SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sica* [2012] QSC 430
PARTIES:	**R** (respondent) **v** **SICA, Massimo** (applicant)
FILE NO:	SC No 68 of 2011
DIVISION:	Trial Division
PROCEEDING:	Applications under s 590AA *Criminal Code* 1899 (Qld) to exclude expert evidence from being admitted at trial
DELIVERED ON:	10 January 2012
DELIVERED AT:	Brisbane
HEARING DATES:	11, 20, 31 October 2011; 1, 4, 7, 10, 11, 17, 23, 30 November 2011; 14, 22, 23, December 2011; 3, 4 January 2012
JUDGE:	Peter Lyons J
RULING:	**I rule that the applications for the exclusion of the evidence of Mr Kennedy, and Dr Jones, are refused.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – IDENTIFICATION EVIDENCE – ADMISSIBILITY – GENERALLY – where foot impressions were found at the crime scene – where foot impressions were examined by a "forensic identification specialist" and a "forensic podiatrist" – where applicant seeks to have evidence of these witnesses excluded – whether the witnesses have expertise in a recognised field or area of expertise – whether evidence is based on a reliable body of knowledge or experience – whether evidence is admissible CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – NATURE OF DISCRETION – GENERALLY – whether evidence should be excluded on the ground of unfairness *Criminal Code* 1899 (Qld), s 590AA *Clark v Ryan* (1960) 103 CLR 486, cited *Festa v The Queen* (2001) 208 CLR 593, applied *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, considered *Morgan v R* [2011] NSWCCA 257, cited *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2000] FCA 1463, cited *R v Harris* (1997) 94 A Crim R 454, cited *R v Hasler; ex parte Attorney-General* [1987] 1 Qd R 239, applied

R v LM [2004] QCA 192, considered
R v Rose (1993) 69 A Crim R 1, cited
R v T [2011] 1 Cr App R 9, considered
The Queen v Bonython (1984) 38 SASR 45, applied
Weal v Bottom [1966] 40 ALJR 436, cited

COUNSEL: S Di Carlo, with M Holohan, for the applicant
M R Byrne SC, with B G Campbell, for the respondent

SOLICITORS: Howden Saggers Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PETER LYONS J:** The applicant has been charged with the murder of three members of the Singh family, Neelma, Kunal, and Sidhi, on or about 21 April 2003. As a result of a telephone call from the applicant on 22 April 2003, police came to the Singh family home at 20 Grass Tree Close, Bridgeman Downs. The bodies of the deceased were in a spa bath in the ensuite to the main bedroom, on the upper level of the house.

[2] On 22 April 2003, and then some days later, footprints, or foot impressions, became visible on carpet in the house. Most were located on the internal stairs, though one was located on carpet on the lower level. With one exception, a print appeared on every second step in the staircase, consistent with a person climbing the staircase, two steps at a time. The most complete foot impression displayed a void area in the vicinity of the ball of the foot, and another such area at the heel.

[3] The evidence indicates that the prints were caused by feet carrying a bleach solution coming in contact with the carpet. The circumstances in which the prints came to be seen meant that in some cases, there has been discolouring as a result of the application of fingerprint chemicals; and the carpet was covered at some point during a forensic examination of the house.

[4] Sample foot impressions were obtained from the applicant on a number of occasions (1 April 2004; 7 and 8 April 2004; and 15 September 2004). The samples were taken on different surfaces. On some occasions the applicant's feet were bare; though on one occasion, he wore socks of differing thicknesses. Some samples were created by the use of ink; others by the use of bleach.

[5] In August and September 2004, footprints were collected from a number of persons in Brisbane, for comparison purposes.

[6] The prosecution proposes to call evidence from Mr Robert Kennedy and Dr Sara Jones of comparisons of the footprints from the carpet in the Singh house, with samples taken from the applicant. The applicant has applied for the exclusion of this evidence.

Contentions of the parties

[7] The applicant has identified three bases for the application. Two go to the admissibility of the evidence, and one seeks its exclusion on discretionary grounds. The applicant submitted that neither witness has expertise in a recognised field or area of expertise. The second ground is that the evidence is not based on a reliable

body of knowledge or experience. The discretionary basis is that the evidence is of slight probative value, and highly prejudicial, so that it would be unfair to admit it.

