IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M162 of 2016

BETWEEN:

THE QUEEN

Appellant

- v -

GLYN DAVID DICKMAN

Respondent

APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR INTERNET PUBLICATION

1.1 The appellant certifies that this submission is in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE RELEVANT ISSUES

2.1 This appeal raises the following questions for consideration –

(a) is reliability a relevant factor in determining the "probative value" of evidence under section 137 of the uniform evidence legislation?; [see **grounds 1-3**] and

(b) does a substantial miscarriage of justice occur in a case where the impugned evidence (adjudged to be wrongly admitted by an appellate court) is not relied upon by the prosecution to prove the guilt of an accused person? [see **ground 4**]

PART III: NOTICE UNDER THE JUDICIARY ACT 1903

3.1 The appellant certifies that it considers that notice is not required to be given under section 78B, Judiciary Act 1903 (Cth) in this appeal.

PART IV: CITATION OF REASONS FOR JUDGMENT

4.1 The decision of the appellate court is cited as *Dickman v R* [2015] VSCA 311.

PART V: STATEMENT OF RELEVANT FACTS

Indictment charges

5.1 The respondent was charged on indictment in the County Court with intentionally causing serious injury (charge 1), recklessly causing serious injury (charge 2), making a threat to kill

John Cain
Solicitor for Public Prosecutions
565 Lonsdale Street Melbourne
Victoria 3000

Telephone: 03 9603 7631
Fax: 03 9603 7460
Email: Caitlin.Seach@opp.vic.gov.au
Ref: 1204024 / C Seach

(charge 3) and theft (charge 4). Charges 1 and 2 were pleaded in the alternative. The respondent pleaded "not guilty" to all charges and a trial proceeded before Judge Coish.

Summary of facts

5.2 In short compass, the relevant facts are as follows.[1]

5.3 In the early hours of 27 September 2009, Faisal Aakbari ("FA") approached the Dallas Showgirls nightclub ("Dallas nightclub") in the Melbourne CBD and entered into a discussion with a number of members of the Hells Angels Motorcycle Club ("Hells Angels") at the entrance. During the course of this discussion, FA falsely stated that he was a member of the Hells Angels in order to gain access to the Dallas nightclub.

5.4 Upon entering the Dallas nightclub, FA was introduced to a number of other men, including the respondent (who was referred to as "Boris" by other Hells Angels members but identified only as the "old man" by FA). FA described the "old man" as having a long beard, long hair (in a ponytail style and either grey, white or blonde in colour) and over 50 years of age. He was wearing a sweatshirt (army style) which was green, grey and white in colour. He was also described as looking like a "rocker" and a member of the Hells Angels. FA described the "old man" as the main person he had contact with at the Dallas nightclub.[2]

5.5 During cross-examination at trial, FA stated that there were no other similarly looking men as the "old man" he had described at the Dallas nightclub. The witness was not challenged on this point. The following exchanges highlight this point:[3]

> Yes, what description did you give?---Yes, as I said the old man, long beard, had a ponytail.
> Yes, and what else?---He was wearing what he called the army shirt, something like that. He looked like a rocker, like one of the Hells Angels, definitely.
> When you say a rocker, you mean because he had a long-ish beard, do you?---Sorry?
> Do you say a rocker because of a beard?---Yes.
> Were there a number of people in that club who look like rockers in the sense of having long-ish beards and being Hells Angels?---In which club are you talking about?
> The Dallas club, before you went back to the club rooms?---Okay, you mean if there was another guy looking like the old man or what's the question now?
> You've used the expression "looking like a rocker", or "looking like a biker" was another expression used yesterday. Were there a number of men in the club who look like rockers or bikers with Hells Angels attire on them? I'm referring to the Dallas club?---No, that was just him.
> What, the only person with a Hells Angels vest and a beard?---Like, a rocker - I think we're talking about the rocker or, like, a - yes.
> ...
> Did you describe him as the oldest guy over there in the club?---You mean the old man?
> Yes, the old man. Did he appear to be the oldest guy?---Yes.
> Correct?---Yes. Yes.

5.6 At some point, FA was directed to drive to the Hells Angels clubroom in Thomastown ("Thomastown clubrooms"). He did not want to leave the Dallas nightclub. The respondent left the Dallas nightclub (with Michael Gerrie) and was driven to the Thomastown clubrooms by Ali Chaouk. By this stage, FA's claim to membership of the Hells Angels was doubted.

5.7 Once the men arrived at the Thomastown clubrooms, FA went to the male toilet – he observed the "old man" in the toilet. FA returned to the main room and was questioned

---

[1] See *DPP v Dickman*, unreported, Vic County Court, 21 November 2014, at [3]-[11] and *Dickman v R* [2015] VSCA 311, at [37]-[56] (majority judgment of Priest JA and Croucher AJA)
[2] See Trial Transcript, 13/10/2014, at 315-317, 382-384, 400-403
[3] See Trial Transcript, 14/10/2014, at 383, 394

about his association with the Hells Angels. FA could not identify any members of the Hells Angels (from overseas clubs) depicted in various photographs. The respondent became aggressive towards FA. At some point, the respondent left but returned with a baseball bat.[4]

5.8 The respondent struck FA to the head with the bat and he fell to the ground. After FA regained his feet, the respondent repeatedly struck him around his head while verbally abusing him. While attempting to protect himself, FA was struck multiple times on his arms and legs. The respondent stopped hitting FA after he ran out of breath. Thereafter, Chaouk continued the assault on FA. The respondent again approached FA, placed a knife near his throat and threatened to kill him and his family if he went to the police. FA stated that his watch, wallet and mobile telephone were stolen but he was not sure by whom. FA was then taken to an unknown location where he was left alone with his vehicle.[5]

5.9 FA was later taken to hospital. He suffered multiple serious injuries, including an injury to his brain, a broken fibula and lacerations. FA was released after 6 days in hospital.[6]

5.10 On 28 September 2009, FA spoke to investigating police about the attack.

5.11 On 29 September 2009 he identified Chaouk from a photoboard. FA also assisted police in designing a "face view" image of the "old man".[7]

5.12 On 2 October 2009, FA was shown CCTV footage from the Dallas Showgirls nightclub and identified five men who were present, including Chaouk and the "old man".[8] FA was shown this footage in court and again identified the "old man" as present.[9] However, investigating police (at the time of the initial identification by FA) mistakenly formed the view that the "old man" identified on the CCTV footage was a man known as Michael Cooper.[10]

5.13 On 5 October 2009, a photoboard (including an image of Cooper) was shown to FA who selected Cooper's photograph (note the photoboard did not contain a photograph of the respondent).[11] However, subsequent police investigations conclusively established that Cooper was not present at the Dallas nightclub on the morning in question.[12] It was not suggested by the defence at trial that Cooper was a possible alternative assailant.[13]

5.14 Later in February 2010, FA was informed by investigating police that he had been mistaken in this particular photoboard identification (in relation to Cooper).

