HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

ANTHONY CHARLES HONEYSETT APPELLANT

AND

THE QUEEN RESPONDENT

Honeysett v The Queen
[2014] HCA 29
13 August 2014
S57/2014

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 5 June 2013 and, in its place, order that:*

   (a) the appeal be allowed;

   (b) the appellant's conviction be quashed; and

   (c) a new trial be had.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with D P Barrow for the appellant (instructed by Blair Criminal Lawyers)

J H Pickering SC with J A Girdham SC for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Honeysett v The Queen

Evidence – Admissibility – Opinion evidence – Section 79(1) of *Evidence Act* 1995 (NSW) exception for evidence of opinion based wholly or substantially on specialised knowledge based on training, study or experience – Prosecution adduced evidence of anatomist regarding physical characteristics common to persons depicted in images – Whether opinion based wholly or substantially on specialised knowledge.

Words and phrases – "opinion rule", "specialised knowledge", "training, study or experience", "wholly or substantially".

Evidence Act 1995 (NSW), ss 76, 79.

1 FRENCH CJ, KIEFEL, BELL, GAGELER AND KEANE JJ. The appellant was convicted of the armed robbery of an employee of a suburban hotel following a trial in the District Court of New South Wales (Bozic DCJ and a jury). Closed-circuit television cameras ("CCTV") recorded the robbery. At the trial, over objection, the prosecution adduced evidence from an anatomist, Professor Henneberg, of anatomical characteristics that were common to the appellant and to one of the robbers ("Offender One"). Professor Henneberg's opinion was based on viewing the CCTV images of the robbery and images of the appellant taken while he was in custody.

2 The appellant appealed against his conviction to the Court of Criminal Appeal of the Supreme Court of New South Wales (Macfarlan JA, Campbell J and Barr AJ)[1]. He challenged the admission of Professor Henneberg's evidence, contending that it was not within the exception to the "opinion rule"[2] for which s 79(1) of the *Evidence Act* 1995 (NSW) ("the Evidence Act") provides. The Court of Criminal Appeal rejected his contention, holding that Professor Henneberg's evidence had been rightly admitted because it was evidence of opinion based on specialised knowledge based on Professor Henneberg's training, study and experience[3]. In the alternative, the Court of Criminal Appeal held that Professor Henneberg's evidence had been rightly admitted because repeated viewing of the images had rendered him an "ad hoc expert"[4]. The appeal was dismissed.

3 On 14 March 2014, French CJ and Keane J granted special leave to appeal. The appellant's first ground of appeal asserts that the Court of Criminal Appeal erred in holding that the evidence of Professor Henneberg "involved an area of specialised knowledge based on training, study or experience" and in holding that Professor Henneberg's opinion was wholly or substantially based on that area of specialised knowledge. The second to fourth grounds are particulars of the first. The fifth ground, in the alternative, asserts that

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1 *Honeysett v The Queen* [2013] NSWCCA 135.

2 The opinion rule is set out in s 76(1) of the *Evidence Act* 1995 (NSW), which states: "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

3 *Honeysett v The Queen* [2013] NSWCCA 135 at [66] per Macfarlan JA.

4 *Honeysett v The Queen* [2013] NSWCCA 135 at [60], citing *R v Tang* (2006) 65 NSWLR 681.

Professor Henneberg's evidence did not meet the basal test of relevance[5] and for that reason was inadmissible[6].

4 For the reasons to be given, the fifth ground is not reached. Professor Henneberg's opinion was not based on specialised knowledge. It follows that the decision to admit the evidence was a wrong decision on a question of law[7]. The respondent did not submit that, in the event legal error was established, the appeal should be dismissed under the proviso in s 6(1) of the *Criminal Appeal Act* 1912 (NSW). The appeal must be allowed, the orders of the Court of Criminal Appeal of New South Wales set aside and a new trial ordered[8].