[8] The prosecution's submissions emphasise that the evidence does not identify the footprints found at the Singh home as footprints of the applicant; rather, it seeks to prove that those footprints are consistent with the sample footprints of the applicant, and thus forms part of a circumstantial case establishing guilt. The evidence demonstrates Mr Kennedy's extensive experience, which qualifies him to give the evidence. The evidence comes within a field of knowledge capable of being regarded as reliable, and which can therefore be the subject of expert evidence. The evidence is of probative value, and any potential prejudice can be adequately addressed by directions to the jury.

Summary of evidence

[9] In 2004, Mr Kennedy inspected the foot impressions on the carpet from the Singh home. These were photographed in colour, and outlines of features of the footprints were traced on a transparent overlay. The same process was followed with respect to sample foot impressions taken from the applicant.

[10] Mr Kennedy has expressed the view that the footprints at the Singh home were made by a sock-covered foot. That view is based on the fact that bleach remained on the feet while a number of steps were taken, Mr Kennedy's experience indicating that it would not remain on a bare foot for so long. Mr Kennedy was of the view that the left foot impressions at the Singh home were consistent with each other, as were the right foot impressions.

[11] Mr Kennedy chose one left foot impression, and one right foot impression (both taken with a light sock) from the sample impressions taken from the applicant, for the purpose of the comparison. He made a comparison between the samples, and the impressions on the carpet from the Singh home. One of the impressions from the Singh home he considered to be unsuitable for comparison, and he considered two to be of limited value. For the rest of the foot impressions from the Singh home, he found no inconsistencies with the applicant's sample foot impressions. He identified a number of points of consistency, which was greater in some cases than others.

[12] In December 2004, he was provided with additional inked barefoot impressions from the applicant, and carried out an exercise with what appear to be similar results. In November 2011 he saw a photograph of one of the footprints (identified as "Crime Scene impression Item #10 print # 2") which he considered more suitable for comparison than a photograph he had previously considered. He then carried out a further comparison exercise, reaching a consistent conclusion.

[13] Dr Sara Jones has inspected a carpet section with a footprint taken from the Singh home. She has also been provided with full sized photographs of each of the footprints found there. She has inspected the feet of Mr Sica, examined his gait, and obtained sample footprints from him. This was done on 7 and 8 April 2004, pursuant to terms of a Forensic Procedure Order. The sample foot impressions were both static and dynamic. The static impressions were both non-weight bearing (Mr Sica was seated) and weight bearing. The dynamic impressions were taken when the applicant walked on three surfaces, concrete (overlaid with paper), carpet (overlaid with paper), and carpet (direct inked impressions). The weight bearing

impressions were taken in bare feet, the applicant declining to wear socks on this occasion. Although there were variations of up to 4 millimetres between measurements both within each series of foot impressions, and between footprints in different series, Dr Jones found that the surface on which the impressions were taken did not affect the length or width of the impressions made.

[14] Measurements were taken of the sample foot impressions, as well as of the impressions from the Singh home. Outlines of the sample impressions were transferred onto clear sheets, and overlaid on the impressions from the Singh home. Comparisons were made of toe shape and position, full foot shape and position, and foot size, both visually, and using the overlays. A comparison of the observed features and the measurements was then carried out. A number of similarities were identified. Dr Jones concluded that she could not exclude the applicant as the possible author of the footprints found in the Singh family home.

[15] Dr Jones also examined two pairs of shoes, apparently worn by the applicant. The insoles were black, and for comparison purposes, photographs were taken with the colours inverted to facilitate an examination of the impressions. One pair, being Puma brand shoes, and showing more extensive signs of wear, provided good insole impressions. The impressions were transferred onto a clear plastic overlay, and superimposed upon the photographs of the impressions found at the Singh family home. Similarities were noted. There was a minor variation in the length and position of the insole impressions, when compared to the impressions from the Singh family home, which Dr Jones considered could be due to the compression of the foot in the shoe, and the likelihood that the person who left the impressions at the Singh family home was climbing stairs and changing direction.

[16] Dr Jones carried out a similar exercise with respect to shoes of members of the Singh family, and concluded that they were not the persons who left the impressions in the carpet at the Singh family home. She was also provided with sample footprints from a number of other persons, and concluded that none of these persons was the author of the footprints found at the Singh family home.