5.15 On 23 August 2011, FA was shown a number of photoboards by police including one with possibilities for the "old man" – this did contain a photograph of the respondent.[14] FA selected the respondent's photograph. At trial, FA was again shown the photoboard and selected the respondent's photograph.[15] At trial, FA accepted that he had selected this

---

[4] See Trial Transcript, 13/10/2014, at 323, 327-329, 399-400
[5] See Trial Transcript, 13/10/2014, at 329-337
[6] See Trial Transcript, 22/10/2014, at 623-628
[7] See Exhibit 2
[8] See Exhibit 3
[9] See Trial Transcript, 23/10/2014, at 344
[10] See Trial Transcript, 24/10/2014, at 700-701
[11] See Exhibit 4
[12] See Trial Transcript, 10/10/2014, at 216-217
[13] See Trial Transcript, 24/10/2014, at 684
[14] See Exhibit 5
[15] See Trial Transcript, 23/10/2014, at 347

photograph because this image was the closest to his memory of what the "old man" looked like.[16]

5.16 FA also correctly identified a photograph of the baseball bat used by the "old man" which had been seized from the Thomastown clubrooms and, in one of two photographs he selected, FA identified a photograph of the knife which had also been seized by investigating police.

At trial in the County Court

5.17 The principal issue at trial was the identity of the "old man" as FA's attacker.[17]

5.18 The prosecution case was that the respondent was the "old man". The prosecution relied on FA's account of the offending and of the "old man" having a long beard and a ponytail, the relevant similarities between the respondent and the "face view" image and FA's identification of the "old man" in the CCTV footage. FA's identification of the respondent in the photoboard exercise in August 2011 was led in effect to counter-balance the Cooper misidentification evidence.

5.19 The prosecution also relied on telephone records which showed the respondent's movements – these included numerous telephone calls and text messages demonstrating the movement of the respondent from South Australia to Melbourne on 26 September 2009. The prosecution tendered telephone intercept material (from Chaouk's telephone) involving a person called "Boris" – including calls where Chaouk states that Boris is with him at the Dallas nightclub and that he is going to take Boris back to the "clubhouse".[18]

5.20 Michael Gerrie was an important witness who also gave evidence for the prosecution. Gerrie testified that he had driven from Adelaide to Melbourne with the respondent on 26 September 2009; that he knew the respondent as "Boris"; that the respondent was a member of the Hells Angels; that the respondent was with him at the Dallas nightclub at the relevant time (the witness identified the respondent on the CCTV footage); and that he and the respondent travelled from the Dallas nightclub to the Hells Angels clubrooms in Thomastown.[19] Under cross-examination, Gerrie stated that he could not recall whether there were other old men with beards at the Thomastown clubrooms – this was at the point when he was about to leave.[20] Critically, Gerrie was not directly challenged by the defence on his identification of the respondent as being present at the relevant time.

5.21 The prosecution played before the jury all 23 tracks of the CCTV footage taken from the Dallas nightclub – this included track 1 where FA identifies the "old man" and tracks 16, 18 & 23 where Gerrie identifies "Boris".[21] The jury had this footage as an exhibit for comparison purposes[22]– it was never suggested by the defence at trial that it was not the same person that was being identified by the two witnesses. However, the defence did dispute that the person so identified was the respondent.[23]

---

[16] See Trial Transcript, 23/10/2014, at 410-411, 422-423, 425

[17] The issues at trial and the respective prosecution and defence cases are described in the majority judgment of the Court of Appeal – see *Dickman v R* [2015] VSCA 311, at [37], [40], [56], [57]-[61]

[18] The prosecution adduced evidence which established that the respondent was known as "Boris" within the Hells Angels.

[19] See Trial Transcript, 23/10/20145, at 642-647

[20] See Trial Transcript, 23/10/2014, at 651

[21] See Trial Transcript, 24/10/2014, at 687-689

[22] See Exhibit 22

[23] See Trial Transcript, 27/10/204, at 733-734

5.22 The critical importance of these two pieces of identification evidence is illustrated by the following exchange between the trial judge and defence counsel (prior to closing addresses):[24]

> HIS HONOUR: Of course, the Crown case is - well, as you know, the jury might not need to consider all of these various matters like the description and the photoboards or anything of the sort if they accept that the complainant identified the old man as being the person depicted in the video and they accept Mr Gerry's [sic] evidence that the old man is the accused.
> MS SHAW: Yes, that's right.
> ...
> HIS HONOUR: If Boris is the old man, all over red rover. That's the end of the case.
> MS SHAW: That's very well the case.

5.23 Further, the prosecution relied on a video search of the respondent's premises in February 2010 (including a depiction of the respondent and a recording of his voice) and invited the jury to conclude that the depiction of the "old man" in the CCTV footage was the respondent and that it was the respondent's voice in the telephone intercept material. Further, items seized from the respondent's premises included documents that had the name "Boris" on them.[25]

5.24 During the search police also seized a mobile "flip" telephone from the respondent. This tied in with the CCTV footage played to the jury which showed the "old man" leave the Dallas nightclub, check his mobile telephone before folding it and placing it into his pocket. The footage also shows this person as wearing a "camouflage" type jacket. Further, the time recorded on the footage when the "old man" is seen leaving the Dallas nightclub is approximately 4.40 am – telephone records show a call made from the respondent's mobile telephone to another person (Bernard Saltsufor) at 4.42 am.

5.25 In short, the defence case was that the "old man" described by FA was not the respondent. The respondent did not give or call evidence at trial.[26]

5.26 With respect to identification, the defence contended that the jury should not accept the prosecution evidence because of inconsistencies between FA's description of the "old man" and the respondent's physical appearance, FA's earlier photoboard identification of Cooper as his attacker and potential contamination of the 23 August 2011 photoboard identification.

5.27 Whilst the defence case was that the respondent was not present at the Thomastown clubrooms when the offending occurred,[27] it was not disputed, however, that the offending did occur.[28] Furthermore, the defence accepted that the respondent was in Melbourne during that week and that Gerrie knew the respondent.[29]

5.28 As to the CCTV identifications, the defence contended that such evidence was unreliable as Gerrie had nominated the respondent as the "old man" yet Detective Blezard had nominated the same person as Michael Cooper.[30]

5.29 On 30 October 2014, the respondent was convicted by jury verdict of intentionally causing serious injury (charge 1) and making a threat to kill (charge 3) following a 15 day trial.

---

[24] See Trial Transcript, 27/10/2014, at 735, 741
[25] See Trial Transcript, 23/10/2014, at 665-666
[26] See Trial Transcript, 27/10/2014, at 729, 753
[27] See Trial Transcript, 24/10/2014, at 685
[28] See Trial Transcript, 6/10/2014, at 10, 84
[29] See Extract – Closing Address, 27/10/2014, at 46; 28/10/2014, at 63
[30] See Extract – Closing Address, 28/10/2014, at 63-64

5.30 On 21 November 2014, the respondent was sentenced by Judge Coish to a total effective sentence of 8 years imprisonment with a non-parole period of 5 years 6 months imprisonment fixed.

On appeal to the Court of Appeal

5.31 The respondent sought leave to appeal against conviction and sentence. On 23 November 2015, the Court of Appeal by majority judgment, allowed the appeal against conviction (on ground 2 only) and ordered a re-trial.

