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	<b>Delivered:</b> 03/02/2022

**IN THE CROWN COURT IN NORTHERN IRELAND  
SITTING IN BELFAST**

—————  
**THE QUEEN**

v

**RAYMOND O'NEILL**  
—————

**RULING (NUMBER 2)  
ON ADMISSIBILITY OF THE EXPERT VIDEO ANALYSIS EVIDENCE**

—————  
**David McDowell QC and Rosemary Walsh (instructed by the Public Prosecution Service  
for Northern Ireland) for the Crown**  
**Martin O'Rourke QC and Colm Fegan (instructed by McIvor Farrell Solicitors Ltd) for the  
Defendant**  
—————

**SCOFFIELD J**

**Introduction**

[1] In these proceedings, the Crown intend to call, and introduce the expert evidence and report of, an imaging expert, Mr Matthew James Stephens. The relevant report compiled by Mr Stephens is dated 30 October 2019. He is a Senior Forensic Investigator and his area of expertise is “in the technical processing and detailed analysis of video evidence.” It is not disputed for present purposes that he has expertise in this field and in the field of facial recognition.

[2] At a review on 20 December 2021, the Crown confirmed that it intends to rely upon the entirety of Mr Stephens’ report. The defendant has made an application to exclude Mr Stephens’ evidence on the basis that it is irrelevant and therefore inadmissible. In the alternative, the defence submit that if Mr Stephens’ evidence is “peripherally relevant”, it would be unfair for his evidence to be admitted since any probative weight it has is outweighed by its prejudicial effect and it ought therefore to be excluded pursuant to Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE”).

[3] I heard argument oral argument on the issue at a pre-trial hearing and give this ruling before the start of the trial under section 40 of the Criminal Procedure and Investigations Act 1996. Accordingly, there is an automatic reporting restriction in relation to the ruling under section 41 of that Act; and no written report of this ruling or the application which gave rise to it shall be published, or included in a relevant programme for reception, in the United Kingdom until the conclusion of the defendant's trial.

### **Background to Mr Stephens' report**

[4] Following the defendant's committal to the Crown Court the defence applied to the court to order a 'no bill' pursuant to section 2(3) of the Grand Jury (Abolition) Act (Northern Ireland) 1969. Colton J, in a written judgment ([2019] NICC 12), refused the defence application. The defendant - while accepting that I am not bound by the views expressed by Colton J - relies upon his written ruling on the 'no bill' application, for reasons set out later.

[5] At the time of the 'no bill' application, the prosecution had not engaged Mr Stephens and were relying on the expert evidence of a Mr Kinnen, who had reviewed the relevant CCTV footage to look for common features between the 'known footage' (confirmed sightings of the defendant at Devonshire Close and Moneen Service Station) and the 'contested footage' (showing the alleged offender in this case at Hazel View and White Glen, whom the defendant disputes to be him). The prosecution also relied upon the evidence of Professor Ivan Birch (an expert in forensic gait analysis). The defence took issue with both of these witnesses' evidence. Having considered their statements, Colton J made a number of observations in the course of his judgment on the 'no bill' application (at paras [46]-[51]) to the following effect:

- (a) The judge referred to Mr Kinnen's report as "an "expert" report" (with the word 'expert' in quotation marks). He noted the similarities to which Mr Kinnen had drawn attention in respect of various aspects of the persons shown in the known footage and the contested footage: see para [46].
- (b) He referred to Professor Birch's opinion that the person in the contested footage and the subject in the known footage could be the same person, concluding that the forensic gait analysis provided "limited support" for the proposition that the figure in the contested footage and the subject in the known footage are the same person: see para [47].
- (c) He then observed that: "These opinions need to be treated with great care. The opinion of Professor Birch is of very limited probative value and really only establishes that the defendant could not be excluded as a suspect": see para [48].

(d) He also agreed with Mr O'Rourke's submission for the defence that Mr Kinnen's opinion on whether or not the similarities he had identified were sufficient to identify the defendant was inadmissible and did not in fact constitute expert evidence. The reason for this was that "Mr Kinnen's expertise is in the preparation of the enhanced images but it is for the jury to assess whether or not any similarities allegedly demonstrated in the contested footage and the known footage are sufficient to identify the defendant." He drew attention to the fact that Mr Kinnen was not a facial mapping expert. His view on the similarity in the walk of the person or persons in the respective footage could not supplant or add to that of Professor Birch: see paras [49] and [50].