[17] The applicant called evidence from Professor Denis Vernon, the Head of Podiatry Service for the Sheffield Primary Care Trust in the United Kingdom. His work includes practice as a forensic podiatrist.

[18] Professor Vernon reviewed the work of Mr Kennedy and Dr Jones. He also compared a sample footprint taken from the applicant, with a foot impression from the Singh family home. He noted that there were some similarities between the two impressions, including the close matching of heel to toe length for those toes clearly visible, and various morphological features. The aspects of the impressions that did not match did not preclude the possibility of both samples having been produced by the same person; but it was also possible that the impressions were produced by different persons.

[19] Some features of the evidence proposed to be called by the prosecution should be noted. The first is that it is not intended to ask Mr Kennedy or Dr Jones to express the view that the footprints found at the Singh family home were made by the applicant, nor is it intended to ask either witness to express a view as to the probability of the applicant being the author of those footprints. The evidence of these witnesses is to be advanced on the basis that the features of these footprints are such that they may have been made by the applicant (though not by members of

the Singh household); and that fact, together with a number of other factors constitutes a set of circumstances from which the jury might infer that the applicant is responsible for the deaths. The role of the evidence was said to be analogous to evidence described as "circumstantial identification evidence" by McHugh J in *Festa v The Queen.*[1]

Criteria for determining the admissibility of expert evidence

[20] Both parties made reference to the following passage from the judgment of King CJ in *The Queen v Bonython*:[2]

> "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. The first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

[21] I was also referred to the following passage from the judgment of Dixon CJ in *Clark v Ryan*,[3] where his Honour adopted a statement in the notes to *Carter v Boehm*[4] as follows:

> "'On the one hand … it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it … While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it.'"

[22] I was also referred, on behalf of the applicant, to the judgment of Heydon JA (as his Honour then was) in *Makita (Australia) Pty Ltd v Sprowles*[5] where his Honour said:[6]

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1 (2001) 208 CLR 593 at [56] ff.
2 (1984) 38 SASR 45 at 46-47.
3 (1960) 103 CLR 486 at 491.
4 1 Smith LC 7th Ed (1876) at 577.
5 (2001) 52 NSWLR 705.

> "In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of 'specialised knowledge'; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be 'wholly or substantially based on the witness's expert knowledge'; so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of a scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v The Queen* (citation omitted), on 'a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise'."

[23] His Honour considered this statement of the law to be consistent with the views expressed in *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd*,[7] quoting a passage from that judgment which included the following:[8]

> "[23] The further requirement that an opinion be *based on* specialised knowledge would normally be satisfied by the person who expresses the opinion demonstrating the reasoning process by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialised knowledge." (emphasis in original)

[24] I was also taken to another passage from the judgment of Heydon JA in *Makita* where his Honour referred to the "prime duty of experts in giving opinion evidence" as being "to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions".[9] In that context, his Honour referred to other statements to the effect that an expert witness must explain the basis of theory or

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6 At [85].
7 [2000] FCA 1463 at [21]-[23].
8 *Makita* at [86].
9 *Makita* at [59].

experience upon which the expert's conclusions are said to rest; and speaking of the need for an expert to explain the basis of the conclusion.[10]

[25] I was also referred to the acceptance of evidence relating to a number of matters based on "adequate practical experience" or "adequate observation" in *Weal v Bottom*;[11] and the acceptance by Bollen J in *R v Rose*[12] (with whom the other members of the court agreed) of the admissibility of the evidence of a "practical expert" including "a mechanic who has worked on engines man and boy for (say) these 30 years".[13] Reference was also made to *R v Harris*,[14] where reference was made to the tests formulated in *Bonython*, and it was accepted that the evidence of an Aboriginal person skilled in tracking satisfied the tests.[15]

[26] I was also referred to the following statement from the judgment of the English Court of Appeal (Criminal Division) in *R v T*:[16]

> "The principles for the admissibility of expert witness were summarised recently in *R v Reed & Reed; R v Garmson*:[17] the court will consider whether there is a sufficiently reliable scientific basis for the evidence to be admitted, but, if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted, then it will leave the opposing views to be tested in the trial before the jury."

