidence of the police officers cannot be excluded on the ground that it was irrelevant, it is necessary to say something more than appears in the joint reasons concerning the conduct of the trial. Save for this added material, I accept the statement of facts set out in those joint reasons[24].

The course of the proceedings

26 At the trial of the appellant, following his arraignment and the entry of a plea of not guilty, various preliminary matters were dealt with before the jury were empanelled. The prosecutor opened her address to the trial judge (Latham DCJ) by conceding that there was a contest concerning the admissibility of the evidence of the two police officers who had recognised the appellant as the person appearing in the bank security camera photographs ("the photographs") which, by multiple depictions of the scene, had recorded the bank robbery as it was actually occurring. The prosecutor indicated that she would be seeking to tender the police evidence as "recognition evidence" and that it would be objected to for the appellant. She conceded that "[a]part from that evidence there's very little other evidence other than the tender of the actual photographs".

27 The prosecutor pointed out that the evidence of the police officers was founded, not only upon viewing the photographs, but also upon "prior familiarity" by reason of the police officers having dealt with the appellant in the Redfern and Waterloo suburbs of Sydney where the appellant had been seen "on numerous occasions" and "interviewed". On one occasion the appellant had been arrested and "seen … over extended periods of time". The statements of Senior Constables Crampton and Peterson were received by the trial judge without objection.

28 Senior Constable Crampton was then examined and cross-examined on the voir dire. The offence charged had occurred on 26 June 1997. Senior Constable Crampton had viewed a number of the photographs on 4 July 1997 and said that he recognised the appellant. He acknowledged that he did not take long looking at the photographs. He said that he knew the appellant from three brief (under five minute) conversations between January and April 1997 and from seeing him "in passing", including about a month before 4 July 1997. In all, there had been half a dozen encounters and all during daylight.

29 Senior Constable Peterson also gave evidence on the voir dire in elaboration of his statement. He had viewed the photographs separately from

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24 Joint reasons at [2]-[5], [9].

Senior Constable Crampton and he too had identified the appellant as the person depicted. He stated that he had previously spoken to the appellant on five or six occasions "while working at Redfern" and had "[a]rrested him a couple of times", on each occasion spending an estimate of "two to three hours … [a] length of time" with the appellant.

30 Not only was no submission put to the trial judge that the foregoing testimony of the police officers was irrelevant to the fact in issue, namely whether the appellant was the person depicted in the photographs viewed by the police officers and *for that reason* a participant in the robbery as charged. On the contrary, as the trial judge noted, the issue argued involved an attempt by the appellant's counsel "to persuade me to exercise my discretion under sections 135 or 137 of [the Act] to exclude that evidence". That discretion only arises once the evidence in question has passed the test of relevance. Her Honour said:

> "It is common ground that if I were to exercise my discretion to exclude the evidence of identification, there is no other evidence to place before the jury linking [the] accused with the robbery at Caringbah on 26 June 1997."

31 The trial judge declined to hold that the evidence was inadmissible on the foregoing bases. She expressed the view that, if the evidence was opinion evidence, which she appeared to doubt, it would nevertheless be admissible under s 78 of the Act. She rejected the argument that the evidence should be excluded on the basis of prejudice to the appellant[25]. Similarly, she concluded that the weaknesses of the evidence, as evidence of identification, could be cured by appropriate directions and warnings to the jury.

32 The jury were then empanelled. The trial of the appellant proceeded in accordance with the judge's rulings. Obviously, in the light of the concession indicated by the prosecutor at the outset, and recorded by her Honour, a contrary decision on the admissibility of the police evidence of identification from the photographs might have resulted in a very different train of events. For example, in light of the prosecution's then concession, a question could have arisen as to whether, deprived of the police evidence judged essential to the prosecution case, the trial should have proceeded against the appellant at all.

33 The appellant was present throughout his trial. There was no suggestion that his appearance had changed from what it had been at the time that the robbery took place. Early in the trial, a photographic laboratory technician, employed by the bank's security company, gave evidence of processing, developing and enlarging the photographs from the film in the security camera

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25 The Act, ss 135, 137.

which had recorded the events of the robbery. It was through his testimony that a book of the photographs was tendered, without objection for the appellant.