10

PART VI: STATEMENT OF ARGUMENT

Ruling by trial judge

6.1 It was contended by the defence that the August 2011 photoboard identification should be excluded under section 137, Evidence Act 2008 (Vic) as the probative value of the evidence (contended to be either none or slight) was said to be outweighed by the risk of unfair prejudice. The defence relied on a number of factors in seeking discretionary exclusion.[31]

20

6.2 The prosecution accepted that the probative value of the evidence was in the "moderate to low" range (said to result from the general problems associated with photoboard identifications, the delay in the case and the misidentification of Cooper). However, the prosecution contended that the evidence should not be excluded on the basis of risk of unfair prejudice as the defects in the evidence were readily apparent to any jury and that any risk could be cured by judicial directions.[32]

6.3 In addition, the prosecution contended that the photoboard identification should be admitted on the general ground of fairness – given that the photoboard identification of Cooper was
30 likely to be put into evidence through cross-examination, then the prosecution should be entitled to lead the latter identification of the respondent by way of rebuttal. However, and importantly, the prosecutor agreed with the trial judge that this point was not part of the section 137 balancing exercise.[33]

6.4 The trial judge summarised the defence position as follows:[34]

> It was submitted on behalf of the defence that the identification of the accused from a photoboard was an inferior form of identification which necessarily had aspects of unreliability. In this case there have been two positive identifications from photoboards, the identification of Cooper on 5 October 2009 and the identification
> 40 of the accused on 23 August 2011. It is submitted on behalf of the defence that the effect of the first positive identification of Cooper is to render the subsequent positive identification of the accused of nil probative value. If it is not accepted that there is nil probative value in the identification of the accused, the probative value is slight and it is further reduced by the following factors.
>
> (1) Delay. There has been great delay before the identification of the accused on 23 August 2011;
> (2) it is submitted that there has been severe contamination of the complainant's memory and there is a displacement effect in that the complainant, having seen the photo of and identified Cooper as his assailant is endeavouring to identify a person of similar appearance to Cooper;
> (3) the complainant had a preconceived view that a photo of his assailant was included in the August 2011
> 50 photoboard;
> (4) there are significant differences between the complainant's descriptions of his assailant, the "old man", the face-view likeness and the photo of the accused;

---

[31] See Trial Transcript, 9/10/2014, at 85-87, 225-272; 433-469, 476-488; *Dickman v R* [2015] VSCA 311, at [81]
[32] See Trial Transcript, 9/10/2014, at 273-280; 474-476; *Dickman v R* [2015] VSCA 311, at [82]
[33] See Trial Transcript, 10/10/2014, at 280; *Dickman v R* [2015] VSCA 311, at [83]
[34] See Trial Transcript, 16/10/2014, at 529-531

(5) the array of photos on the photoboard is not a fair representation; in particular only the accused had a long beard; (See R v. Blick (2000) N.S.W.C.A. 61)
(6) on 23 August 2011 the complainant was shown seven photoboards. After identifying the accused he failed to correctly identify three other relevant persons and did not correctly identify one knife;
(7) the photoboard had two photos of one person, therefore although there were 12 photos there were only 11 persons;
(8) the quality of some of the photos on the photoboard was poor;
(9) the informant, rather than an entirely independent police officer unknown to the complainant conducted the photoboard identification;
(10) the informant acted inappropriately in his comments and actions when the purported identification was being made by the complainant.

It was therefore submitted that if there was any probative value in the photoboard identification of the accused by the complainant on 23 August 2011 in view of the earlier identification by the complainant of Cooper it was further reduced by these factors.

It was submitted by the defence the probative value was outweighed by the danger of unfair prejudice to the accused. The unfair prejudice being that the jury could assign too much weight to the photoboard identification evidence.

6.5 The trial judge summarised the prosecution position as follows:[35]

It is accepted by the prosecution that there are difficulties associated with identification from photoboards. These difficulties have been referred to in numerous authorities. It is submitted on behalf of the prosecution that, having regard to these matters and the delay, the probative value of the photoboard evidence in the absence of the mistaken identification of Cooper could be in the moderate to low range; and having regard to what the prosecution submits is a mistake in the identification of Cooper, the probative value of this evidence would be further reduced.

The prosecution submits that the evidence does, however, retains [sic] some probative value. It is submitted on behalf of the prosecution that there is no danger of unfair prejudice to the accused as the defects in the evidence are readily apparent and the real risk of misidentification is demonstrated in the earlier identification of Cooper. Further, this evidence will be the subject of detailed directions to the jury which will ameliorate any danger of unfair prejudice.

6.6 The trial judge refused to exclude the evidence under section 137 holding:[36]

I do not accept the defence submission that the probative value of the evidence of the identification of the accused on 23 August 2011 is nil having regard to the earlier identification of Cooper. In my opinion, the earlier identification of Cooper does reduce the probative value of the identification of the accused but it does not extinguish it. I do not accept that what may be a mistake in identification by a witness means that any subsequent identification evidence from that witness has no probative value and is therefore inadmissible.
...
The array of photos on the photoboard is, in my opinion, reasonable. I do not accept that it is correct to suggest only the accused is seen with a long beard. Looked at overall, I consider this to be an array of sufficiently similar photos and I consider the quality of images to be acceptable. Whilst there are two photos of one person they are different photos of that person and I do not consider this to be of any consequence.

The complainant has embarked on a number of photoboard examinations of persons with varying results. This is relevant in assessing his reliability. He has made mistakes. This is relevant. It is also relevant that he had a belief or hope that his assailant would be on the photoboard. He was told in the preamble read to him by Sergeant Condon that he should not conclude or guess that the photoboard contained the image of the person he had been asked to identify.

There has been great delay in this identification. This is relevant as ordinarily it would be expected that memory would be adversely affected by the effluxion of time. I do not accept that it is likely there has been any displacement or contamination by virtue of the complainant's selection of the photo of Cooper. The complainant only saw the Cooper photo on one occasion on 5 October 2009.
...
The risks associated with identification evidence, particularly from photoboards, and the particular dangers in this case will be the subject of detailed directions to the jury.

---

[35] See Transcript, 16/10/2014, at 531-532
[36] See Transcript, 16/10/2014, at 532-535

In accordance with *R v Dupas* I have, in undertaking the balancing exercise required by s 137, made some assessment of the way [sic, weight] the jury could, acting reasonably, give to the identification evidence the prosecution seek to adduce. I have assessed the risk of the jury attaching more weight to the identification evidence than it deserves.

I have assessed the probative value the jury could assign to this evidence. I am satisfied that, despite the earlier identification of Cooper and delay, this identification evidence could have *some, albeit relatively low, probative value.* I have carefully considered the danger of unfair prejudice to the accused. The concept of unfair prejudice has been discussed in many authorities. I note that in R v Darwiche (2006) NSWSC 924, Bell stated:

> "The danger of unfair prejudice to which s.137 is directed is the danger that the jury may misuse the evidence in some unfair way...."

In the particular circumstances of this case, *I assess that risk or danger is minimal.* I am not satisfied that the probative value of the evidence is outweighed by the danger of unfair prejudice.

Accordingly the identification evidence is admissible. [emphasis added]

6.7 The trial judge assessed the "danger of unfair prejudice" in accordance with authority.[37] In this case, the impugned evidence could be tested by reference to the earlier misidentification of Cooper by FA. Furthermore, as the Victorian Court of Appeal unanimously noted in its judgment in ***Dupas v R***:[38]

> Appropriate warnings are generally likely to remove any real risk of identification evidence being given greater probative value than the evidence deserves.

Grounds of appeal in court below

6.8 Grounds 1 and 2 of the appeal against conviction in the court below were interrelated.

6.9 Ground 1 of the appeal complained as to the admissibility of the identification evidence relating to the August 2011 photoboard identification. The defence at trial had objected to the admission of this photoboard identification. The trial judge ruled that the identification evidence was admissible under section 114, Evidence Act 2008 (Vic). This ground of appeal was dismissed in the court below.

