THE QUEEN v DICKMAN (M162/2016)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2015] VSCA 311
Date of judgment:	23 November 2015
Date special leave granted:	18 November 2016

On 30 October 2014, following a trial in the County Court of Victoria, a jury convicted the respondent of intentionally causing serious injury and making a threat to kill. He was sentenced to 8 years' imprisonment, with a non-parole period of 5 years and 6 months.

The principal issue in the trial was identity; in particular, whether an individual identified as the 'old man' — who, during the evening of 27 September 2009, bashed the complainant, Faisal Aakbari ('FA') with a baseball bat and threatened him with a knife — was the applicant. On 5 October 2009, a photoboard was shown to FA. He selected a photo of Michael Cooper as depicting the culprit. As a result of this misidentification, Mr Cooper was charged. After further investigation, however, the charges were abandoned. By an email to FA dated 18 February 2010, a police investigator informed FA that he had been mistaken in his identification. On 23 August 2011 police showed FA a number of photoboards, one of which contained possibilities for the 'old man', and included a photograph of the respondent. FA selected photo '9', the respondent's photograph. In cross-examination at trial, it was put to FA — and accepted by him — that he had selected the photograph because he had taken the view that of all the pictures on the board, the image that he selected was the closest to his memory of what the 'old man' looked like.

On appeal to the Court of Appeal (Priest JA and Croucher AJA, Whelan JA dissenting) the respondent argued, inter alia, that the trial judge erred in failing to exercise his discretion to exclude the evidence of identification based on the second photographic array contrary to s 137 of the *Evidence Act* 2008 (Vic). In ruling the evidence to be admissible, the trial judge (Judge Coish) said that, for the purposes of s 137, he had 'assessed the probative value the jury could assign to this evidence'. Despite the misidentification of Michael Cooper and the delay in FA selecting the respondent's photo, the judge said he was satisfied that the impugned evidence '*could have some, albeit relatively low, probative value'*. His Honour said further that he was '*not satisfied that the probative value of the evidence [was] outweighed by the danger of unfair prejudice*'.

The majority of the Court of Appeal found five principal reasons for concluding that the probative value of the impugned evidence was outweighed by the risk of unfair prejudice, and hence for concluding that the judge was wrong to admit the evidence. First, FA was demonstrated to have been an unreliable witness so far as identification was concerned. Secondly, there had been a delay of almost two years between the assault and FA's purported identification of the respondent as the 'old man' on 23 August 2011. That delay served to exacerbate the doubts the majority had about FA's reliability.

Thirdly, there was a considerable risk that FA's memory may well have been contaminated, both by the earlier misidentification of Michael Cooper, and as a result of the possible 'displacement' effect flowing from his viewing of CCTV footage. Fourthly, by the time FA selected the respondent's photo as being that of the 'old man', he had been told that earlier he had made a mistaken identification. Thus, when he came to view the photoboard on 23 August 2011, by his own admission, FA had a preconceived view that a photo of his assailant was included in it. Fifthly, FA would have been striving to find a photo that best resembled his memory of the attacker. Indeed, FA admitted that he selected the photograph that was closest to his memory of what the 'old man' looked like.

The majority noted that 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, provided no answer to the intrinsic lack of probative value in the evidence. Their Honours concluded that the evidence of FA's visual identification from the photoboard on 23 August 2011 should have been excluded. Any probative value that the evidence may have had was outweighed by the risk of unfair prejudice. There had been a substantial miscarriage of justice. The convictions were quashed and a new trial ordered.

Whelan JA (dissenting) found that as matters transpired in the trial, far from the photoboard identification being prejudicial to the respondent, it was used by his senior counsel as a principal component of the defence case. Counsel for the Crown all but disavowed reliance upon it. Accordingly, when all the evidence as actually presented was assessed, there was no substantial miscarriage of justice in the admission of the photoboard identification of the respondent.

The proposed grounds of appeal include:

- The Court of Appeal, by majority judgment, erred in holding that issues of "reliability" were relevant in any assessment of the probative value of evidence of identification (based on the second photographic array) pursuant to s 137 of the *Evidence Act* 2008 (Vic).