34 Before the jury, the police officers gave evidence of recognising the appellant from the photographs. That evidence was similar to that which they had given on the voir dire, although Senior Constable Peterson did not recount the circumstances of his arrest of the appellant. The cross-examination was addressed to the quality of the photographs. It did not contest the encounters. Nor did it explore the precise circumstances of the previous contacts between the police officers and the appellant. The police officers themselves did not elaborate such occasions, doubtless because doing so would encourage, and perhaps justify, submissions about prejudice.

35 The appellant gave no evidence at his trial. The only witness called in his case was his mother with whom he resided. Her evidence was inconclusive. However, in cross-examination she stated that police had shown her photographs, presumably the bank security photographs, suggesting that her son was shown in them. She had said: "Excuse me, I don't think so". At trial, no one asked her directly, by reference to the photographs that had been admitted in evidence, whether the person shown in them was her son.

36 At the close of the case for the appellant, the judge received a request from the jury for a magnifying glass "for the photographic evidence". Her Honour refused, informing the jury:

> "[T]he issue in this trial and no doubt it has not escaped your attention is whether or not the police officers who identified [the] accused identified [him] correctly from their knowledge of the accused and that when they looked at the photographs they did that with a naked eye, without any aid, and the issue is as to the correctness of their identification, not so much whether or not you might form a view that perhaps with the aid of some magnifying device that they could have done a better job.
>
> I don't want to distract you from the prime issue in the trial and on that basis we will leave magnifying glasses out of it."

The directions of the trial judge

37 In her closing directions to the jury, the trial judge described once again the central question for their consideration having regard to the way the trial had been fought:

> "The only, I would suggest, issue in this trial is whether or not the accused [was one] of those four persons. That is really the only issue, and that is why the Crown case depends entirely, or almost entirely, on that identification evidence from Constables Crampton [and] Peterson".

38 Repeatedly, the trial judge instructed the jury that the question was "whether or not the identification was correctly made". She recorded that "the substance of [the] argument to you in the course of [counsel's address] has been directed to the reliability of the identification of those police officers". She warned the jury about the dangers of mistaken identification and that "two witnesses can be just as mistaken as one". Her Honour called for "close attention to the quality of the photographs" and pointed to the fact that the face of the person alleged to be the appellant was shaded by a hood. She drew to notice the limitations of "black and white … one-dimensional" photographs and the failure of the police to conduct an identification parade. She recounted the police explanation for that failure, which rested on the inability of eye-witnesses to give a description of the participant[26], as well as a difficulty in producing sufficient persons of the appellant's age and Aboriginal appearance. The charge concluded with clear directions as to the entitlement of the appellant not to give evidence and the requirement for the prosecution to prove its case beyond reasonable doubt. No redirections were sought by the appellant's counsel.

39 After the jury retired they sent a further message to the judge. This asked: "[D]o we rely on the photos used by the police only to determine if the accused had been positively identified or do we look at all the photos as a whole to determine our verdict"? After receiving submissions from counsel, her Honour recalled the jury and reminded them of her instruction that:

> "[I]n order to convict … the accused you have to be satisfied beyond reasonable doubt that the identification … was correctly made from the photographs. Now you are entitled to look at all the evidence in the trial including all of the photographs that have been tendered and admitted into evidence in making that decision …
>
> [T]hat does not preclude you from looking at all of the photographs in order to determine whether you are satisfied beyond reasonable doubt that those constables made their respective identifications accurately and correctly."

40 The jury retired again and later returned with a verdict of guilty. The appellant was convicted and sentenced.

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26 Eight people present in the bank at the time of the robbery were shown a video compilation of male faces, including the appellant. None identified the appellant. Two identified a person other than the appellant.

The police evidence was relevant

41 Against the background of the conduct of the trial, as I have described it, it is not possible, in my respectful opinion, to determine this appeal on the basis that the evidence of the two police officers was inadmissible as not relevant, directly or indirectly, to a fact in issue. The evidence of the police officers addressed the question whether the appellant was the person represented in the photographs, which incontestably recorded the actual events of the robbery. If the police evidence were accepted, it could therefore rationally affect, at least indirectly, the assessment by the jury of the probability of the existence of a fact in issue, namely whether the appellant was one of the four participants in the robbery at the bank on 26 June 1997. In past decisions, it has been observed that such identification evidence may be relevant if the jury require further assistance on the interpretation of photographs; if the appearance of the accused has changed and the witness can testify to the specific appearance at the time of the offence[27]; or if the witness has an advantage over the jury based on sufficient familiarity with the accused or other expertise[28]. Approached in that way, there are several grounds for upholding the relevance of the police evidence.