6.10 Ground 2 of the appeal was framed as follows:

> Alternatively as to ground 1, the learned judge erred in failing to exercise his discretion to exclude the evidence of identification based on the second photographic array contrary to section 137 of the Evidence Act 2008.

6.11 This ground of appeal was upheld by Priest JA and Croucher AJA in a joint judgment; with Whelan JA dissenting in a separate judgment. A retrial was ordered.

6.12 The appellant submits as follows –

(i) that the trial judge did not err in refusing to exercise his discretion to exclude the evidence of identification based on the August 2011 photographic array contrary to section 137, Evidence Act 2008; [**grounds 1-3**] and

(ii) in any event, no substantial miscarriage of justice was occasioned in this particular case by the admission of the impugned evidence when regard is had to the conduct of the prosecution in proving its case (the impugned evidence was not relied upon to prove the guilt of the respondent) **[ground 4]**.

---

[37] See, for example, *R v BD* (1997) 94 A Crim R 131; *R v Darwiche & Ors* (2006) 166 A Crim R 28

[38] (2012) 40 VR 182, at [177] per Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA

Preliminary issue

6.13 Photoboard evidence has been routinely admitted into criminal trials for the purposes of identification. Importantly, common law principles have been developed over the years by appellate courts to ensure that juries are made aware of the limitations and potential dangers of such evidence.[39]

6.14 Section 114 (visual identification evidence) and section 115 (picture identification evidence) of the uniform evidence legislation are statutory provisions dealing with identification evidence which, if applicable, trump the common law.

6.15 It was eventually agreed between the parties at trial that the admission of the photoboard evidence was governed by section 114 of the uniform evidence legislation – this was because apparently it was considered that the photographs used in the relevant photoboard exercise had not been "kept for the use of police officers" (within the meaning of that expression as used in section 115(1)). The trial judge ruled on this basis. In hearing the grounds of appeal, the Court of Appeal proceeded on the same basis.[40]

6.16 The relevant definitional provisions are reproduced (in part) as follows:

Section 114 - Exclusion of visual identification evidence

(1) In this section, ***visual identification evidence*** means identification evidence relating to an identification based wholly or partly on what a person saw but does not include picture identification evidence.

Section 115 - Exclusion of evidence of identification by pictures

(1) In this section, ***picture identification evidence*** means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers.

6.17 It may be doubted that section 114 in fact applied – rather section 115 of the Act relates to "picture identification evidence" and it is submitted that the section does not require the pictures used for identification purposes be kept for any particular period of time by police officers. A photoboard is a standard investigative tool for police and section 115(1) should not be construed in such a strict sense (as was done in this case). In short, the various pictures were being kept for the purpose of identification of potential suspects. The relevant expression is not a legal term of art; and nor should evidence be generally required to prove that photographs produced in a photoboard were kept by police officers for their use.

6.18 The very fact that a photoboard is produced by investigating police is prima facie evidence that such pictures are kept for the use of police officers in the discharge of their investigative duties (and it is irrelevant as to whether the pictures have been "kept" for a very limited period of time or indeed indexed/catalogued for investigative purposes). Indeed, where the picture identification occurs when an accused person is in custody, section 115(3) requires that a photoboard contain a picture of the accused that has been taken after the accused was taken into custody – this provision obviously contemplates the keeping of a relevant picture for a very short period of time prior to the identification process.

6.19 Somewhat interestingly, defence took this position initially on the voir dire – however, as counsel pointed out, it was not contended that there was a breach of the provisions of section

---

[39] See, for example, *Alexander v The Queen* (1981) 145 CLR 395; *Domican v The Queen* (1992) 173 CLR 555; *Festa v The Queen* (2001) 208 CLR 593

[40] See *Dickman v R* [2015] VSCA 311, at [74]

115.[41] In response, the prosecutor adopted a different view, contending that section 114 applied as section 115 only dealt with picture identification when an accused person is in custody.[42] The defence then conceded the point.[43]

6.20 After further reflection, the prosecutor later submitted that her initial position was wrong and that section 114 did not apply to the photoboard identification citing the general approach taken in both New South Wales and the Australian Capital Territory; and, as the respondent was not in custody at the time of identification, section 115 did not also apply.[44] However, it was contended by the prosecutor that if both provisions of the uniform evidence legislation did not apply, then the photoboard identification remained admissible under the common law.

6.21 In response, defence counsel maintained that the photoboard identification fell under section 114 as it was "visual identification evidence".[45] It was contended that as section 115 did not apply because the respondent was not in custody, then section 114 should apply as it was in the nature of a "remedial" provision.

6.22 In reply, the prosecutor conceded that section 115 did not apply as there was no clear evidence that the photographs the subject of the identification in August 2011 were "kept for the use of police officers" within the meaning of sub-section (1).[46] As indicated above, this narrow construction of the provision does not promote the plain purpose of the provision.

6.23 On this issue, the trial judge ruled as follows:[47]

> The evidence the prosecution seeks to adduce is identification evidence as defined. The admissibility of Identification Evidence is governed by part 3.9 of the Evidence Act 2008 and subject to part 3.11, Discretionary and Mandatory Exclusions.
>
> ...
>
> As there is no evidence before me that all the pictures on the photoboard shown to the complainant on 23 August 2011 were, "Pictures kept for the use of police officers", I am not satisfied this is "picture identification evidence" as defined. Accordingly the identification by the complainant of the accused's photo on 23 August 2011 is "visual identification evidence" as defined.

6.24 The approach adopted by the trial judge is inconsistent with the decision of the New South Wales Court of Criminal Appeal in ***Blick v R***.[48]

6.25 In any event, and most importantly, nothing turns on the resolution of this preliminary issue – the photoboard identification was admissible as relevant evidence under section 56 of the Act (there being no breach of section 115 requirements); and the issue of section 137 discretionary exclusion would have been likewise engaged.

Discretionary exclusion - majority judgment

6.26 The majority (Priest JA and Croucher AJA) concluded that FA was an unreliable witness in terms of identification of his attacker – this was based on his misidentification of Cooper as

---

[41] See Trial Transcript, 10/10/2014, at 255-256, 260-261
[42] See Trial Transcript, 10/10/2014, at 274-277
[43] See Trial Transcript, 10/10/2014, at 277-278, 286
[44] See Trial Transcript, 15/10/2014, at 430-433
[45] See Trial Transcript, 15/10/2014, at 434-440
[46] See Trial Transcript, 15/10/2014, at 451-452
[47] See Trial Transcript, at 523-524
[48] (2000) 111 A Crim R 326; see also *R v Darwiche & Ors* (2006) 166 A Crim R 28

his assailant, the delay in selecting the respondent's photo as being closest to the "old man" and other misidentifications of persons said to be present.[49]

6.27 The majority held it to be significant that FA had misidentified Cooper as his assailant some 9 days after the attack.[50] However, it must be remembered that investigating police also had made a similar mistake – after viewing the CCTV footage, Detective Blezard wrongly concluded that the "old man" shown in the footage was Michael Cooper.

6.28 Importantly, the appellant submits that it must not be forgotten that FA had picked out the "old man" from the CCTV footage as being present during the attack – this identification had occurred some 3 days prior to the misidentification of Cooper from the relevant photoboard. Furthermore, the "old man" depicted in the CCTV footage was identified as the respondent by Gerrie – that testimony that was not challenged by the defence at trial.