[27] I was also referred to the following passage from the same case:[18]

> "However, the fact that there is no reliable statistical basis does not mean a court cannot admit an evaluative opinion. … it can do so where there is some other sufficiently reliable basis for its admission."

Does the evidence deal only with matters within the capacity of the jury?

[28] Ultimately, the evidence of Mr Kennedy and Dr Jones involves the comparison of foot impressions found at the crime scene with other foot impressions. In my view, a number of aspects of their evidence demonstrates that it is unlikely that inexperienced persons are capable of forming a correct judgment upon that comparison, without their assistance.

[29] The evidence shows that foot impressions made by the same foot will vary for a variety of reasons. While in some cases it will plainly be obvious that two foot impressions were made by different feet, in other cases that will not be so. The extent to which impressions from the same foot will vary is not a matter about which, in my view, inexperienced persons are likely to prove capable of forming a correct judgment.

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10 See *Makita* at [60].
11 [1966] 40 ALJR 436 at 439.
12 (1993) 69 A Crim R 1.
13 Ibid at 9, 19.
14 (1997) 94 A Crim R 454.
15 Both *Rose* and *Harris* were cited with apparent approval in *McGarry v The Queen* (2001) 207 CLR 121 at [111].
16 [2011] 1 Cr App R 9 at [70].
17 [2010] 1 Cr App R 23 at [111]-[112].
18 Ibid at [92].

[30] There are other aspects of the work of these witnesses about which I would reach a similar conclusion. They include the taking of sample footprints; the identification of features to measure; the carrying out of the measurements; the identification of other features to be considered in the comparison; and the making of the comparisons of those features.

[31] I would add that, unlike facial recognition, or observations about a person's build or other physical features, or perhaps even a person's gait, the observation and comparison of footprints is, as a matter of common experience, not an exercise regularly conducted by ordinary people.

[32] While it may be within the capacity of an ordinary member of a jury to form a view that there is some similarity between footprints taken from the applicant and the footprints found at the Singh family home, I do not consider that such a person, without appropriate experience or training, is capable of forming a sound judgment on the question whether the applicant could, or could not, have been the person who left the foot impressions at the Singh family home. As mentioned, I do not consider it to be within the capacity of such a person to carry out in a reliable fashion the exercises undertaken by the witnesses for the purpose of answering that question. Likewise, I do not consider that an ordinary member of the jury has the capacity to make a sound judgment that the other persons whose foot impressions or shoes were examined by Dr Jones was not the author of the foot impressions at the Singh family home (at least where the differences are not particularly obvious).

The body of knowledge

[33] Dr Jones is a practising podiatrist, who is also the Program Director of Podiatry Programs at the University of South Australia. She holds a Doctorate of Philosophy in Health Sciences, a Master of Science degree, and a diploma of Applied Science (Podiatry). She has given expert evidence in the area of podiatry in South Australia and New South Wales. She has been involved in forensic investigations in those States, as well as Victoria and Tasmania, before her involvement in the present case. She has been consulted by legal representatives for both prosecution and defence. Her professional work involves the taking and examination of foot impressions, both in a forensic and non-forensic context. The focus of her examination and comparison of foot impressions is (or, in 2004, was) associated with the morphology and structure of the human foot.

[34] I note that Dr Jones's evidence was, in 1993 in *Rose*, recognised as being admissible expert evidence (in that case, the evidence was that foot impressions apparent on the insoles of some shoes could have been made by the defendant's feet).

[35] Professor Vernon describes one of his qualifications as a Doctorate in "Podiatry/Forensic Podiatry". He is a registered forensic podiatry expert under the Forensic Science Society competency testing scheme, and a member of the American Society of Forensic Podiatrists. He lectures in forensic podiatry. For many years he has conducted research in relation to techniques to be used in forensic podiatry. A number of his publications relate to forensic podiatry. In his report, he described the work of Dr Jones in the present matter as the work of a forensic podiatrist.

[36] In my view, the evidence establishes that Dr Jones's opinion forms part of a body of knowledge (and experience) which is sufficiently organised and recognised to be

accepted as a reliable body of knowledge (and experience), special acquaintance with which by Dr Jones would render her opinion of assistance to the court; and that Dr Jones has that acquaintance.