[6] The net result was that Mr Kinnen could be allowed to give evidence as a witness of fact but not to provide expert opinion evidence. Professor Birch's evidence was considered by Colton J in assessing the strength of the prosecution case but was of very limited probate value, in his view.

[7] In the meantime, Mr Stephens was instructed in August 2019 on behalf of the prosecution following Colton J's ruling on the 'no bill' application in April 2019. He was asked to analyse and report on the contested footage. No doubt this was to fill the gap to which Mr Kinnen's lack of specific expertise had given rise. Mr Stephens' final report is dated 30 October 2019 but, having received this, the Crown initially declined to use this report in evidence but, instead, on 1 November 2019, provided the report to the defence by way of disclosure on the basis that it was the Crown's assessment that the report undermined its own case and/or assisted the defendant's case.

[8] A trial before Horner J followed shortly thereafter, which had to be abandoned for reasons which are not relevant for present purposes. During that trial, however, a defence application was made to the trial judge to exclude the proposed evidence of Mr Kinnen. This application was heard as a *voir dire* during which Mr Stephens was called to give evidence *on behalf of the defence* and was cross-examined by Mr Ciaran Murphy QC (who appeared with Mr Russell) on behalf of the Crown. Copies of the transcript of his evidence have been provided to me in the course of the present application.

[9] As a fresh trial of the defendant approaches, the Crown has now confirmed that it will no longer be seeking to rely on the evidence of either Mr Kinnen or Professor Birch. Mr Kinnen has essentially been replaced by Mr Stephens, whom the prosecution wish to call notwithstanding their disclosure of his report as being (in substance) unhelpful to their case; and Professor Birch has been replaced by another expert in forensic gait analysis, Dr Asgeirsdottir.

## Mr Stephens' report

[10] I do not intend to set out in detail all of the relevant portions of Mr Stephens' report of 30 October 2019, which I have read. It is clear that he has been asked to provide his opinion on a comparison between known CCTV footage of the defendant and the contested footage of the alleged perpetrator in respect of the following specific features: (i) the facial features of each; (ii) the jacket worn by each; and (iii) the trousers, belt and footwear worn by each.

[11] At para 32 of his report, Mr Stephens explains how his conclusions are expressed, using terminology endorsed by the Forensic Image Analysis Division (FIAD). In terms of the terminology used to express a statement of the degree of support for the contention that the two subjects or objects are the same, the following hierarchy of statements are used:

- "1. Lends NO SUPPORT
2. Lends LIMITED SUPPORT
3. Lends MODERATE SUPPORT
4. Lends SUPPORT
5. Lends STRONG SUPPORT
6. Lends POWERFUL SUPPORT."

[12] The summary of Mr Stephens' findings is found at paras 11-16 of his report, in the following terms:

- "11. The imagery of the offender on Hazel View is unsuitable for facial comparison.
12. Whilst there is no evidence to exclude the possibility that Mr. O'NEILL is the suspect on White Glen, there is NO SUPPORT to the same contention.
13. There are no irreconcilable differences between the jacket, trousers (and belt) and footwear worn by the offender and those articles which were worn by Mr. O'NEILL.
14. The evidence lends LIMITED SUPPORT to the contention that the jackets are of the same tone, make and mass-produced model.
15. The evidence lends NO SUPPORT to the contention that the trousers and belt are of the same tone, make and mass-produced model.

