



Summary of Judicial Decision

**HKSAR v Lam Tsz-kin, Howard (“the Appellant”)
HCMA 179/2019; [2020] HKCFI 562; [2020] HKCFI 654**

Decisions : (1) Appeal against conviction dismissed
(2) Application for a Certificate that the judgment in the appeal involved points of law of great and general importance dismissed

Date of Appeal Hearing : 2 March 2020
Date of Appeal Judgment : 2 April 2020
Date of Certification Hearing : 22 April 2020
Date of Certification Ruling : 24 April 2020

(Full text of the Court’s Judgment (AJ)):

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127303&QS=%28%E6%9E%97%E5%AD%90%E5%81%A5%29&TP=JU

(Full text of the Court’s Certification Ruling (CR)):

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127555&QS=%2B&TP=JU

Background

1. This is the first Hong Kong appeal authority in which the Court examined the legal principles regarding identification evidence of witness with special knowledge adduced under the following gateway identified in ***AG’s Reference (No. 2 of 2002)*** [2003] 1 Cr App R 21 §29:

“(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...”.

2. The prosecution case alleged that the Appellant made a false report of himself being abducted in Mongkok to the police on the strength of the CCTV evidence that captured a masked person sharing the Appellant’s distinctive physique, pigeon-toed gait and clothing, who was in fact the Appellant, walk freely in Mongkok area after the alleged abduction.
3. In accordance with the gateway identified in ***AG’s Reference (No. 2 of 2002)*** above, the trial magistrate admitted into evidence the evidence of a police officer (PW3) who had viewed the CCTV evidence to the effect that he



opined that the masked person was the Appellant.

4. The Court dismissed the Appellant's appeal against conviction in which the Appellant challenged the admissibility and reliability of PW3's identification evidence. The Court also dismissed the Appellant's application for a Certificate certifying that the judgement in the appeal involved points of law of great and general importance for his ensuing application for leave to appeal to the Court of Final Appeal.

Issues in dispute (appeal proper)

5. In one of the grounds of appeal, the Appellant argued that the magistrate had erred in admitting PW3's evidence because (i) the said gateway under ***AG's Reference (No.2 of 2002)*** only allowed admission PW3's identification evidence if the Appellant's facial features had not been obscured; (ii) PW3 did not possess the requisite "special knowledge"; (iii) PW3's evidence was not reliable and could not be tested objectively; and (iv) once the magistrate accepted PW3's evidence as "expert evidence", the magistrate could not view the relevant CCTV evidence and make his own findings of fact independent of PW3's evidence regarding the CCTV evidence.

Department of Justice's Summary of the Court's rulings

6. The gateway identified in ***AG's Reference (No.2 of 2002)*** under which the evidence of a witness with special knowledge can be admitted is available whether or not the facial features of the identified person are obscured in part or in whole: ***R v Savalia (Priyankrai)*** [2011] EWCA Crim 1334 §23; especially if that person has some other distinctive features such as distinctive clothing and accessories, unusual bodily features, or special gait which the witness can identify for his identification purposes: ***HKSAR v Tagao Saudee Abad***, CACC 366 / 2015. (§§34-36 of AJ)
7. Whether the witness has acquired the requisite special knowledge for his/her identification evidence to be admitted into evidence, is a fact-sensitive issue. The frequency of viewing of the CCTV evidence, and the methodology used in the analysis of the images, form only a part of the equation. Other considerations include the distinctiveness of the special features of the identified person relied upon by the witness for making the identification; whether the identification of those special features requires any special training or experience; how the witness familiarises himself/herself with those special features of the identified person; and the degree of familiarity. In the present case, the fact that PW3 had the opportunity to study the Appellant's physique and special gait (which did not require any special knowledge in anatomy) for 8 hours after his arrest; and to view thousands of hours of CCTV evidence over a period of 4 months (which the trial magistrate could not have



- done) qualified him to have acquired the requisite special knowledge to give identification evidence. (§§49-51 of AJ)
8. The requirement under Code D of the Code of Practice for Identification of Persons by Police Officers in force in the United Kingdom for such a witness to make contemporaneous notes of descriptions or absence of descriptions of his observations of the person identified in the CCTV evidence - so that assessment of the reliability of the witness's identification evidence can be made - has no application in Hong Kong. Nevertheless, a failure to make such contemporaneous notes would not necessarily mandate the exclusion of the witness's identification evidence nor a conclusion that the conviction must be unsafe since much will depend upon the quality of the identification evidence and all the other available evidence: ***R v Gomez (Kevin)*** [2016] EWCA Crim 2046 §25. In any event, in the present case, PW3 had made such contemporaneous notes in the form of witness statements. (§§54-55 of AJ)
 9. The identification evidence of such a witness with special knowledge is non-expert opinion evidence and he/she is not an expert: ***Leaney and Rawlinson*** (1988) 38 CCC (3d) 263 p 276. A tribunal of fact is entitled, and indeed required, (a) to consider such identification evidence in light of the whole of the evidence; (b) to decide whether to accept the whole of the witness's evidence or only a part thereof bearing in mind the ***Turnbull*** directions; and (c) to view the CCTV evidence itself and to come to the tribunal's own conclusion whether the person was correctly identified: ***R v Ryan Nugent & Michael Savva*** [2003] EWCA Crim 3434 §47, ***R v Daniel Weighman*** [2011] EWCA Crim 2826 §48, ***R v John Darren Mitchell*** [2005] EWCA Crim 731 §49, ***R v Flynn and St John*** [2008] 2 Cr App R 20 §50; ***Gomez (supra)*** §26, ***R v Clark & Peach*** [1995] 2 Cr App R 333, and *Crown Court Compendium Part I* pp 15-6 to 15-9 & 15-14 to 15-17. (§§57-60 of AJ & §§5-13 of CR).

Prosecutions Division
Department of Justice

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