[37] Mr Kennedy, who is now retired, worked for 35 years in the Forensic Identification Research Service of the Royal Canadian Mounted Police. For many years, he has undertaken research on the question whether the pressure bearing areas of bare feet are unique to an individual. That has involved the collection of a database of bare foot impressions (taken from a larger body of foot impressions) from 12,000 individuals (24,000 feet), for the purpose of statistical analysis. Mr Kennedy estimated in evidence that he has examined in total of the order of 28,000 to 29,000 bare foot impressions, including those in the database.

[38] He has published a number of papers relating to the comparison of bare foot impressions and related research. He has contributed chapters to the Encyclopaedia of Forensic Science, particularly in relation to the comparison of bare foot impressions. He has conducted courses, both in Canada and elsewhere, relating to the comparison of bare foot impressions. For many years he has been a member, and for a time president, of both the Canadian Identification Society, and the International Association for Identification. Both bodies seek the advance of forensic science in relation to physical comparisons, including the comparison of foot impressions.

[39] Mr Kennedy describes himself as a forensic identification specialist.

[40] Professor Vernon referred to the examination of bare footprints as a form of forensic science. It is of some interest that in discussing this area of forensic science, Professor Vernon refers to the writings of Mr Kennedy on several occasions.

[41] Professor Vernon also spoke of two "main disciplines" in the area of bare footprint identification, referring to the work of forensic scientists and that of forensic practitioners. He stated that the work of the latter was based on experience. Forensic podiatrists work in one of these areas, and forensic footwear examiners work in the other, the latter focussing, according to Professor Vernon, on physical pattern comparison.

[42] It may be accepted that much of Mr Kennedy's expertise in relation to the comparison of foot impressions is based on experience, acquired over very many years. It has however, included some study relating to the comparison of impressions, including foot impressions; as well as writing and lecturing.

[43] In discussing the work of Mr Kennedy on the question whether foot impressions are unique to an individual person, Professor Vernon referred to the area as a "'fledgling' science". He referred to a number of areas where further study was required, from which I would infer that this description extends to attempts to assess the probability that a foot impression was made by a particular individual. Were it necessary to determine whether there is a body of knowledge or experience, sufficiently organised or recognised to be accepted as reliable, which extended to the unique authorship of a particular foot impression, or the probability that it was made by a specific person, this evidence might be important. However, that is not the nature of the evidence to be advanced by the prosecution at the trial. In respect of that evidence, I note that Professor Vernon acknowledges "the strength" of the

work of forensic practitioners, because the uncertainties associated with that work are more easily identified.

[44] I should also mention that in 2004, Dr Jones recommended that the opinion of Mr Kennedy be sought, describing him as "a highly recognized expert in the area".

[45] I also note that in *R v T*,[19] it was accepted that an expert examiner of footwear marks could express the opinion that a particular shoe could or could not have made the mark.[20] If that be true in relation to impressions created by footwear, it is difficult to see why it would not also be correct in relation to impressions created by unshod feet.

[46] The applicant's submissions referred to decisions of courts in the United States and Canada where Mr Kennedy's evidence was held to be inadmissible,[21] in support of the proposition that Mr Kennedy's analyses are not recognised as being sufficiently reliable to be admitted. Those cases all related to a consideration of insole impressions, in some cases with the expression of an opinion of the likelihood that those impressions came from the feet of the defendant. It seems to me that these decisions are not relevant to the reliability of the comparisons and conclusions of Mr Kennedy in the present case.

[47] The evidence satisfies me that there is a body of experience, sufficiently recognised to be accepted as reliable, relating to the comparison of bare foot impressions, involving the formation of an opinion as to whether a particular impression could or could not have been made by a particular person. Appropriate experience would enable a witness to express an opinion on such matters, for the assistance of the court. I therefore consider that Mr Kennedy's evidence comes within a recognised field or area of expertise.

[48] The applicant's submissions referred to criticisms made in published literature of opinions connecting evidence to a specific individual or source. While problems no doubt exist, it seems to me that much depends upon the nature of the opinion given, and the extent to which it might purport to convey scientific certainty, or a mathematical level of probability. Reference to this literature does not lead me to conclude that the body of experience relied upon by Mr Kennedy for the evidence he proposes to give is, in the present context, not reliable.