16. The evidence lends NO SUPPORT to the contention that the footwear are of the same tone, make and mass-produced model.”  
[Capitalisation in original text]

[13] A further summary is found in para 54, drawing the report to a conclusion, in these terms:

“In summary:

- a. There are no irreconcilable differences between the jacket worn by the offender and that which was worn by Mr. O’NEILL on 01 August 2015.
- b. The evidence lends LIMITED SUPPORT to the contention that the jackets are of the same tone, make and mass-produced model.
- c. In the absence of any uniquely identifying features that could separate the ‘source’ or ‘comparison’ jacket from its mass-produced article, the evidence lends NO SUPPORT to the contention that they are one and the same.
- d. There are no irreconcilable differences between the trousers and belt worn by the offender and those which were worn by Mr. O’NEILL on 01 August 2015.
- e. The evidence lends NO SUPPORT to the contention that the trousers and belt are of the same tone, make and mass-produced model.
- f. There are no irreconcilable differences between the footwear worn by the offender and those worn by Mr. O’NEILL on 01 August 2015.
- g. The evidence lends NO SUPPORT to the contention that the footwear are of the same tone, make and mass-produced model.”

### **Summary of the defendant’s submissions**

[14] The defence submits that “it is patently clear on a fair and reasonable reading of Mr Stephens’ report, that it does not assist or advance the Crown’s case that the Defendant is the individual in the CCTV footage at Hazel View and White Glen.”

They emphasise Mr Stephens' observations about the limitations of the disputed footage at Hazel View and White Glen in relation to facial features and even, in the case of the former, the offender's gender or ethnicity.

[15] They contend that Mr Stephens' report does not allow the Crown to advance a positive case of the defendant's guilt but, rather, merely allows the Crown to argue that the disputed footage does not *exclude* the defendant as being the suspect in the footage. In summary, Mr O'Rourke submitted that, "At best, the report establishes that the Defendant could not be excluded as a suspect – it does not provide any compelling or significant evidence that points towards the Defendant being the individual in the footage." In short, therefore, it is said that the report is entirely neutral, rather than supportive of the Crown case, and so, irrelevant.

[16] It is also said that the admission of the report would be prejudicial because it was plainly obtained (after Mr Kinnen and Professor Birch's reports failed to provide adequate evidence in this regard) in order to support, and seek to prove, the police's view that the defendant could be identified from the contested footage. Albeit the defence submits that Mr Stephens' report does not advance the police theory in this regard, it is argued that its admission will make plain to the jury that the police *believed* the defendant could be identified from the footage and thereby prejudice him.

### **The need for evidence to be relevant**

[17] It is not in dispute that, in order to be admissible, evidence should be relevant. Mr O'Rourke relied on *May on Criminal Evidence* (6<sup>th</sup> edition, 2015, Sweet & Maxwell) ("May") for this basic proposition. At para 1-12, May states that:

"The golden rule of admissibility is that all evidence which is relevant is admissible and that which is irrelevant is inadmissible."

[18] A more complex question is what constitutes relevance. In respect of this, the defendant relies on further passages in May, at paras 1-13 and 1-14, in the following terms:

"... The matter may be summarised in this way. For the purpose of a criminal trial, evidence is relevant if its effect is to make more or less probable the existence of any fact which is in issue, *i.e.* upon which guilt or innocence depends. Or, as Lord Steyn put it: "[to] be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue."

The facts in issue are those facts which the prosecution must establish in order to prove its case and the defendant must establish in order to raise a defence ...”

[19] A further observation in *May*, also at para 1-13 but not cited by the defendant in his skeleton, is as follows:

“It is not easy to define the meaning of “relevance” in general terms: it will depend in each case upon the circumstances and the way in which the case is being conducted.”

[20] In *R v Byrne* [2002] EWCA Crim 632, on which the defendant relies, the Court of Appeal of England and Wales considered the principle that the prosecution cannot be permitted to adduce irrelevant evidence as part of its case. It drew on the case of *R v Sandhu* [1997] Crim LR 288, in which prejudicial evidence going to the defendant’s attitude and state of mind was led by the prosecution in relation to an offence of strict liability in which issues of intention, motive and knowledge were irrelevant to guilt. The Court of Appeal in the *Sandhu* case accepted that the conviction was unsafe because of the admission of this evidence, commenting as follows:

“In our judgment it is important to have regard to the principles which have to be observed in a case of this kind. Any evidence adduced by the prosecution was, as we think, relevant if and to the extent that it went to answer any one of the five questions already indicated. Evidence which did not go to answer any of those five questions was irrelevant and therefore inadmissible. There are of course cases in which evidence, although irrelevant and inadmissible, is not prejudicial to a defendant and thus will not threaten the safety of the conviction. Such is the case where the evidence is neutral. But where evidence is irrelevant, inadmissible and damaging to a defendant, then it is in truth mere prejudice. Its admission will serve no purpose other than to incline a jury to think badly of that particular defendant ...”