42 In most of the photographs, the features of the person alleged to be the appellant were partially hidden by a hood pulled over the head. It is not unusual for those who participate in crimes of this character to attempt to disguise their features[29]. A jury, invited to identify the participant as the accused from photographs with such impediments, might, quite properly, hesitate to do so solely on the basis of their own observations of the photographs as compared to the appearance of the accused before them. The jury's hesitation in this case is demonstrated by their request for a magnifying glass and the two questions they put to the trial judge. Members of a jury watch a person such as the appellant (especially where, as here, that person gives no evidence) sitting immobile in the courtroom. The police witnesses had repeatedly viewed the appellant in daylight. They had seen him in motion. They had observed him from different angles. They had had the opportunity to view him engaged in varying and more natural facial movements.

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27 *Stockwell* (1993) 97 Cr App R 260 at 263-264.

28 *R v Tolson* (1864) 4 F & F 103 [176 ER 488]; *R v Palmer* [1981] 1 NSWLR 209; *R v Grimer* [1982] Crim LR 674; *R v Goodall* [1982] VR 33; *R v Smith* (1983) 33 SASR 558.

29 eg *R v Smith* (1983) 33 SASR 558 (offender wearing balaclava); *R v Griffith* [1997] 2 Qd R 524 (offender wearing stocking mask).

43 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. In such circumstances, the acceptance of the evidence of two witnesses who spontaneously and separately identified the participant as the appellant, on the basis of their repeated contacts with the appellant in the six months prior to the recording of the photographs and act of recognition, cannot in my view be said to be incapable, even indirectly, of rationally affecting the assessment by the jury of the probability that the appellant was present during the robbery. Decision-makers, in such circumstances, could properly consider that the witnesses were better placed to recognise the person in the photographs than they were.

44 Moreover, the purpose of installing security cameras in banks and like places cannot be overlooked. In part, it is doubtless to act as a deterrent to crime. The display of recorded film and photographs to crime victims and police also plays an important role in the detection (as opposed to the trial) process[30]. But once the investigative stage is over and where the person performing the identification has substantial advantages over the jury, it may also become evidence relevant to the issues for trial[31], where the involvement of the accused is in dispute and especially where the accused gives no evidence.

45 Finally, the view that the police officers' evidence of identification was relevant is consistent with the broad test of relevance expressed in the Act[32]. It fits comfortably with the approach taken by the Australian Law Reform Commission in the successive reports upon which the Bill, which became the Act, was based[33]. It is also appropriate to the respective functions of the judge and jury in a trial by jury and to the fact that questions of relevance often have to be ruled upon before the judge knows all of the issues that may become relevant in the trial. As a matter of legal policy it is undesirable, and unnecessary in terms of rules of admissibility "otherwise provided by [the] Act"[34], to set the hurdle of relevance too high.

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30 *Alexander v The Queen* (1981) 145 CLR 395 at 410-411.

31 eg *R v Maqsud Ali* [1966] 1 QB 688; *R v Leung* (1999) 47 NSWLR 405.

32 The Act, s 55.

33 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 2 at 125-132 [55]-[58]; Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 70 [122]; see also the previous common law as noted by the Commission: *Martin v Osborne* (1936) 55 CLR 367 at 375 per Dixon J (Latham CJ concurring); *Wilson v The Queen* (1970) 123 CLR 334 at 337 per Barwick CJ; *R v Pfitzner* (1976) 15 SASR 171 at 196 per Wells J.

34 s 56(1).

46 In *Carusi*[35] Hunt CJ at CL remarked that: "It is now beyond question that evidence of identification from photographs is relevant and therefore prima facie admissible."[36] His Honour went on to acknowledge the dangers in the trial of the use of such evidence resulting from the seductive effect of identification evidence generally; the problem of witnesses displacing memory image with photographic image; the limitations of two-dimensional representations; and the inability of the accused to contest the weaknesses of an identification or "recognition" at the time it is made. It is those dangers that enliven the exclusionary rules. But they do so accepting that the test of relevance has been passed.

47 Concluding as I do that the evidence of the police officers was relevant in the sense provided by the Act, it is appropriate to return to the issues that emerged in these proceedings before relevance was raised in this Court. The Court of Criminal Appeal resolved these issues against the appellant. It is therefore necessary to start my own analysis by recalling what that Court held.