The factual background

5 The robbery took place inside the hotel on 17 September 2008 after the close of trading. Three employees were present at the time. Each of the three robbers was disguised and each had some form of weapon. Offender One was holding a pink-handled hammer; wore dark clothing covering the trunk and limbs; and wore a covering of white material, shrouding the head and face, leaving only a narrow slit exposing the eyes. Offender One's hands were gloved. A gap between sleeves and gloves revealed a small area of skin.

6 The descriptions of Offender One given by the witnesses were necessarily vague. Estimates of Offender One's height varied from five foot two inches to "about six [foot] or so". One witness described Offender One as "thinnish" and "kind of brown around the eyes … he's not like a white looking guy". Another witness said that Offender One had "dark skin, dark eyebrows" and that he

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5 Section 55(1) of the Evidence Act provides that evidence "that is relevant in a proceeding is evidence that, 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".

6 Section 56(2) of the Evidence Act provides that evidence "that is not relevant in the proceeding is not admissible".

7 *Criminal Appeal Act* 1912 (NSW), s 6.

8 The power to order a new trial is provided in s 8(1) of the *Criminal Appeal Act* 1912 (NSW). On the hearing of the appeal the appellant accepted that, in the event his appeal was allowed, the appropriate consequential order was to order a new trial.

"looked Indian or …". Two witnesses described the head covering worn by Offender One as consistent with being a white t-shirt.

7 The pink-handled hammer was left at the scene of the robbery. The three robbers fled in a vehicle, which one witness identified as an Audi RS4.

8 On 25 November 2008, the police recovered a stolen Audi RS4. The evidence pointed strongly to this vehicle as the robbers' getaway vehicle. A sports bag was found inside the vehicle. It contained a white t-shirt, which might have been the head covering worn by Offender One. Analysis of a sample taken from the pink-handled hammer contained DNA which had the same DNA profile as that of the appellant. Analysis of a sample taken from the inside neck of the t-shirt also contained DNA which had the same DNA profile as that of the appellant.

9 The prosecution case was circumstantial and largely depended upon the DNA evidence. The appellant gave evidence denying involvement in the robbery. The appellant is Aboriginal. He said that he had been staying in an area known as "the Block" in Redfern at the time of the robbery. He led evidence of the practice of sharing clothing among members of the Aboriginal community at the Block.

The voir dire

10 The objection to the admission of Professor Henneberg's evidence was determined at a voir dire hearing which was conducted before the jury was empanelled. No oral evidence was adduced at the hearing. The evidence at the hearing included: two expert certificates[9] signed by Professor Henneberg; an expert certificate signed by Dr Sutisno, an anatomist; and one signed by Glenn Porter, a forensic photographer. The latter two certificates were tendered in the appellant's case and contained criticisms of Professor Henneberg's opinion and methodology. The second of Professor Henneberg's certificates responded to some of those criticisms.

11 Professor Henneberg identified his specialised knowledge, based on his training, study and experience, as biological anthropology and anatomy. He has a doctorate and post-doctoral qualifications in biological anthropology. At the date of his evidence, Professor Henneberg occupied the Wood Jones Chair of Anthropological and Comparative Anatomy in the School of Medical Sciences at

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9 Evidence Act, s 177.

the University of Adelaide. Professor Henneberg also identified "forensic identification" as within his specialised knowledge, stating that he has practised this discipline (also described as "anatomical identification") since 1976 and has published the results of his forensic research in peer-reviewed international journals and in books. He described forensic identification as the comparison of individuals based on the inspection of images. He stated that he has provided "numerous expert certificates to police" and that his evidence has been admitted in Australian courts.

12 Professor Henneberg's curriculum vitae recorded his research interests as "[h]uman evolution and microevolution, evolution of human brain, theory of biocultural evolution, human ecology, population genetics, paleodemography and historic demography, palaeopathology human physical growth and development, anatomical variation, body composition, ergonomy". The titles of the many articles authored by Professor Henneberg that are listed in his curriculum vitae appear to reflect these wide research interests.