6.29 Thus, the only real issue for the prosecution was to exclude (to the relevant criminal standard) the possibility of another person closely resembling the "old man" being present at the Dallas club and at the Thomastown clubrooms.

6.30 In determining the section 137 question, the majority applied the recent Victorian decision of the Court of Appeal in ***Dupas v R*** which permits questions of reliability to be considered in assessing the "probative value" of the relevant evidence.[51] Their Honours stated:[52]

> In assessing probative value, a trial judge must evaluate the weight that the jury could rationally attach to the evidence. When undertaking the required balancing exercise, the judge is not required to assume that the reliability of the impugned evidence will be accepted. In determining the capacity of the evidence rationally to affect the determination of a fact in issue – in this case identity – the judge must make some assessment of the weight that the jury could, acting reasonably, give to the evidence. If it is contended that the quality of the evidence (or, perhaps, its weaknesses) might result in the jury giving it more weight than it deserved, the judge must assess the extent of the risk. The judge is not required to gauge the weight that the jury will give the evidence, however, but instead must assess what probative value the jury could give the evidence, and balance against it the risk that the jury will give it disproportionate weight.

6.31 The majority agreed with the trial judge's conclusion that the probative value of the impugned identification was low; but was unable to agree with the assessment that the risk of unfair prejudice was minimal. In short, the majority concluded that the probative value of the evidence was outweighed by the risk of unfair prejudice.[53]

6.32 The majority ascribed 5 reasons for their conclusion as follows –

(1) that FA was an "unreliable" witness in terms of identification (both as to his assailant and other persons who were also said to be present);[54]

(2) the delay of almost 2 years in FA's identification of the respondent as the "old man" in August 2011;[55]

(3) the risk of contamination (both as to the misidentification of Cooper and the possible displacement effect from his viewing of the CCTV footage);[56]

---

[49] See *Dickman v R* [2015] VSCA 311, at [96]-[97]
[50] See *Dickman v R* [2015] VSCA 311, at [50]
[51] (2012) 40 VR 182
[52] See *Dickman v R* [2015] VSCA 311, at [98]
[53] See *Dickman v R* [2015] VSCA 311, at [102], [110]
[54] See *Dickman v R* [2015] VSCA 311, at [104]
[55] See *Dickman v R* [2015] VSCA 311, at [105]
[56] See *Dickman v R* [2015] VSCA 311, at [106]

(4) that FA had a preconceived view that the relevant photoboard shown to him in August 2011 would contain a photograph of his assailant;[57] and

(5) that the selection was based on a photograph closest to FA's memory of what the "old man" looked like.[58]

6.33 In concluding that the trial judge had erred, their Honours stated:[59]

> On the other hand, there is a seductive quality to identification evidence that is difficult to ameliorate by judicial direction. The prosecution argued that the frailties of the evidence were exposed for the jury's consideration, and that the judge's directions would mitigate any prejudicial effect that admitting the evidence might have. Those matters, however, provide no answer to the intrinsic lack of probative value in the evidence.

6.34 Several things must be said about this conclusion.

6.35 First, as to the seductive quality of identification evidence being difficult to ameliorate by judicial direction, the majority cited this Court's decision in ***Domican v The Queen*** as authority for such a proposition.[60] But, with respect, *Domican* provides no such support – what this Court did say was that where evidence as to identification represents a significant part of the prosecution case, the jury must be warned by the trial judge as to the dangers of convicting on such evidence where its reliability is disputed. Importantly, nowhere in the judgment is it suggested that such a judicial warning cannot overcome the "seductive effect" of identification evidence. In fact, as this Court recently pronounced in ***Dupas v The Queen***, it is a constitutional dimension of the criminal law that juries act on the evidence and in accordance with the directions of a trial judge.[61]

6.36 Secondly, all of the above factors (adumbrated at para 6.32) generally relate to the reliability of FA's evidence – but, as Whelan JA points out in his minority judgment, this factor is irrelevant to any assessment of the risk of unfair prejudice.[62] These factors, in combination, resulted in the probative value of the identification evidence being properly assessed as "low",[63] but were quite irrelevant to the risk limb of the section 137 exercise.

6.37 Thirdly, the finding by the majority as to the "intrinsic lack of probative value" in the relevant photoboard identification evidence does not sit well with their earlier finding that the trial judge was correct in assessing the probative value as "low".

6.38 Fourthly, the majority concluded that the evidence of identification by FA of the respondent in August 2011 should have been excluded under section 137. Put simply, the "unreliability" of the evidence was critical to this conclusion – and thus, the correctness of the *Dupas* approach requires examination (see below).

6.39 Finally, the majority concluded that the failure to exclude the impugned evidence resulted in a substantial miscarriage of justice.[64] The appellant also challenges that conclusion particularly in light of how the prosecution case was presented before the jury (see below).

---

[57] See *Dickman v R* [2015] VSCA 311, at [107]
[58] See *Dickman v R* [2015] VSCA 311, at [108]
[59] See *Dickman v R* [2015] VSCA 311, at [111]
[60] (1992) 173 CLR 555, at 561-562, per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ
[61] (2010) 241 CLR 237, at 248 [28] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ
[62] See *Dickman v R* [2015] VSCA 311, at [8]
[63] See *Dickman v R* [2015] VSCA 311, at [109]
[64] See *Dickman v R* [2015] VSCA 311, at [113]-[114]

Minority judgment

6.40 Whelan JA also agreed with the conclusion by the trial judge that the probative value of the August 2011 identification was "low" (reasons for this conclusion included the earlier misidentification of Cooper, the other mistaken photoboard identifications, the delay in the photoboard identification of the respondent, and the mindset of FA in selecting the respondent's photograph at the relevant time).[65]

6.41 Whelan JA also agreed with the trial judge's conclusion that the risk of unfair prejudice was "minimal", thus departing from the majority on ground 2.[66]

6.42 The departure by Whelan JA was justified on the following 2 grounds –

(1) evidence of all of the factors which led to a reduction in the probative value of the identification evidence was led before the jury (including mistakes FA made in other photoboard identifications);[67] and

(2) the trial judge was able to (and did) give careful directions to the jury about identification evidence.[68]

6.43 Importantly, Whelan JA disagreed with the approach adopted by the majority as to the resolution of this ground:[69]

> When considering the trial judge's conclusion as to the risk of unfair prejudice, it is not to the point to address the circumstances which reduced the probative value of the evidence. That was not the issue. The relevant issue was whether the jury could comprehend the risk of unreliability and deal with it accordingly. Priest JA and Croucher AJA suggest that identification evidence has a "seductive quality" which is difficult to ameliorate by judicial direction. This may be so. When all that a jury hears is the controversial identification evidence and a judicial direction, the risk of misuse or disproportionate weight may be real. That was not the case here. The concerns to be guarded against here could not only be stated, they could be demonstrated, and they were to be demonstrated in evidence before the jury.
>
> It was in those circumstances that the trial judge concluded that, notwithstanding the factors which made the evidence less probative, the risk or danger of misuse was minimal.