The decision of the Court of Criminal Appeal

48 The reasons of the Court of Criminal Appeal for rejecting the appellant's appeal were given by Sheller JA[37]. His Honour recounted the evidence and the ruling of the trial judge. He then addressed himself to s 76 of the Act which provides:

> "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

49 The difficulty which the common law had experienced in defining "opinion" was acknowledged. His Honour referred to texts ancient[38] and

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35 (1997) 92 A Crim R 52 at 55; see also *Blick* (2000) 111 A Crim R 326 at 333-334 [23].

36 Relying on *Alexander v The Queen* (1981) 145 CLR 395 at 399, 427, 434; *R v Fannon and Walsh* (1922) 22 SR (NSW) 427 at 429-430; *R v Doyle* [1967] VR 698 at 699; *R v Russell* [1977] 2 NZLR 20 at 27.

37 (1999) 47 NSWLR 419 (Grove and Hidden JJ concurring).

38 Cornewall Lewis, *An Essay on the Influence of Authority in Matters of Opinion*, (1849) at 1-2.

modern[39], as well as decisional authority concerned both with the common law[40] and the several versions of the Act[41]. He cited Wigmore to make the point that no sharp distinction between "opinion" testimony and "fact" testimony is scientifically possible[42]:

> "We may in ordinary conversation roughly group distinct domains for 'opinion' on the one hand and 'fact' or 'knowledge' on the other; but as soon as we come to analyze and define these terms for the purpose of that accuracy which is necessary in legal rulings, we find that the distinction vanishes, that a flux ensues, and that nearly everything which we choose to call 'fact' either is or may be only 'opinion' or inference."

50 It was upon this footing that, whilst acknowledging the dangers of identification evidence (especially from photographs), Sheller JA concluded[43]:

> "The evidence given by the police officers was not evidence of an opinion but was direct evidence that a person shown in the photograph was the accused. As such it was not excluded by s 76 of the Act. Accordingly, there is no need to consider the application of s 78 or other statutory exceptions to the opinion rule."

51 His Honour also rejected the challenge to the refusal of the trial judge to exclude the evidence as unfairly prejudicial or as inadmissible identification evidence[44]. It was for these reasons that the appellant's appeal was dismissed.

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39 *Cross on Evidence*, 6th Aust ed (2000) at 808-809.

40 eg *R W Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1991) 34 NSWLR 129 at 130, cited at *R v Smith* (1999) 47 NSWLR 419 at 422 [17].

41 *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd [No 5]* (1996) 64 FCR 73 at 75, cited at *R v Smith* (1999) 47 NSWLR 419 at 422 [17]; see also *Hughes Aircraft Systems International v Airservices Australia* (1997) 80 FCR 276 at 279-280.

42 Wigmore, *Evidence*, Chadbourn rev ed (1978), vol 7 at §1919, cited at *R v Smith* (1999) 47 NSWLR 419 at 422-423 [18].

43 *R v Smith* (1999) 47 NSWLR 419 at 424 [24].

44 *R v Smith* (1999) 47 NSWLR 419 at 424 [25]-[26].

The police evidence was of opinion not fact

52 For the purposes of applying s 76 of the Act, it is clear that the distinction between evidence of a "fact" and of an "opinion" is one of degree rather than of kind. The difficulty of classification arises from the fact that, in one sense, all evidence is of the opinion of the deponent. Even when the evidence relates to the witness personally, it involves inferences or conclusions drawn from mental impressions of existing phenomena and past experience[45]. However, there is no point complaining about the difficulty of the classification. Categorisation is required by the language of the Act, as indeed it was previously required by the common law[46].

53 A hint as to the point of distinction intended for the Act is found in the discussion by the Australian Law Reform Commission of its proposal[47]:

> "The distinction [between fact and opinion] can serve a useful purpose and is, in the end, unavoidable. Evidence at the extreme of the continuum, which most would be prepared to classify as evidence of opinion, will generally be open to more dispute than material at the opposite end, which most would classify as evidence of fact. For accuracy of fact finding and to minimise confusion and time-wasting, therefore, it is necessary to exercise some control upon material at the opinion end of the continuum."

54 The respondent urged that a wide latitude should be accorded to the trial judge as to the applicable classification, given the blurred boundary between fact and opinion[48]. I agree. I also accept the point made by Sheller JA that a statement identifying a person, clearly depicted in a studio photograph, as one's spouse (or partner), would normally be regarded as a statement of fact[49].