13 Professor Henneberg stated that the police had asked him to conduct anatomical comparisons of an offender and a known person. He had been supplied with a disc containing a copy of the CCTV recording of the robbery and asked to identify the anatomical features of Offender One. He had been supplied in a separate envelope with two discs containing images of the appellant. These included video recordings showing the appellant moving about his cell and carrying out various activities. These recordings and some still photographs of the appellant were all taken on 16 January 2009.

14 Professor Henneberg made his assessment of the physical characteristics of Offender One before he opened the envelope containing the images of the appellant. He did this to avoid the psychological phenomenon of "displacement", which is the tendency to read the features of a known person into poor quality images.

15 Professor Henneberg expressed this opinion of the physical characteristics of Offender One:

> "He is an adult male of ectomorphic (thin, 'skinny') body build. His shoulders are approximately the same width as his hips. His body height is medium compared to other persons, and to familiar objects (eg doorways) visible in the images from the [offence]. He carries himself very straight, so that his hips are standing forward while his back has a very clearly visible lumbar lordosis (the small of his back is bent forward) overhung by the shoulder area. Although the offender covers his head and

> face with a cloth (what looks like a T-shirt) … the knitted fabric is elastic and adheres closely to the vault of his skull (= braincase). This shows that his hair is short and does not distort the layout of the fabric. The shape of the head is clearly dolichocephalic (= long head, elongated oval when viewed from the top) as opposed to brachycephalic (= short head, nearly spherical). The offender is right-handed in his actions. … Although most of the body of the offender is covered by clothing, head wrap and gloves, an area of naked skin above his wrist (between the glove and the sleeve) in images … is visible and can be compared to the skin colour of a female hotel employee on the same images."

16 Professor Henneberg expressed this opinion of the physical characteristics of the appellant:

> "[The appellant] is an adult male of ectomorphic (= slim) body buil[d]. His hips and shoulders are of approximately the same width. His stance is very straight with well marked lumbar lordosis and pelvis shifted forward. His skull vault is dolichocephalic when viewed from the top. Comparison of lateral (side) and front views of his head also indicates the head ... is long but narrow. His skin is dark, darker than that of persons of European extraction, but not 'black'. … He is right-handed – uses his right hand to sign documents."

17 Professor Henneberg concluded that "[t]here is [a] high degree of anatomical similarity between [Offender One] and [the appellant]". His opinion was strengthened by the fact that he was unable to discern any anatomical dissimilarity between the two individuals.

18 Professor Henneberg's method of "forensic identification" can be shortly described. Professor Henneberg looks at an image of a person and forms an opinion of the person's physical characteristics. His opinion is not based on anthropometric measurement or statistical analysis. Professor Henneberg stated that statistical analysis may yield reliable results when anthropometric measurements can be taken or the photographs are taken at the same angle and in prescribed body positions. Surveillance images and standard police photographs are not of this standard. He explained that his examination of images does not differ from that of a lay observer save that he is an experienced anatomist and he has a good understanding of the shape and proportions of details of the human body.

19 Much of Dr Sutisno's and Mr Porter's evidence was directed to Professor Henneberg's capacity to express an opinion of the high degree of

anatomical similarity between Offender One and the appellant. As will appear, the prosecution did not seek to adduce Professor Henneberg's opinion in this respect. Dr Sutisno and Mr Porter were critical of Professor Henneberg's failure to explain how artefacts produced by lens distortion had been taken into account in the identification of the physical characteristics of Offender One. In light of the quality of the images and the head to foot clothing worn by Offender One, Dr Sutisno disputed the capacity to make an assessment of that individual's height, gender, maturity, build and hair length. She considered that Professor Henneberg's conclusion respecting the last-mentioned characteristic was "purely guess work and extremely subjective". Mr Porter, who at the date of his certificate had submitted a PhD thesis for examination on the subject of the reliability of CCTV images, was not aware of any studies of Professor Henneberg's method.