6.44 Whelan JA noted that the photoboard misidentification of Cooper formed the central plank of the defence case – thus, assessing all the evidence in the context of the trial as a whole, no substantial miscarriage of justice was occasioned by the admission of the photoboard identification of the respondent. In fact, his Honour went one step further – the evidence of the photoboard identifications was "advantageous" to the defence given the number of mistaken identifications made by FA.[70]

Analysis

6.45 Putting to one side the correctness of the decision in ***Dupas v R*** (see below), the appellant submits that the conclusion by the trial judge (and as supported by the dissenting judgment of Whelan JA) is unquestionably correct.

6.46 The deficiencies in the identifications by FA were placed before the jury. The deficiencies were highlighted by defence counsel during both cross-examination of witnesses and in the closing address. In fact, the deficiencies were also exposed by the prosecutor in her closing

---

[65] See *Dickman v R* [2015] VSCA 311, at [2]
[66] See *Dickman v R* [2015] VSCA 311, at [3], [9], [29]
[67] See *Dickman v R* [2015] VSCA 311, at [4], [6]
[68] See *Dickman v R* [2015] VSCA 311, at [5]
[69] See *Dickman v R* [2015] VSCA 311, at [8]-[9]
[70] See *Dickman v R* [2015] VSCA 311, at [15], [20]-[24]

address.[71] In this case, the jury was not required to grapple with abstract notions as to the dangers of identification evidence, but rather the deficiencies were graphically demonstrated before them.

6.47 And importantly, the trial judge gave careful directions to the jury on the topic of identification evidence – without any exception taken by the defence.

6.48 In terms of directions, the trial judge gave an extensive general warning about identification evidence, which included the CCTV footage.[72] For example, the trial judge stated:[73]

> The experience of the law has shown that people have been wrongly convicted because even respectable and honest witnesses have given mistaken evidence confidently identifying them as the offender. Because of this risk of unjustly convicting the wrong person, identification evidence must be treated with great care. Now I am not saying that you should not rely on identification evidence. However, to avoid a possible miscarriage of justice, you must take the potential unreliability of identification evidence into account in determining whether you accept such evidence and if you do accept it, in deciding what weight to give to that evidence. You should examine all identification evidence with special care and be especially cautious before accepting such evidence as correct and relying on it.

6.49 In addition, the trial judge gave directions on the specific factors that can affect the reliability of identification evidence.[74] On the topic of photographic identification, the trial judge stated:[75]

> I need to give you an additional warning about photographic identification evidence. This sort of evidence may be unreliable due to the differences between photographs and real life.... It may look like the accused has seen in a photograph but may look different when viewed face to face. You should therefore treat photographic identification evidence with special care.

6.50 In dealing with the photoboard identifications, the trial judge directed on the discrete topics of displacement and FA's earlier identification of Cooper as the "old man".

6.51 The trial judge concluded his directions on this topic with this final reminder:[76]

> Just to summarise, it is important you take special care in determining whether you accept identification evidence and if you do accept it in deciding what weight to give to that evidence, you must consider the general dangers of identification evidence as well as any particular weaknesses of the evidence in this case. Some of the matters that you must consider include the circumstances in which the offender was observed, the characteristics of the witness and what state he was in at the time of the observation and the way in which the accused was identified.

Decision in Dupas v R

6.52 The relevant provision for discretionary exclusion of evidence is section 137 of the Evidence Act 2008 (Vic). That section provides:

> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

6.53 In ruling on the section 137 application, the trial judge applied the Victorian decision of ***Dupas v R***. In the context of discretionary exclusion, the decision in *Dupas* is a landmark

---

[71] For example, the prosecutor stated: "I've said some unkind things, some harsh things about the photo ID and that there's problems associated with that." - see Extract – Closing Address, 27/10/2014, at 38
[72] See Charge Transcript, 28/10/2014, at 781-783
[73] See Charge Transcript, 28/10/2014, at 783
[74] See Charge Transcript, 28/10/2014, at 783-785, 791-797
[75] See Charge Transcript, 28/10/2014, at 795
[76] See Charge Transcript, 28/10/2014, at 797

judgment in Victoria. The Victorian Court of Appeal declined to follow the line of well-established authority laid down in the New South Wales decision of ***R v Shamouil.***

6.54 For the purposes of this appeal, it is only necessary to briefly refer to the conflict between the Victorian and New South Wales authorities (as to the relevance of "reliability" in any assessment of the probative value of evidence) in light of this Court's recent decision in ***IMM v The Queen.***

6.55 In ***Dupas v R,***[77] the accused was found guilty of murder. Four witnesses identified the accused, or someone resembling the accused, as being in the vicinity at around the time of the murder. The defence case was that the identification witnesses were mistaken and unreliable. The accused sought leave to appeal against his conviction on several grounds, including that the trial judge should have had regard to the reliability of the identification evidence when determining its admissibility pursuant to s 137 of the Act.

6.56 The Victorian Court of Appeal held that the trial judge undertaking the balancing task under section 137 was only obliged to assume that the jury will accept the evidence to be truthful, but was not required to assume that its reliability will be accepted. The Court held that such a construction did not involve any encroachment upon the traditional jury function. The approach taken in the New South Wales decision of *Shamouil* was expressly rejected.[78]

6.57 In ***R v Shamouil,***[79] the New South Wales Court of Criminal Appeal held that when determining the "probative value" of evidence under provisions of the Evidence Act 1995 (NSW), a court should not take into account issues of reliability. Spigelman CJ observed:[80]

> The preponderant body of authority in this Court is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility. There is no reason to change that approach.

6.58 Unsurprisingly, the correctness of the approach propounded in *Dupas* surfaced quickly.[81]

6.59 In ***R v XY,***[82] the New South Wales Court of Appeal held that section 137 did not require an assessment of the credibility, reliability or weight of the evidence under examination as those are matters to be left to the jury to determine once the evidence is admitted.[83] The decision in *Shamouil* was followed in preference to that endorsed in *Dupas*.

6.60 The conflict was resolved by this Court in the recent decision of ***IMM v The Queen.***[84] In that case, French CJ, Kiefel, Bell and Keane JJ jointly held that, when assessing the probative value of evidence for the purposes of section 137, a trial judge must proceed on the assumption that the jury will accept the evidence. No question can arise at that stage as to matters of credibility or reliability. Their Honours stated:[85]

> It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. The

---

[77] (2012) 40 VR 182
[78] Ibid, at 196-197 [63]-[65]
[79] (2006) 66 NSWLR 228
[80] Ibid, at 237 [60]
[81] For example, the decision in *Dupas v R* was criticised by Heydon QC as "rather complex, and not wholly workable" – see J D Heydon QC, *2014 Paul Byrne SC Memorial Lecture – Is the Weight of Evidence Material to its Admissibility?*, 26(2) Current Issues in Criminal Justice 219, at 230
[82] (2013) 84 NSWLR 363
[83] Ibid, at 366 [2], 375 [42], 385 [86]-[87], 400 [171], 401 [175]
[84] (2016) 330 ALR 382
[85] Ibid, at 392 [50], [52]

> circumstances surrounding the evidence may indicate that its highest level is not very high at all. The example given by J D Heydon QC was of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). On another approach, it is an identification, but a weak one because it is simply unconvincing. The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence.
>
> Once it is understood that an assumption as to the jury's acceptance of the evidence must be made, it follows that no question as to credibility of the evidence, or the witness giving it, can arise. For the same reason, no question as to the reliability of the evidence can arise. If the jury are to be taken to accept the evidence, they will be taken to accept it completely in proof of the facts stated. There can be no disaggregation of the two — reliability and credibility — as *Dupas v R* may imply. They are both subsumed in the jury's acceptance of the evidence.