[21] In the *Byrne* case, at para [31], the court went on to say that:

“As a general rule the prosecution is entitled to adduce evidence that is sufficiently relevant to an issue in the case as advanced by the prosecution. But all that is irrelevant or is not sufficiently relevant to the case as put should, generally speaking, be excluded. (See Cross & Tapper on Evidence 8<sup>th</sup> edition page 56: *Hollington v Hewthorn & Co*

[1943] 1KB 587 at 594 per Goddard LJ). The second part of this principle must be particularly observed where the admission of irrelevant evidence (which, by definition, is not probative of the alleged offence) is likely to be prejudicial to the defendant.”

[22] The *Byrne* case concerned the admission of evidence of the deceased injured party’s wife, in which she gave highly prejudicial evidence (that the defendant had stabbed her husband with a knife, with murderous intent) which was completely at odds with how the prosecution case was put (that the defendant was guilty of manslaughter only, on the basis that he was present at the attack and encouraged it but had no knife and only anticipated injury falling short of really serious harm).

### **Expert evidence in relation to video footage**

[23] The defendant further submits that, as the evidence in dispute in this application relates to video evidence (and photographic stills taken from CCTV footage), it is also helpful to consider the law and guidance set out in *Blackstone’s Criminal Practice* (2022 edition) (“Blackstone”), at section F19.20, entitled ‘Photographic and Video Evidence at Trial.’ It refers in particular to *A-G’s Ref (No. 2 of 2002)* [2002] EWCA Crim 2373, [2003] 1 Cr App R 21 (321), and the summary provided by Rose LJ at para [19] of her judgment in that case, as follows:

“In our judgment, on the authorities, there are, as it seems to us (at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up) a jury can be invited to conclude, that the defendant committed the offence on the basis of a photographic image from the scene of the crime:

- (i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (*Dodson & Williams*);
- (ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this (*Fowden & White*, *Kajalave v Noble*, *Grimer, Caldwell & Dixon* and *Blenkinsop*); and this may be so even if the photographic image is no longer available for the jury (*Taylor v The Chief Constable of Chester*);
- (iii) where a witness who does not know the defendant spends substantial time viewing and analysing

photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (*Clare & Peach*);

- (iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury (*Stockwell* 97 Cr App R 260, *Clarke* [1995] 2 Cr App R 425 and *Hookway* [1999] Crim LR 750)."

[24] The defendant submits that it is the fourth category which is relevant in this case, since Mr Stephens is accepted to be a facial mapping expert, as well as having other expertise. He also relies on the following passage from section F19.20 of Blackstone:

"In many cases, the quality of CCTV images is so poor that juries might not be able to make an identification merely by viewing the images themselves, whereas someone who knows D well, or who has expertise in facial mapping or gait analysis, might be able to assist them. See further F19.21.

The danger in such a case is that the jury will simply take on trust a convincing assurance from the witnesses when they are unable to make the judgement themselves; hence, the importance of directions to the jury as to the caution with which they must approach their task (*Lariba* [2015] EWCA Crim 478 at [40]). Thus, a *Turnbull* warning will ordinarily be required (*Selwyn* [2012] EWCA Crim 2968; and see the *Crown Court Compendium*, ch. 15-3)."

[25] The defendant asserts that Mr Stephens is being called as an expert to assist the jury but that his evidence will not assist them; because it simply establishes that he could not be excluded as the individual in the contested footage.