Opinion evidence under the Evidence Act

20 Before turning to the reasons given by Bozic DCJ for holding that Professor Henneberg's evidence was admissible, there should be reference to the provisions of Pt 3.3 of the Evidence Act, which governs opinion evidence, and to decisions of the New South Wales Court of Criminal Appeal concerning the admissibility of opinion evidence of anatomical comparison, sometimes described as "body mapping".

21 Section 76(1) of the Evidence Act states a rule of exclusion: "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed." An opinion is an inference drawn from observed and communicable data[10]. Professor Henneberg's identification of Offender One's physical characteristics consisted of inferences from his observations of the CCTV images. It was evidence of opinion. The evidence was adduced to prove the existence of a fact about the existence of which the opinion was expressed. The evidence was inadmissible unless it came within one of the exceptions to the opinion rule in Pt 3.3 of the Evidence Act.

22 The exception on which the prosecution relied is contained in s 79(1) of the Evidence Act:

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10 *Lithgow City Council v Jackson* (2011) 244 CLR 352 at 359 [10] per French CJ, Heydon and Bell JJ; [2011] HCA 36; Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1978), vol 7, §1917; Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 76 [156].

> "If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

23 Section 79(1) states two conditions of admissibility: first, the witness must have "specialised knowledge based on the person's training, study or experience" and, secondly, the opinion must be "wholly or substantially based on that knowledge". The first condition directs attention to the existence of an area of "specialised knowledge". "Specialised knowledge" is to be distinguished from matters of "common knowledge"[11]. Specialised knowledge is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. It may be of matters that are not of a scientific or technical kind and a person without any formal qualifications may acquire specialised knowledge by experience. However, the person's training, study or experience must result in the acquisition of *knowledge*. The *Macquarie Dictionary* defines "knowledge" as "acquaintance with *facts, truths, or principles*, as from study or investigation"[12] (emphasis added) and it is in this sense that it is used in s 79(1). The concept is captured in Blackmun J's formulation[13] in *Daubert v Merrell Dow Pharmaceuticals Inc*: "the word 'knowledge' connotes more than subjective belief or unsupported speculation. … [It] applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds"[14].

24 The second condition of admissibility under s 79(1) allows that it will sometimes be difficult to separate from the body of specialised knowledge on which the expert's opinion depends "observations and knowledge of everyday

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11 Evidence Act, s 80(b).

12 *Macquarie Dictionary*, rev 3rd ed (2001) at 1054.

13 The formulation stated was with respect to r 702 of the Federal Rules of Evidence. At that time, the rule provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

14 509 US 579 at 590 (1993), cited in *R v Tang* (2006) 65 NSWLR 681 at 712 [138] per Spigelman CJ.

affairs and events"[15]. It is sufficient that the opinion is *substantially* based on specialised knowledge based on training, study or experience. It must be presented in a way that makes it possible for a court to determine that it is so based[16].

25 As explained in the joint reasons in *Dasreef Pty Ltd v Hawchar*, the starting point in determining the admissibility of evidence of opinion is relevance: what is the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving[17]. It is to be noted that at trial Professor Henneberg's opinion was tendered to prove that Offender One and the appellant shared similar physical characteristics in support of a conclusion of identity.

R v Tang and *Morgan v The Queen*

26 In *R v Tang*, the Court of Criminal Appeal dealt with a challenge to evidence that a person depicted in still frames taken from a CCTV recording of a robbery was the same as a person depicted in a police photograph. The evidence in that case was given by Dr Sutisno. Her opinion took into account her assessment of the "relatively upright posture" of the person in each of the images[18]. The observation was an essential element of her opinion of identity[19].

27 Spigelman CJ (Simpson and Adams JJ concurring) cautioned against introducing an extraneous idea such as "reliability" into the determination of admissibility under s 79(1)[20]. Importantly, his Honour laid emphasis on the requirement of *knowledge* by reference to the statement in *Daubert* set out earlier

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15 *Velevski v The Queen* (2002) 76 ALJR 402 at 427 [158] per Gummow and Callinan JJ; 187 ALR 233 at 268; [2002] HCA 4.