55 However, even relatives can make mistakes of identification from photographs. The accuracy of such identification testimony may depend upon the quality of the photograph; the clarity of the lighting at the scene; whether

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45 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 524; Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at 192 [349].

46 See eg *Ramsay v Watson* (1961) 108 CLR 642.

47 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at 409-410 [738].

48 Relying on *McCormick on Evidence*, 4th ed (1992), vol 1 at 43.

49 *R v Smith* (1999) 47 NSWLR 419 at 422 [16].

there is a frontal, or sideways, or rear depiction of the features of the subject; the eyesight of the examiner; the length of time that the photograph is examined; external indicia of familiarity in the print; the degree of physiological or psychological arousal at the time of perception and so on[50]. Most people have, at some stage in their lives, mistaken the identity of a person as a family member or someone they know well. How much greater is the chance of error in identification where it is done from a photograph and the photograph relied upon is not of a well-lit studio portrait of a close family member or friend (where testimony might properly be accorded the status of fact rather than opinion), but the somewhat imperfect representation in a bank security photograph of a scene where the subject of the photography is taking pains to disguise, or hide, his or her appearance.

56 The experience of the law, expressed with increasing conviction during the last two decades, is that very great risks of wrongful conviction and miscarriages of justice can attend identification (and recognition) evidence generally, and particularly where such evidence is based on photographs[51]. In this sense, I see no difference in the dangers caused by evidence of identification from photographs of the offender in action, such as produced by bank surveillance, and identification from photographs of the accused and other suspects held by police. The risks, already large, may be enhanced by the natural desire of a person performing the act of identification to produce an affirmative outcome rather than to admit to incapacity and failure. The risks are still further increased where the person concerned has a relevant professional motivation (even if only subconsciously) to identify a person[52]. One such motivation is that which a police officer quite naturally has to solve a serious crime.

57 Given all that is now known about the dangers of mistakes inherent in the process of identification (and recognition)[53], it is unsurprising that identification evidence of the kind offered by the two police officers has normally been

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50 eg Kapardis, *Psychology and Law: A Critical Introduction*, (1997) at 27, 36-39; Loftus and Doyle, *Eyewitness Testimony: Civil and Criminal*, 3rd ed (1997).

51 Especially since the publication of the Devlin Report: *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, (1976); *R v Turnbull* [1977] QB 224 at 228; *Domican [No 3]* (1990) 46 A Crim R 428 at 443-446; *Domican v The Queen* (1992) 173 CLR 555 at 560-564.

52 Yarmey, *The Psychology of Eyewitness Testimony*, (1979) at 154.

53 See *Craig v The King* (1933) 49 CLR 429 at 446; *Davies and Cody v The King* (1937) 57 CLR 170 at 181.

classified as opinion rather than factual evidence[54]. Although not dealing with the requirements of the Act, it is useful to look at two recent decisions, in which the Supreme Court of Canada[55] and the Court of Appeal of New Zealand[56] have proceeded on the basis that police testimony of identification, based upon viewing video film and still photographs of a robbery, is opinion evidence. Each Court emphasised the desirability of excluding mere deductional evidence where the trier of fact (judge or jury) is in as good a position as the witness to reach a conclusion on matters of opinion about identification. Relevance, it should be observed, was assumed in both cases.

No exception to the opinion rule is established

58 Consistent with this trend of authority, it is my view that the evidence of identification (or recognition) of the appellant, offered by the police witnesses, was opinion evidence. Accordingly, by s 76 of the Act, it was not admissible to prove the existence of the fact about the existence of which the opinion was expressed. In these proceedings, the fact to be proved was that the appellant was one of the persons depicted in the security photographs recorded at the time of the robbery and hence a participant in the robbery. Unless the evidence became admissible by virtue of an exception to the opinion rule, reflected in the Act, it should have been excluded.

59 Two possible bases for exception from the opinion rule were explored in argument. The exception for admitting evidence based on specialised knowledge provided by s 79 of the Act can be disregarded, as no suggestion of such expertise was made in relation to the police officers. Their prior contact with the appellant did not amount to ad hoc expertise based on familiarity[57], nor did they claim any expertise in, for example, anatomical or photographic comparisons[58]. The exception for lay opinion evidence provided by s 78 of the Act states:

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54 *R v Palmer* [1981] 1 NSWLR 209; *R v Smith* (1983) 33 SASR 558 at 560; *R v Smith* [1987] VR 907; *Griffith* (1995) 79 A Crim R 125.