## Consideration

[26] Having carefully considered the defence submissions and Mr Stephens' report, I have concluded that the defendant's application to exclude his evidence must fail. This is for three basic reasons, which are expanded upon below but which may be summarised as follows:

- (1) First, Mr Stephens' report, read fairly and as a whole, provides *some* positive support to the Crown case. Albeit this support may be extremely modest, it does provide some assistance to the Crown in seeking to prove their case: that is indeed, no doubt, why they wish to rely upon it.
- (2) Second, if and insofar as Mr Stephens' evidence does no more (or aspects of it do no more) than simply undermine any suggestion that there are certain irreconcilable differences between the features shown in the known and disputed footage respectively, that is, of itself, of some probative value.
- (3) The weight to be attributed to this evidence is a matter for the jury to determine but, in any event, the majority of that which the defendant seeks to exclude is not prejudicial to him. On the contrary, it is potentially of assistance to him; and it would be artificial only for a very limited portion of Mr Stephens' conclusions to be admitted.

[27] As set out above, Mr Stephens' findings include that the evidence lends limited support to the contention that the jacket worn by the defendant in the known footage and the jacket worn or in the possession of the alleged offender in the contested footage are of the same tone, make and mass-produced model. This constitutes support – albeit of a limited nature – that the jackets are the same type. In turn, this at least potentially sounds on the question of the likelihood of the jackets being the same jacket (although that cannot be established from comparison of the CCTV footage) and, indeed, of it being the same person shown in each, when this factor is taken together with other evidence upon which the Crown relies (including the evidence of the defendant being in the victim's company earlier that evening and wearing his own jacket which is in question that day).

[28] The prosecution has drawn a proper comparison, in my view, with the case of *R v Smith and Greer* [2014] NICA 84 in which the Court of Appeal considered the situation of a single particle of cartridge discharge residue matching that found in a cartridge recovered from the scene of a murder on a glove bearing the DNA of one of the defendants in the passenger footwell of the car used to carry out the offence. There, the expert's evidence was to the effect that the presence of this residue afforded "very weak support" to the prosecution case. Nonetheless, the Court of Appeal considered that the evidence had been properly admitted, with Girvan LJ commenting (at para [50]) that, "This piece of evidence in its overall context was not so valueless as to be rendered inadmissible." It was part of a strand in what was a circumstantial case.

[29] A similar approach is evidenced in a decision of the English Court of Appeal in *R v George (Dwaine)* [2015] 1 Cr App R 15 involving expert evidence of very limited discharge residue. Even where the evidence about this, on its own, was such that “no evidential significance can be attached to it”, that did “not mean that the evidence is necessarily inadmissible or irrelevant” (see para [46] of the judgment of Sir Brian Leveson P). The jury would be more than able to assimilate evidence as to potential significance, or lack of significance, provided that there was an appropriate explanation of that significance.

[30] The defence is of course entitled to seek to undermine the support which this aspect of Mr Stephens’ evidence provides for the Crown case. It may do so, for instance, by emphasising the limited nature of his conclusions on this issue and the absence of other support in his evidence for there being similarities in respect of facial features and clothing; and by cross-examining on whether the limited support he has found for the jackets being of the same tone (amongst other things) is undermined by the difficulties which the nature of footage presents in terms of distinguishing between light and dark toned objects (addressed in paras 24, 42a and 50b of his report). However, these are all matters which are properly for the jury to consider.

[31] In addition, in my view there is evidential value in the other central conclusion reached by Mr Stephens to the effect that, having compared a number of features apparent in both sets of footage, there are no irreconcilable differences between the clothing and footwear seen in each. Although the defendant has not identified any other person whom he contends to be the perpetrator of the alleged offences (nor need he, of course), it is inherent in his case that the person shown in the contested footage is not him. His defence statement raises mistaken identity as a complete defence. In assessing this, it is relevant, the prosecution contend, that there is nothing irreconcilable between the defendant’s appearance in the known footage and the offender’s appearance in the contested footage. I accept that to be the case. Even if (as Mr O’Rourke submitted) the defendant will not be contending that the contested footage is sufficiently clear to say that it does *not* show him, this is an issue which will be for the jury’s consideration.

[32] In the ‘no bill’ application, Colton J considered that Professor Birch’s opinion provided only “limited support” for the proposition that the defendant was the individual in the footage. He considered that this opinion needed to be treated with great care and was “of very limited probative value” since it “really only establishe[d] that the defendant could not be excluded as a suspect.” In the judge himself assessing the weight of the evidence for the purpose of the exercise required in a ‘no bill’ application, he was of course entitled to take that view. Nonetheless, he still proceeded on the basis that the opinion (which he considered to simply establish that the defendant could not be excluded) was admissible evidence and was relevant to an assessment of the Crown case overall. I would agree with that analysis.