16 *HG v The Queen* (1999) 197 CLR 414 at 427 [39] per Gleeson CJ; [1999] HCA 2.

17 (2011) 243 CLR 588 at 602 [31] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 21.

18 *R v Tang* (2006) 65 NSWLR 681 at 688 [26].

19 *R v Tang* (2006) 65 NSWLR 681 at 712 [136].

20 *R v Tang* (2006) 65 NSWLR 681 at 712 [137].

in these reasons[21]. The opinion that the individual displayed "relatively upright posture" was not wholly or substantially based on Dr Sutisno's specialised knowledge of anatomy[22]. His Honour found that it had not been established at the trial that the comparison of physical attributes – "body mapping" – constituted an area of "specialised knowledge" capable of supporting an opinion of identity[23].

28 In *Morgan v The Queen*, opinion evidence given by Professor Henneberg as to the high degree of anatomical similarity between images of a disguised offender recorded by CCTV and police photographs of the accused was found to have been wrongly admitted[24]. The Court of Criminal Appeal was critical of the lack of research into the reliability of Professor Henneberg's method[25]. It was also critical of the lack of explanation of Professor Henneberg's capacity to detect anatomical similarity between individuals in circumstances in which no part of the body of the person depicted in CCTV images was exposed[26].

The voir dire determination

29 No doubt mindful of the statements in *Tang*, the prosecution did not apply to tender at the trial Professor Henneberg's opinion of the "high degree of anatomical similarity" between Offender One and the appellant. The voir dire was conducted on the understanding that Professor Henneberg's evidence would be confined to three topics: the physical characteristics of Offender One; the physical characteristics of the appellant; and the absence of observable anatomical dissimilarity between the two.

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21 *R v Tang* (2006) 65 NSWLR 681 at 712 [138], citing 509 US 579 at 590 (1993) per Blackmun J.

22 *R v Tang* (2006) 65 NSWLR 681 at 713 [140].

23 *R v Tang* (2006) 65 NSWLR 681 at 714 [146].

24 (2011) 215 A Crim R 33 at 61 [146] per Hidden J (Beazley JA agreeing at 35 [2], Harrison J agreeing at 62 [155]).

25 *Morgan v The Queen* (2011) 215 A Crim R 33 at 59 [138].

26 *Morgan v The Queen* (2011) 215 A Crim R 33 at 60 [140].

30 Consistently with the statement in *Dasreef*, Bozic DCJ first asked whether "the opinion [is] relevant, including whether the field of knowledge is one in which expert opinion can properly be called". His Honour concluded that Professor Henneberg's evidence of the similarities between Offender One and the appellant was a relevant item of "circumstantial identification evidence". He moved to a consideration of whether Professor Henneberg possessed specialised knowledge based on his training, study or experience. His Honour found that Professor Henneberg has specialised knowledge based on study and experience in relation to anatomy and anatomical features and experience in the application of that knowledge to the observation of CCTV images and still photographic images. He concluded that Professor Henneberg's opinion as to similarities was based wholly or substantially on that knowledge.

31 Judge Bozic considered that Professor Henneberg's opinion complied with the obligation to furnish the trier of fact with the criteria to enable it to be tested[27]. His Honour illustrated that conclusion by reference to Professor Henneberg's second certificate, in which he explained that he assessed that Offender One was an adult "on the basis that the individual was not one metre short and the limb to trunk proportions were within adult range, bearing in mind that children have short extremities in proportion to trunk and large heads in relation to the body". Judge Bozic appears to have accepted that Professor Henneberg's specialised knowledge included his experience in the conduct of "forensic identification" as earlier described. His Honour took into account the criticisms of Professor Henneberg's method made by Dr Sutisno and Mr Porter. He said that expert evidence based on factual material that is deficient or unreliable is not for that reason inadmissible. His Honour did not, in terms, consider whether an opinion of the characteristics of a human body based on looking at CCTV images is an area of specialised *knowledge*.