55 *R v Leaney* [1989] 2 SCR 393 at 403 per Lamer J, 407, 409 per Wilson J, 412-413 per McLachlin J (L'Heureux-Dubé and Sopinka JJ concurring); see also *R v Browne and Angus* (1951) 99 CCC 141 at 147; 11 CR(Can) 297 at 302.

56 *R v Tipene* unreported, Court of Appeal of New Zealand, 30 May 2001 at 6-7 per Doogue J; see also *R v Williams* (1993) 11 CRNZ 34.

57 cf *R v Tipene* unreported, Court of Appeal of New Zealand, 30 May 2001 at 8-9 per Doogue J; *R v Leung* (1999) 47 NSWLR 405 at 412-413 [37]-[40].

58 cf *Stockwell* (1993) 97 Cr App R 260 at 264.

"The opinion rule does not apply to evidence of an opinion expressed by a person if:

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event, and

(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event."

60 Neither police officer was present at the "matter or event" in question in the appellant's trial, namely the robbery. Although the security photographs record the robbery taking place, the opinion of the police officers is "based on" the photographs and not, as such, "based on" the robbery itself which they did not see, hear or otherwise perceive. The Australian Law Reform Commission's report makes it clear that this provision of the Act was addressed, essentially, to the opinion of eye-witnesses[59]. It exists to allow such witnesses to recount, as closely as possible, "their original perception [so as] to minimise inaccuracy and encourage honesty". It is important to note that the requirements for the applicability of s 78 of the Act are cumulative ("and"). Neither the language of the Act governing the reception of lay opinion evidence, nor the purposes of those provisions as explained by the Commission, justifies treating the opinions expressed by the two police officers as falling within a permissible exception.

61 It follows that the evidence, being of an opinion, was not admissible to prove that the appellant was a participant in the robbery. In the result, the opinion, although relevant, could be no more than a step in the process of investigation and detection that led to the appellant's being charged. Proof of the police officers' evidence should not, in my view, be excluded as irrelevant to the fact in issue. But it should be excluded as nothing more than a lay opinion upon a subject about which the jury were required to form their own opinion.

62 There is no inconsistency between this conclusion and my earlier conclusion that the evidence of the police officers was relevant, in the sense broadly defined in the Act. Some highly relevant evidence is excluded from consideration of decision-makers in court, particularly in jury trials. It is excluded for reasons of principle or policy that outweigh relevance. Such is the case here. The opinion rule dictated the exclusion of the evidence of the police opinions.

63 Contrary to the apparent belief of the prosecutor at the trial, this outcome does not necessarily mean that there was no basis upon which the appellant might properly be convicted. Were it otherwise, an order for the retrial of the appellant

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59 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at 410 [739]-[740].

would be unnecessary, indeed inappropriate. The photographs were properly proved and received in evidence. Arguably, one of them, at least, is sufficiently clear and depicts the well-lit face of a person said to be the appellant. There is no suggestion of a change of appearance on the part of the appellant between the date of the robbery and the trial. Therefore, even if the appellant gave no evidence and the jury had no magnifying glass, properly instructed, they might still conclude to the requisite standard, from their own senses, if that was their opinion, that the person depicted in the photographs was the accused placed in their charge.

64 My conclusion renders it unnecessary to consider the argument, faintly advanced, concerning the provisions of the Act dealing explicitly with identification evidence and whether evidence of "recognition" forms a separate category from such identification evidence[60]. Nor is it necessary to consider the arguments, more strongly pressed, that the police evidence should have been excluded as unfairly prejudicial[61], given that, in this case, it necessarily disclosed significant prior contact between him and the police[62]. I would reserve consideration of such arguments to a case where their resolution is necessary. Here, the evidence should have been excluded not by considerations of irrelevance or prejudice but by the limited circumstances in which lay opinion is admissible under the Act.

Orders

65 It is for the foregoing reasons that I joined in the orders of the Court.

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60 The Act, ss 113-116.

61 As happened in *Blick* (2000) 111 A Crim R 326 at 335 [29] per Sheller JA (James and Dowd JJ concurring).

62 The Act, ss 135, 137; see also *R v Fowden and White* [1982] Crim LR 588 at 589.