6.61 Thus, the majority erred in its approach to the section 137 balancing exercise – a court should not have regard to the reliability of the evidence in assessing the probative value of evidence under challenge. The August 2011 photoboard identification was relevant evidence. The probative value of the evidence, when properly assessed, remained nevertheless "moderate to low" – this is because FA conceded under cross-examination at trial that he had selected this photograph because this image was the closest to his memory of what the "old man" looked like.[86]

6.62 For example, in ***Dupas v R***,[87] identification evidence was admitted at trial from a witness (Mrs Burman) who had prepared a computerised image of the offender with investigating police 6 months after the offence. The witness had viewed a photoboard nearly 2 years after the offence, from which she selected a photograph of Dupas as the person "most likely" she had seen at the scene of the crime. On appeal against conviction, it was argued the photoboard identification should have been excluded under section 137 of the Act. The Victorian Court of Appeal held that the trial judge was correct in not excluding the evidence as any risk of misuse of such evidence could be cured by appropriate judicial directions.

6.63 The correct approach to the admissibility of such evidence as the August 2011 photoboard identification was set out by Gleeson CJ in ***Festa v The Queen***.[88] In that case, the appellant had been convicted at trial on a number of offences concerning a series of armed robberies and unlawful use of motor vehicles. On appeal to this Court, the appellant contended that, inter alia, the trial judge had failed to exclude the evidence of some witnesses who purported to identify her. One of those witnesses was Hill who was at work when he observed one of the robberies occurring. He saw a female, who was one of the robbers. She had layered hair and an olive complexion. This witness was later shown by the police a board containing a number of photographs. He said that the persons depicted in photographs 6, 8 and 11 had the same hair and skin type as the woman he had seen committing the robbery. The appellant was depicted in photograph 6. This was of course not evidence that directly identified the appellant, but simply some evidence that the appearance of the appellant was consistent with the appearance of the female seen participating in the robbery.

6.64 As to the admissibility of this type of identification evidence, Gleeson CJ stated:[89]

---

[86] See Trial Transcript, 23/10/2014, at 410-411, 422-423, 425

[87] (2012) 40 VR 182

[88] (2001) 208 CLR 593

[89] Ibid, at 598-599 [10]-[11], [13]-[14]; at 614-615 [66]-[67] per McHugh J agreeing that the evidence was admissible and that its prejudicial effect did not require exclusion; at 644 [171] per Kirby J dissenting (but agreeing as to the Hill identification evidence); at 658 [216] per Hayne J agreeing

The evidence of Mr Hill was in some respects similar to that held to be admissible by the Supreme Court of South Australia in *Murphy v R*. There, a number of witnesses to a robbery were shown photographs. They selected one photograph being that of the appellant, but could do no more than indicate that there was a similarity. That evidence was held admissible. King CJ said:

> This evidence was not ... in the true sense identification evidence. None of the witnesses were able to identify the photographic slide of the appellant as that of a participant in the robbery. Nevertheless the evidence did possess, in my opinion, some evidentiary value.

In that case, the number of witnesses who selected the same photograph was significant. But the case shows how evidence falling short of positive identification may nevertheless be of significance, having regard to the whole of the evidence.

...

The strength or weakness of evidence may depend in part upon the use that might be made of it. Mr Hill's selection of three photographs, including one of the appellant, of itself could not support a positive conclusion that the woman he saw was the appellant. But the evidence did not stand alone. And even if it only showed that the woman he saw was consistent in appearance with the appellant, that was a material fact....

Questions as to the admissibility of evidence may be related to, but are different from, questions as to whether the totality of the evidence in a case is sufficient to sustain a jury's verdict, or questions as to the warnings that need to be given to a jury about the use that may properly be made of the evidence. If evidence is of some, albeit slight, probative value, then it is admissible unless some principle of exclusion comes into play to justify withholding it from a jury's consideration. It is not enough to say that it is "weak", and, as already mentioned, whether it is weak might depend on what use is made of it. The totality of the evidence may be such as to render a conviction unsafe. But that does not affect admissibility....

No substantial miscarriage of justice

6.65 If, contrary to our primary submission, the trial judge did err in not excluding the impugned evidence, the appellant nevertheless submits that the majority were wrong to conclude that the admission of the identification evidence resulted in a substantial miscarriage of justice within the meaning of section 276(1) of the Criminal Procedure Act 2009 (Vic).

6.66 Section 276(1) of the Act is reproduced as follows:

> (1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that –
>
> (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
> (c) for any other reason there has been a substantial miscarriage of justice.

6.67 As this Court observed in the plurality judgment in ***Domican v The Queen***:[90]

> Of course, the other evidence in the case may be so compelling that a court of criminal appeal will conclude that the jury must have convicted on that evidence independently of the identification evidence. In such a case, the inadequacy of or lack of a warning concerning the identification evidence, although amounting to legal error, will not constitute a miscarriage of justice.

6.68 As Whelan JA observes in his dissenting judgment, the prosecution addressed the jury on the strength of the prosecution case as follows – the CCTV footage, FA and Gerrie's evidence in relation to the footage, the evidence identifying the respondent as "Boris", and the telephone records and intercepted conversations.

6.69 The potency of the CCTV footage can be gleaned from the identification by FA (5 days later on 2 October 2009) of the "old man" as his assailant – importantly, the portion of the CCTV shown to FA from which he selected the assailant contained persons other than the respondent. Gerrie gave evidence that he was at the Dallas nightclub and the Thomastown

---

[90] (1992) 173 CLR 555, at 565 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ

clubrooms with the respondent on the morning in question. The CCTV footage shows the person identified as the assailant (by FA) in company with Gerrie. Gerrie identifies a male person on the CCTV footage as someone he knew as "Boris".[91] And importantly, Gerrie's evidence was not challenged by the defence in cross-examination.

6.70 Furthermore, it was never suggested at trial that the two identifications (by FA and Gerrie) involved different persons (the jury had the CCTV footage as an exhibit for comparison purposes). Indeed, as the majority opine in their conclusion on ground 6 of the appeal against conviction (relating to a claim that the verdicts are unsafe and unsatisfactory):[92]

> There is evidence that the "old man" is shown in the Dallas CCTV footage wearing a camouflage jacket. Michael Gerrie, a companion of the applicant's, identified the man in the camouflage jacket depicted in the CCTV footage as the applicant.

6.71 Other evidence led by the prosecution demonstrated that "Boris" was the respondent (both testimony of Gerrie and items found by police at the respondent's home with the name "Boris" on them). The telephone records demonstrated that the respondent was in company with Gerrie at the relevant time. It was also not disputed that the respondent was a member of the Hells Angels.