32 Judge Bozic declined to exercise the discretions to reject Professor Henneberg's evidence under ss 135 and 137 of the Evidence Act. His Honour concluded that the evidence of similarity between Offender One and the appellant was "of potentially significant probative value". The conclusion took into account that the prosecution case was circumstantial and otherwise dependent on the DNA evidence.

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27 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 729 [59] per Heydon JA.

The trial

33 Professor Henneberg's evidence in the trial accorded with the opinions in his certificates. In the course of evidence-in-chief the CCTV footage of the robbery was played and Professor Henneberg pointed out the physical characteristics that he discerned in Offender One. Evidence-in-chief continued:

> "Q. Professor as part of your comparison were you aiming to find any discernible differences?
>
> A. Yes that's the first thing I was looking for.
>
> Q. [If] one obvious difference between the offender and the accused is found is that sufficient to exclude the accused?
>
> A. If it's an obvious and consistent difference yes it is.
>
> Q. Did you find any differences?
>
> A. No."

34 Professor Henneberg gave a fuller account of the basis for his conclusions in the course of oral evidence. He considered that it would have been obvious to anyone looking at the CCTV footage that Offender One is male. He concluded that Offender One was an adult based on comparing Offender One's body size with familiar objects and with the other persons depicted in the CCTV images. He concluded that Offender One was a male because he did not appear to have breasts nor the distribution of fat deposits around the hips and buttocks that are consistent with the characteristics of a female. He concluded that Offender One's hair was short because the shape revealed by the fabric adhering to the head was consistent with a characteristic shape of the human brain case. He concluded that Offender One was of skinny build because the clothing worn by the offender was not very bulky and clothing hangs closer to the central line of the body in the case of a thin person, a feature observable in the images of Offender One. He also observed that Offender One did not appear to have a protruding stomach. Professor Henneberg accepted that to a certain degree loose-fitting clothing makes it difficult to tell the shape of a person's spine. He explained that each and every person has lumbar lordosis; it is a normal anatomical feature. His conclusion that Offender One was of medium height was an approximation based on comparing the offender to other objects, such as doors.

The Court of Criminal Appeal

35 The appellant argued in the Court of Criminal Appeal that Professor Henneberg's evidence at his trial was "essentially identical" to his evidence in *Morgan* and should have been rejected for that reason[28]. The focus of Macfarlan JA's analysis (with which the other members of the Court agreed) was directed to the rejection of that submission. His Honour observed that the opinion in *Morgan*, of the existence of a high level of anatomical similarity, had come close to evidence of identification[29]. As such it was strongly arguable that admission of that evidence would have conflicted with authority, including *Tang*[30]. His Honour commented that the difficulty with opinion evidence of that kind is the absence of established criteria for determining the number and type of similarities that would support it[31]. He distinguished *Morgan* because Professor Henneberg had not given evidence in the appellant's trial of a conclusion drawn from his observations of identified common characteristics[32].

36 Macfarlan JA said that the evidence that Professor Henneberg had not discerned dissimilarity between the persons depicted in the two sets of images was not evidence of similarity[33]. His Honour considered that "[Professor Henneberg's] evidence, and the CCTV footage itself, would have made it clear to the jury that the clothing of the offender made it very difficult to do more than identify a very limited number of characteristics"[34]. In the circumstances, his Honour said that the jury could not have reasonably

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28 *Honeysett v The Queen* [2013] NSWCCA 135 at [57].

29 *Honeysett v The Queen* [2013] NSWCCA 135 at [56].

30 *Honeysett v The Queen* [2013] NSWCCA 135 at [56], referring to *R v Tang* (2006) 65 NSWLR 681; *Murdoch v The Queen* (2007) 167 A Crim R 329 and *R v Gardner* [2004] EWCA Crim 1639.

31 *Honeysett v The Queen* [2013] NSWCCA 135 at [56].

32 *Honeysett v The Queen* [2013] NSWCCA 135 at [57].

33 *Honeysett v The Queen* [2013] NSWCCA 135 at [68].