[49] The applicant's submissions referred to a number of other matters said to relate to the reliability of the body of knowledge or experience relevant to Mr Kennedy's evidence. Some might be thought to be relevant to the applicant's application for the exclusion of evidence under discretionary grounds, and will be referred to in that context. Those relevant for present purposes might be summarised as follows:

(a) the absence of scientific principles;
(b) reliance on a self-assessment;
(c) vagueness of terminology and methodology;
(d) reliance on individual observations by Mr Kennedy;
(e) the absence of justifiable protocols;

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19 [2011] 1 Cr App R 9.

20 Ibid at [73]; see also [71].

21 *State v Jones* 343 SC 562, 541 SE2 2d 813 (2001); *State v Berry* 143 NC App 187; 546 SE 2d 145; *R v Dimitrov* (2003) 181 CCC (3d) 554; 18 CR (6th) 36; 68 OR (3d) 641; see also the further decision in *State v Jones* 383 SC 535, 681 SE 2d 580 (SC 10 August 2009) (No 26699).

(f) the absence of a suitable database for comparison;
(g) the fact that no mathematical likelihood ratio is calculated;
(h) the range of variables which may result in different impressions being made by the same foot;
(i) the absence of quality assurance and proficiency testing.

[50] Again, these matters are matters which may, in a different context, be important in determining whether an opinion forms part of a reliable body of knowledge or experience. It is not inevitable that evidence is unreliable because a mathematical likelihood ratio is not calculated. So much is apparent from the second passage from *R v T*[22] set out earlier in these reasons. Indeed, it is obvious that when one has regard to expert evidence well recognised as admissible, the admissibility of the expert evidence often does not require satisfaction about the matters raised by the applicant. An obvious example is the evidence of an art dealer on the question whether a painting is forged.[23] It is difficult to see the relevance of these matters to the reliability of the evidence proposed to be called.

Exposure of reasoning

[51] Ultimately this will depend on what evidence is led at the trial. In view of the evidence led before me, it seems to me that I can assume that, in addition to the measurements and the conclusions based on observation of Mr Kennedy and Dr Jones, evidence will be led of the intermediate steps which they took, including at least some of the overlays that were produced.

[52] The evidence is, in essence, evidence of measurement and visual comparison. The steps taken by the witnesses to reach their conclusions are, in my view, likely to be exposed; and the jury will be in a position to assess for itself the validity of the conclusions reached.

Exclusion on discretionary grounds

[53] The applicant submitted that the evidence of Mr Kennedy and Dr Jones should be excluded because its probative value was outweighed by its prejudicial effect.[24]

[54] In addition to the general reliability issues previously mentioned, the applicant identified a number of matters which were submitted to affect the probative value of the evidence of Mr Kennedy and Dr Jones. They included the following:
(a) uncertainty as to whether the foot impressions at the Singh family home were made by the feet of a person wearing socks; and if so, the thickness of the socks;
(b) the presence of the void areas in one of the foot impressions found at the Singh family home;
(c) the possibility that one foot impression included the superimposition of another impression (on Professor Vernon's evidence);
(d) the likely difference between the volume and concentration of bleach which resulted in the foot impression at the Singh family home, and the volume and concentration of bleach used to take sample foot impressions from the applicant;

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22 [2011] 1 Cr App R 9.
23 *Phipson on Evidence* (Thomson Reuters, London: 17th ed, 2010) at 1133.
24 Relying on *R v Tran* (1990) 50 A Crim R 233; *R v Lucas* [1992] 2 VR 109.

(e) the indistinct nature of the impressions made on the carpet;
(f) uncertainty about the time for which the feet which left the impressions at the Singh family home were in contact with the carpeted surface;
(g) (with respect to Mr Kennedy's evidence), his failure to consider that a foot impression was left only on every second (or in one case on the third) stair;
(h) potential differences in the carpet used for test purposes, and the failure to use an underlay;
(i) failure to take into account that the applicant had an antalgic gait;
(j) (in Mr Kennedy's case) the absence of precise scientific measurements and what were described as "amorphous statements";
(k) the fact that on one occasion Mr Kennedy expressed the view that the second toe in one of the foot impressions from the Singh family home was the same height as the first toe; and on another occasion that the second toe was either equal in length or slightly longer than the first toe;
(l) the effect of covering a number of the impressions with newspaper for a number of days;
(m) the fact that the crime scene was contaminated by shoe prints were left by a police officer, and possibly emergency services personnel;
(n) the fact plastic sheeting was placed over the carpet;
(o) the spilling of fingerprint chemicals on the carpet.