6.72 Furthermore, there was no evidence that there were other persons of similar appearance to the "old man" at either at the Dallas nightclub or the Thomastown clubrooms at the relevant time. FA stated in evidence that there was only one person at the Dallas nightclub who "looked like a rocker or a biker in Hells Angels gear" and that was the "old man".[93]

6.73 The respondent did not give or call evidence at his trial.

6.74 As to the photoboard identification, the prosecutor informed the jury that there were "real problems with that type of evidence and those type of identifications".[94]

6.75 Importantly, the prosecutor stated in relation to both the photoboard identifications (Cooper and that of the respondent), that it was not evidence that the prosecution relied on in order to prove its case. In her closing address, the prosecutor stated:[95]

> It is relevant to your task in determining whether or not the accused man was the offender, is relevant to your task to know that when he was shown a photo board with Mr Cooper's image on it, he picked it. That Mr Cooper as the old man. It is obviously relevant. It's also relevant that when he was shown a photo board with the accused man, he picked the accused as the old man. It's relevant information for you to take into account but it's not something either way that could either lead you or to conclude he's guilty nor can it give rise to what we call a reasonable doubt. You've got it before you. *It's in the mix so to speak but it is not the evidence upon which I rely to prove my case.* [emphasis added]

6.76 In terms of the main strands of the prosecution case, the prosecutor stated to the jury in her closing address:[96]

> So ladies and gentlemen, I'm finally getting to the meat of the case. *What is the evidence that I say that you can rely on to find the accused man guilty beyond reasonable doubt? And it is this. Mr Aakbari looked at the footage from the CCTV outside Dallas and he said that's the old man. Mr Gerry looks at the same footage and says that's Boris, Boris is the accused, that's the link. The old man is in the footage, that man in the footage is the accused man known as Boris.* [emphasis added]

---

[91] See Trial Transcript, at 645-646
[92] See *Dickman v R* [2015] VSCA 311, at [132]
[93] See Trial Transcript, 14/10/2014, at 383
[94] See Extract – Closing Addresses, 27/10/2014, at 28
[95] See Extract – Closing Addresses, 27/10/2014, at 30
[96] See Extract – Closing Address, 27/10/2014, at 33-34

6.77 As already pointed out, there was significant evidentiary support for the identification of the respondent made by Gerrie – Gerrie referred to the respondent as "Boris" and documents found during the search of the respondent's premises revealed the name "Boris"; the telephone records showing Gerrie and the respondent travelling from Adelaide to Melbourne on the day in question and calls being made at the relevant time (both at the Dallas nightclub and the Thomastown clubrooms.

6.78 Again the prosecutor returned to the topics of the strength of the CCTV identifications and the real limitation of the photoboard identification of the respondent towards the end of her closing address:[97]

> So all of those things, when you tie them altogether, you can be satisfied that the accused is known as Boris. That when Mr Gerry says that bloke in the footage in the camo jacket is the accused man, you can be satisfied that he's right about that. That is the accused in the footage. That's only half of this equation. And the other half is whether you can rely on Mr Aakbari's evidence when he says "That man in the CCTV footage is the old man".
>
> It's clear from his evidence that whenever he says "the old man" he's talking about the bloke who hit him, who he met at Dallas and who hit him with the baseball bat....
>
> Why can you rely on Mr Aakbari's evidence that that man in the camo jacket, with the ponytail and the beard, is the old man? *Well, let's compare that because I've said some unkind things, some harsh things about the photo ID and that there's problems associated with that.* Let's look at the difference between a still photograph, you've seen in there in those photo boards. A little head shot with CCTV footage. In the CCTV footage we have a full body view of the person. We've got them walking around.
>
> ...
>
> The other thing that I'd like to point out is that there's not just one person in the footage. He is shown - the clip that has the old man in it has got other people in it. None of them have the long ponytail, that's true. But it's not as if he was given an empty street with a person walking down it and said "Pick somebody in it". He's given multiple people in that and the person he picks is consistent with all the other evidence as being the old man.
>
> Let's look at the other picks that he made. He picked Ali. He got that right. He picked Bullring, the person he described as Bullring. There's no confusion about who that is in the footage. He picked Delhi, there's no confusion about who was Delhi in the footage. He picked Mr Gerry and Mr Gerry says "Yeah, that's me". He got that right. So he's doing pretty well at the moment, he's got all of those people right. He nominates Mr Smith, he gets that right, and he nominates the accused. My submission to you is that just as with each of those other people, he got the right man when he nominated the man in the camo jacket as the old man.
>
> ...
>
> What I urge you to do ladies and gentlemen, is remember what I said to you. *That I do not rely on the picking of the photos from the photo boards to prove on that evidence alone, to prove the case.*
>
> As you can hear from my address to you, *the evidence which I urge you to rely upon and to consider very carefully and analyse, is the CCTV footage. The footage of the search and the phone evidence. Listen to those calls. Put it altogether as I've attempted to do for you in this closing address and when you do that, when you carefully analyse that evidence, I have no doubt that you will be able to find this man guilty beyond reasonable doubt.* [emphasis added]

6.79 On the other hand, defence counsel in her closing address made much of the photoboard identification:[98]

> [T]he Crown really want to put to one side, don't they, this photo ID business. They really want to put it to one side because it is completely contrary to my client being the old man.

6.80 As Whelan JA observes, the photoboard evidence was a significant part of the defence case – thus, it is somewhat remarkable for the majority to contend that this line of cross-

---

[97] See Extract – Closing Address, 27/10/2014, at 37-38, 39, 42-43 [note the transcript writer refers to "Gerry" rather than "Gerrie" as the surname of the witness is noted on the indictment (see also paras 5.22 and 6.76)]

[98] See Extract – Closing Address, 28/10/2014, at 67

examination would have been avoided by the defence but for the prosecution seeking to adduce the August 2011 identification of the respondent by FA.[99]

6.81 The evidence as to the mistaken Cooper identification was led by the prosecution – and this was relied upon by defence counsel throughout the conduct of the trial. Once the Cooper identification evidence was admitted, general fairness dictated the admission of the subsequent August 2011 identification (as conceded by the majority).

6.82 The appellant submits that when the evidence is assessed as a whole, and taking into account the way the case was run by both parties, Whelan JA was correct in concluding that the admission of the photoboard evidence did not result in a substantial miscarriage of justice. As his Honour notes, the admission of the impugned evidence was "advantageous" to the defence.[100] In short, conviction was inevitable based on all the evidence other than the photoboard evidence (this body of evidence having been eschewed by the prosecutor as part of her case in her closing address to the jury). Thus, the respondent has not suffered a substantial miscarriage of justice by virtue of the failure to exclude the impugned photoboard identification evidence.

Part VII: Applicable constitutional provisions, statutes and regulations

7.1 The applicable statutory provisions have been incorporated into these submissions (see paras 6.52 and 6.66 above) – such provisions are still in force in the same form at the date of these submissions.

Part VIII: Orders sought

8.1 The orders sought are as follows:

(i) that the appeal against conviction be allowed;
(ii) that the orders of the Supreme Court (Court of Appeal) of Victoria be set aside and that the appeal against conviction to that Court be dismissed; and
(iii) that the matter be remitted to the Supreme Court (Court of Appeal) of Victoria to deal with the application for leave to appeal against sentence.

Part IX: Presentation of oral argument

9.1 The appellant estimates 1 hour is required for the presentation of oral argument.

Dated: 23 December 2016

.....
Name: Gavin J. C. Silbert QC
Chief Crown Prosecutor (Victoria)
Telephone: 03 9603 2541
Email: gavin.silbert@opp.vic.gov.au

.....
Name: Brett L. Sonnet
Crown Prosecutor (Victoria)
Telephone: 03 9603 7566
Email: brett.sonnet@opp.vic.gov.au

[99] See *Dickman v R* [2015] VSCA 311, at [25]-[27]
[100] See *Dickman v R* [2015] VSCA 311, at [23], [30]