[33] Accordingly, even if all Mr Stephens' evidence did was to establish that the defendant could not be excluded from being the person shown in the contested footage that would itself serve to partially rebut any suggestion on the defendant's behalf that it could not be him. It is also relevant to the Crown case overall – which is circumstantial in nature – that the person shown in the contested footage, who is alleged to be the offender entering and leaving the victim's home shortly before and after the murder, did not have clothing or features which (on the basis of expert analysis) could be said to be irreconcilable with those of the defendant in the known footage.

[34] Mr McDowell went further and suggested that, in light of the "cautious description of the evidence" by Mr Stephens, a finding on his part that there was "no support" for there being similarities between features he had considered did not, in fact, mean that there was no support for them being similar in layman's terms. He drew this from answers provided by Mr Stephens in examination by Mr O'Rourke in the course of the previous *voir dire* where he appeared to suggest that a 'no support' description would include a case where "perhaps there are broad similarities" but otherwise no identifiable features which are comparable; and also from an answer in cross-examination by Mr Murphy QC where Mr Stephens characterised his conclusions generally as "on the positive side, absolutely." I am sceptical about reading too much into these isolated answers in the absence of hearing Mr Stephens' evidence in full in the course of the present trial. Nonetheless, I consider that they broadly support the view I have reached above that a conclusion of 'no irreconcilable differences' is, in itself, probative to a limited degree and of assistance to the Crown case.

[35] These considerations perhaps apply with additional force in circumstantial cases where it is well recognised that evidence may be relied upon which, on its own, would do no more than raise a mere suspicion but which, taken in combination with other circumstances, may create a strong conclusion of guilt (see the discussion in *R v Kincaid* [2009] NICA 67 at para [22], citing the well-known dictum of Pollock CB in *R v Exall* (1866) 4 F&F). Indeed, authority establishes that a circumstance may be relevant in such a case where, on its own, no inference of guilt could be drawn (or it is perhaps consistent with innocence) but where, viewed with all the other circumstances relied upon, it supports an inference of guilt. As an example, Mr McDowell referred to the Northern Ireland Crown Court Bench Book specimen direction on circumstantial evidence which includes advice to the jury that they must consider "whether or not there exists one or more circumstances which are *not merely neutral in character* but are inconsistent with any other conclusion than that the defendant is guilty" [italicised emphasis added].

[36] There was evidently some debate in the course of the 'no bill' application before Colton J as to whether this case was property to be viewed as a circumstantial case or an identification case (see para [44] of Colton J's ruling), with his view (expressed at para [51]) being that it was "an identification case but one which is potentially supported by other circumstantial evidence." For my part, I would not

consider that there is or must be a strict dichotomy between these two types of cases; and nor does Colton J appear to have thought so. However, insofar as it is relevant, I would also consider the Crown case in this prosecution to be more in the nature of a circumstantial case than an identification case. That is because I do not understand the Crown to be suggesting that the defendant can be clearly identified in the contested footage. It is only a combination of several or all of the matters specified in detail in para 15 of the prosecution's skeleton argument in respect of this application factors which would permit a jury (the Crown submits) to be sure that the defendant was guilty of the offences charged.

[37] Put another way, I do not understand the Crown to be suggesting that, on the basis simply of the jury's assessment of the video footage (even with the benefit of Mr Stephens' evidence and/or the forensic gait analysis), but without reference to the various surrounding circumstances upon which they also rely, the jury could properly be sure that the defendant was identified as the person shown in the contested footage (assuming that person is the offender). Rather, the Crown case is that there are similarities between the defendant's presentation and that of the person shown in the contested footage and that, taken together with all of the other circumstantial evidence upon which they rely, the jury can be satisfied to the criminal standard that the defendant was guilty of the offences charged. In support of this approach, Mr McDowell referred me to the decision of the High Court of Australia in *R v Hillier* (2007) 233 ALR 634 in which Gleeson CJ emphasised that circumstantial cases are not to be considered piecemeal; and said, in particular, at para [48] that "the quality of evidence of identification may be poor, but other evidence may support its correctness." He also referred me to the reference in *Gubinas v HM Advocate* [2018] JC 45, at para [62], to a jury being entitled to form their own view on whether or not an image is that of an accused but also being entitled to hold that it shows a person resembling the accused, so as to provide corroboration in a circumstantial case.