34 *Honeysett v The Queen* [2013] NSWCCA 135 at [68].

understood Professor Henneberg's evidence as an assertion that there were no points of difference between the two individuals[35].

37 Macfarlan JA did not give separate consideration to the preconditions for admissibility under s 79(1). His Honour appears to have accepted Bozic DCJ's analysis in these respects. The critical passage in his Honour's reasons is set out below[36]:

> "In addition to his formal qualifications in anatomy, Professor Henneberg is a person of extensive practical experience in examining CCTV footage, with all its deficiencies, and attempting to identify characteristics of persons depicted in it. The view he expressed on this topic is necessarily subjective and not amenable to elaboration beyond the reasons he gave, or to measurement and calculation."

The submissions

38 The appellant submits that an opinion that is "necessarily subjective" and "not amenable to elaboration" or to "measurement and calculation" is not one that is wholly or substantially based on "specialised knowledge". He contends that in order to constitute an area of "specialised knowledge" there must be an independent means of gauging the reliability and validity of an opinion based on that knowledge.

39 On the hearing of the appeal, the respondent did not support Bozic DCJ's analysis that Professor Henneberg has specialised knowledge based on his experience examining CCTV images. The only specialised knowledge on which the respondent now seeks to support Professor Henneberg's evidence is his knowledge of anatomy. The respondent argues that the appellant's challenge to the reliability of Professor Henneberg's method is not to the point. This is because Professor Henneberg did not give evidence in the trial of identification based on anatomical comparison. It is said that his evidence was no more than an account of the characteristics of the body of the person depicted in each set of images and was incapable of supporting a conclusion of identity: it was evidence of opinion wholly or substantially based on Professor Henneberg's specialised knowledge of anatomy.

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35 *Honeysett v The Queen* [2013] NSWCCA 135 at [68].

36 *Honeysett v The Queen* [2013] NSWCCA 135 at [63].

40 In this Court the respondent submitted the fact that Professor Henneberg's evidence had been adduced to prove was that the appellant was not excluded as Offender One. The submission should not go unremarked. The contention that Professor Henneberg's evidence was adduced to prove no more than that the appellant could not be excluded as the offender was not the basis on which it was tendered. As earlier noted, the evidence was admitted as an item of circumstantial evidence to support a conclusion of identity. This was the use made of the evidence by the prosecutor at the trial. In her closing address, the prosecutor took the jury through each of the physical characteristics of Offender One identified by Professor Henneberg and continued:

> "[W]hen [Professor Henneberg] assessed then the [appellant] from the known images he found all those characteristics to be the same. … I'd suggest that you would accept his evidence as being of assistance to you, because it's reliable science and it is something that he can explain, even though you may not be able to see all of the things that he's been able to see."

41 It will be recalled that Bozic DCJ declined to exclude the evidence because of its significant probative value as "circumstantial identification evidence". In due course his Honour directed the jury that "the similarities observed by Professor Henneberg between the CCTV footage at the [hotel] and the footage of the [appellant] in custody at the police station" were one of the circumstances upon which it was open to draw the conclusion of guilt.

42 The respondent is nonetheless right to say that the appeal does not raise an issue of whether "body mapping" was shown at the trial to constitute an area of "specialised knowledge"[37]. In light of the concession that Professor Henneberg's specialised knowledge was confined to anatomy, the appeal does not provide the occasion to consider the appellant's larger challenge respecting the requirement of an independent means of validation before an opinion may be found to be based on "specialised knowledge".

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37 See *R v Gray* [2003] EWCA Crim 1001; *R v Gardner* [2004] EWCA Crim 1639; *R v Tang* (2006) 65 NSWLR 681; *Murdoch v The Queen* (2007) 167 A Crim R 329; *R v Atkins* [2010] 1 Cr App R 8; *Morgan v The Queen* (2011) 215 A Crim R 33; *Otway v The Queen* [2011] EWCA Crim 3; *Shepherd v The Queen* [2012] 2 NZLR 609.