[55] For the applicant, it was submitted that the evidence was prejudicial because of the undue weight likely to be given to the evidence of experts, relying in particular on statements taken from *R v LM*[25] and on what has been described as the "white coat effect".[26]

[56] For the prosecution, it was submitted that the probative value of the evidence sought to be excluded is not to be assessed in isolation from the rest of the case, and without consideration of its intended use.[27] The risk of prejudice found in *LM* is not to be found in the evidence proposed to be called in the present case. In any event, that risk can be adequately addressed by an appropriate direction.[28]

[57] Both parties referred to *R v Hasler; ex parte Attorney-General*[29] where Thomas J pointed out that exclusion should occur only when the evidence in question is of relatively slight probative value; and the prejudicial effect of its admission would be substantial.[30]

[58] Looked at in isolation from the rest of the evidence in the case, the evidence of Mr Kennedy and Dr Jones is not probative of the applicant's guilt.[31] It is difficult to assess its true strength without a knowledge of the totality of the prosecution case, and the opportunity to determine what support it gives to or derives from other evidence.[32] Such an approach may, in some cases, make it difficult for an applicant to establish that the discretion to exclude such evidence should be exercised.

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25 [2004] QCA 192.
26 See *Morgan v R* [2011] NSWCCA 257 at [146].
27 Relying on *Festa v R* (2001) 208 CLR 593 at [5]-[9], [13], [14], [63].
28 Referring to *Gilbert v R* (2000) 201 CLR 414 at [13].
29 [1987] 1 Qd R 239.
30 Ibid at 251; see also 245-246 per Connolly J.
31 See the observation of Gleeson CJ in respect of some of the evidence relating to identification in *Festa v R* (2001) 208 CLR 593 at [6].
32 See the passage from *Murphy v The Queen* (1994) 62 SASR 121 at 128 cited by McHugh J in *Festa* at [63].

However, in the present case, I would not be prepared to refuse the application for this reason alone.

[59] I am not satisfied the prejudicial effect of the admission of this evidence would be substantial. A number of factors lead me to this conclusion. One is the nature of the evidence itself. It simply deals with the question whether the foot impressions found in the Singh home could, or could not, have been made by the applicant. The matter is capable of being relatively easily explored; and of being assessed by the members of the jury. It involves an examination of the foot impressions found in the Singh home, and the samples of foot impressions made by the applicant; and a consideration of physical features identified by the experts as having been considered by them in reaching their conclusion. It is not a case where the use of impressive technical expressions might result in the jury giving the evidence greater weight than it deserves.[33] It seems to me likely that directions would identify the limited nature and the utility of this evidence; at least, I am not satisfied that I should assume the contrary. Plainly the evidence does not positively incriminate the applicant. It can only be regarded as circumstantial evidence, analogous to the "circumstantial identification evidence" referred to in *Festa*. It is therefore likely to attract the usual direction, to the effect that the applicant should not be convicted unless his guilt is the only rational inference that can be drawn from the totality of the evidence.[34]

[60] The evidence is, or at least is analogous to, the identification evidence considered in *Festa*, there described by McHugh J as "weak",[35] and some of which was regarded by Gleeson CJ as, standing alone, not permitting a conclusion of guilt.[36] Notwithstanding the risks generally associated with identification evidence, that did not mandate a conclusion that the evidence was to be excluded.[37] In the present case, the fact that the evidence comes from experts might be said to be an additional factor contributing to prejudice. Given the matters referred to earlier, such additional risk as there may be does not warrant the exclusion of the evidence.

Conclusion

[61] I would refuse the applications.

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33 Compare *R v LM* 2004] QCA 192 at [68].
34 Compare *Shepherd v The Queen* (1990) 170 CLR 573 at 578.
35 *Festa v R* (2001) 208 CLR 593 at [50].
36 *Festa v R* (2001) 208 CLR 593 at [6].
37 Ibid at [23]; see also McHugh J at [51].