[38] The issue in the *Sandhu* case referred to above (see para [20]) was that evidence was given in relation to matters (the defendant's state of mind) which were simply *not in issue*. The difficulty arose not because the evidence in question did not assist one way or another on a relevant question; but because it was directed to an issue which was entirely irrelevant. As the court noted, the question of admissibility turned on whether the evidence went to answer one of the questions in issue. In the present case, Mr Stephens' evidence – going to the comparison between footage of the defendant and footage of the apparent offender – is plainly relevant to a key issue in the case, namely whether the suspected perpetrator shown in the contested footage is or could be the defendant.

[39] The *Byrne* case, properly understood, also does not assist the defendant in my view. Its facts were very far from the situation at issue in the present case. Here, there is nothing necessarily inconsistent between the Crown's case and the evidence which the defendant seeks to be excluded. The Court of Appeal in *Byrne* suggested that the question was one of *sufficient* relevance. For the reasons given above, I

consider that Mr Stephens' expert evidence on the comparison of the images is sufficiently relevant to the facts in issue to be admissible.

[40] I have also considered my discretion to exclude Mr Stephens' evidence under Article 76 of PACE. The defendant submits that, even if I conclude (as I have) that Mr Stephens' evidence is sufficiently relevant to be *prima facie* admissible, I nonetheless ought to exclude it on the ground that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. In support of this aspect of the application, the defendant submits that, in light of the weakness of the relevant evidence in supporting the Crown case, "the only reasonable conclusion to draw is that the Prosecution's purpose in adducing this evidence is not to rely upon the expert's ultimate opinions on the various aspects which he considered but rather to draw the attention of the jury to the aspects of his examination on the basis that the police clearly believed that comparisons could be made between the respective CCTV footage."

[41] In short, the defence contend that the prosecution wish to adduce the report to put in play before the jury the very issues on which Mr Stephens found there was no support for concluding that features in the known and contested footage were the same or similar; and to introduce the police view that aspects of the respective footage are connected or similar (albeit this view was rejected by the expert himself). Seeking to adduce the evidence for this purpose, it is said, is a manipulation or abuse of the trial process. The primary example given in this respect in the defence submissions was the suggestion that there was a similarity between a bald patch evident in the White Glen contested footage and that evident on the defendant in some of the known footage. Mr O'Rourke submits that Mr Stephens' evidence will raise this issue and, in doing so, albeit that Mr Stephens dismisses it, he will convey the police view that (in his having been asked to examine the issue) there is a similarity providing support to the view that the figure in the contested footage is the defendant. It is submitted that this scenario risks being highly prejudicial to the defendant if the jury then goes on to conduct its own identification evaluations of the footage, whenever Mr Stephens has warned about the quality and limitations of the footage for analysis purposes even by an expert such as him, never mind being analysed for identification purposes by the jury (as non-experts).

[42] I do not accept this submission. It is an important and necessary component of the Crown case that the person shown in the contested footage *is* the defendant. That is a matter which the jury will inevitably have to consider. For the jury to learn that possible similarities between the two sets of footage were explored in the course of the investigation could hardly be a startling revelation, given that the defendant was investigated and is now being prosecuted for the offences on the Bill of Indictment. The more important factor is that, having considered the matter in some detail, Mr Stephens finds only very limited support for this aspect of the Crown case in his analysis and, in many instances, no support for similarities which the Crown may have hoped he might have discovered or substantiated. That is no doubt why his report was disclosed as being of potential assistance to the defence. However,

viewed in this way, I cannot see that the giving of this evidence is prejudicial to the defendant, or prejudicial in any significant or material way.