43 Professor Henneberg's opinion was not based on his undoubted knowledge of anatomy. Professor Henneberg's knowledge as an anatomist, that the human population includes individuals who have oval shaped heads and individuals who have round shaped heads (when viewed from above), did not form the basis of his conclusion that Offender One and the appellant each have oval shaped heads. That conclusion was based on Professor Henneberg's subjective impression of what he saw when he looked at the images. This observation applies to the evidence of each of the characteristics of which Professor Henneberg gave evidence.

44 The respondent accepted that, with the possible exception of the opinion that Offender One and the appellant are both right-handed, it would have been open to prosecuting counsel in the course of her closing address to have invited the jury to inspect the images and find that Offender One and the appellant share each of the characteristics identified by Professor Henneberg without the necessity of evidence. The reservation respecting right-handedness was based on the circumstance that Professor Henneberg's master's thesis was on the topic of handedness. However, Professor Henneberg's specialised knowledge of handedness was not the basis of his opinion. Professor Henneberg inferred that Offender One and the appellant are each right-handed because he observed that Offender One used his right hand to remove cash from the till and the appellant used his right hand to write his name and insert a swab into his mouth.

45 Professor Henneberg's evidence gave the unwarranted appearance of science to the prosecution case that the appellant and Offender One share a number of physical characteristics[38]. Among other things, the use of technical terms to describe those characteristics – Offender One and the appellant are both ectomorphic – was apt to suggest the existence of more telling similarity than to observe that each appeared to be skinny.

46 Professor Henneberg's opinion was not based wholly or substantially on his specialised knowledge within s 79(1). It was an error of law to admit the evidence.

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38 *HG v The Queen* (1999) 197 CLR 414 at 429 [44] per Gleeson CJ; *Morgan v The Queen* (2011) 215 A Crim R 33 at 61 [145] per Hidden J.

Ad hoc expertise

47 As earlier noted, an alternative basis for the Court of Criminal Appeal's conclusion that Professor Henneberg's evidence was admissible was as an ad hoc expert. Macfarlan JA said that Professor Henneberg's detailed examination of the CCTV footage over a lengthy period had qualified him as such[39].

48 In *Butera v Director of Public Prosecutions (Vict)*[40] this Court endorsed the statement of Cooke J in *R v Menzies*[41] that a person may "be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc". In issue was the admission of the transcript of a tape recording as an aid to assist the jury in its understanding of an indistinct recording. *Butera* and *Menzies* concerned the common law of evidence. The particular problem that they addressed is the subject of provision under the Evidence Act[42]. Whether the New South Wales Court of Criminal Appeal is right to consider that the repeated listening to an indistinct tape recording or viewing of videotape or film may qualify as an area of specialised knowledge based on the listener's, or viewer's, experience does not arise for determination in this appeal[43]. The respondent acknowledged that Professor Henneberg had not examined the CCTV footage over a lengthy period before forming his opinion. In this Court, the respondent does not maintain the submission that Professor Henneberg's opinion was admissible as that of an ad hoc expert.

Orders

49 For these reasons the following orders should be made.

1. Appeal allowed.

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39 *Honeysett v The Queen* [2013] NSWCCA 135 at [60].

40 (1987) 164 CLR 180; [1987] HCA 58.

41 *Butera v Director of Public Prosecutions (Vict)* (1987) 164 CLR 180 at 188 per Mason CJ, Brennan and Deane JJ, citing [1982] 1 NZLR 40 at 49.

42 Evidence Act, s 48(1)(c).

43 *R v Tang* (2006) 65 NSWLR 681 at 709 [120], referring to *Butera v Director of Public Prosecutions (Vict)* (1987) 164 CLR 180; *R v Leung* (1999) 47 NSWLR 405 and *Li v The Queen* (2003) 139 A Crim R 281.

2. Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 5 June 2013 and, in its place, order that:

   (a) the appeal be allowed;

   (b) the appellant's conviction be quashed; and

   (c) a new trial be had.