[43] The jury will be shown the relevant footage and will have to make their own assessment of its evidential value, having been directed how to approach the evidence in the trial judge's charge at the closing of the case. Having expert evidence explaining only the very limited support (in the expert's assessment) for similarities between the two is to my mind to the defendant's advantage. I accept Mr McDowell's submission, for instance, that, in relation to the question of the suspect's 'bald patch', even if Mr Stephens' evidence were to draw attention to this issue, it will also temper the contention that this is of evidential significance because of (i) the alternative explanation he gives as to why this might seem apparent from the footage taken at White Glen; and (ii) his conclusion that there is no support for the contention that the defendant is the offender based on a comparison of facial features, including hairline (see para 43e of his report).

[44] Having concluded that Mr Stephens' evidence is relevant and admissible for the reasons set out above, I also consider that all of it - with many aspects of it proving to be of limited or no assistance to the prosecution case - should be put before the jury. It would be artificial to seek to fillet it (which neither party suggested) and would, in my view, give rise to an unnecessary risk of the jury speculating on aspects of the footage, including the question of whether a bald patch was or was not evident in the contested footage, without the benefit of the available expert evidence which provides a caution against this. This is also not a case where there is any material risk of the concern identified in the passage of Blackstone set out at para [24] arising. Since Mr Stephens does not purport to provide a "convincing assurance" that the figure in the contested footage is the defendant, the danger of the jury unquestioningly taking that assurance on trust does not arise. Mr Stephens' evidence is much more balanced than that but should be considered in its entirety so that the jury is properly informed.

#### **Detective Constable Beattie's further evidence**

[45] I should mention one further issue which was addressed at the course of the hearing in relation to the above application. Additional evidence from Detective Constable Beattie was served on 23 December 2021. There was a question about whether or not this was new evidence or had, in substance, previously been disclosed. The prosecution position is that the footage (Exhibit CJB12) was disclosed some time ago in primary disclosure. In any event, the new statement makes clear that on 11 January 2016 the police went to the house in Hazel View where the contested Hazel View footage was obtained and conducted a form of reconstruction with a police officer passing the relevant camera on a number of occasions wearing, variously, a light-coloured jacket and then a dark-coloured jacket in order to ascertain whether they could be distinguished in the CCTV footage. This footage ("the reconstruction footage") was shown to me and, in each case, the jacket worn appeared to the viewer as light. Mr O'Rourke submitted that Mr Stephens was

required to see this footage in order to reconsider, and potentially qualify or amend, his report.

[46] It follows from the ruling given above that I do not accept that it is necessary for Mr Stephens to see the reconstruction footage before ruling on this application. His report clearly shows that he was aware of the issue, noting (at para 24) that monochrome imagery presents particular problems in assessing the tone of an object and that the effect of its interpretation of the visible light spectrum, combined with an element of near infra-red, “can be to present a dark-toned object as being of a significantly lighter tone ...”. Moreover, at para 49a he has commented that, in the source imagery of the suspect on Hazel View, the offender “wears a jacket of indeterminable colour” and that “the light conditions (near-infrared) are such that the jacket may be dark-toned to the naked eye.” The source imagery from White Glen came from a colour camera which “offers a more reliable representation of tone, such that the carried article could be described as being light-toned” (although an issue has been raised as to whether this is the outer or inner lining of the jacket shown).

[47] I am satisfied that Mr Stephens was sufficiently aware of this issue when dealing with the contested footage from Hazel View that there is nothing requiring his consideration of the reconstruction footage before this application is determined. It would of course be prudent for Mr Stephens to consider the reconstruction footage in advance of giving evidence and he will no doubt be examined and/or cross-examined in relation to it and the effect (if any) it has on his opinion.

### **Conclusion**

[48] By reason of the foregoing, I refuse the defence application to exclude Mr Stephens’ evidence. In my view, the report is admissible and the jury should have the opportunity to consider and weigh it. If it transpires that, after cross-examination, Mr Stephens’ evidence takes the prosecution case nowhere, or even turns out to undermine the prosecution case, that is a matter which can be addressed in the defendant’s closing and in the charge to the jury. If and insofar as it is prejudicial to the defendant, any such prejudice would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.