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KNIGHT v STATE OF VICTORIA & ANOR (M251/2015)

Date Special Case referred to Full Court: 14 November 2016

On 10 November 1988 the Plaintiff, Julian Knight, pleaded guilty to seven counts of murder and 46 counts of attempted murder. He was sentenced by Hampel J in the Supreme Court of Victoria to life imprisonment with a minimum term of 27 years. The minimum term expired on 8 May 2014. On 2 April 2014 the *Corrections Amendment (Parole) Act* 2014 (Vic), which inserted s 74AA into the *Corrections Act 1986* (Vic), came into operation. Section 74AA provides that the Adult Parole Board ('the Board') may make an order for release "of the prisoner Julian Knight if, and only if," he is in imminent danger of dying or seriously incapacitated and does not pose a risk to the community.

The Plaintiff is not at present in imminent danger of dying or seriously incapacitated. On 11 March 2016 he applied for the Board to make an order that he be released on parole. After considering the application, the Board determined to obtain reports pursuant to s 74AA(3) of the *Corrections Act* and to not make any order that the plaintiff be released on parole.

The Plaintiff contends that s 74AA is inconsistent with Ch III of the Constitution and invalid for two reasons: (a) First, as a matter of substance, s 74AA operates to interfere with a particular and readily identifiable exercise of judicial power by the Supreme Court of Victoria, namely the sentence imposed on the Plaintiff by Hampel J following the Plaintiff's guilty plea and conviction; (b) Second, s 74AA authorises Victorian judicial officers to participate in a decision making process that undermines their judicial independence from the executive and hence renders the courts on which they sit unsuitable to be repositories of federal judicial power.

On 14 November 2016 Gordon J referred the Special Case for consideration by the Full Court.

Notices of Constitutional Matter have been served. At the time of writing the Attorneys-General for the Commonwealth, New South Wales, Queensland, South Australia, and Western Australia have filed Notices of Intervention.

The questions in the Special Case include:

- Is s 74AA of the *Corrections Act* invalid on the ground it is contrary to Ch III of the Constitution?

COMMISSIONER OF TAXATION v JAYASINGHE (S275/2016)

Court appealed from: Full Court of the Federal Court of Australia [2016] FCAFC 79

Date of judgment: 9 June 2016

Special leave granted: 16 November 2016

Mr Kamal Jayasinghe ("the Respondent") is a civil engineer who was engaged by the United Nations Office of Project Services ("UNOPS") to work in Sudan as a project manager during the income years ending in June 2010 and June 2011. In September 2013 the Commissioner of Taxation ("the Appellant") assessed the Respondent for taxation based on his earnings during that period. The Respondent objected to that assessment, contending that his earnings were exempt from taxation pursuant to:

(a) the *International Organisations (Privileges and Immunities) Act* 1963 (Cth) ("the IOPI Act"); and/or

(b) Taxation Determination TD92/153 ("TD92/153").

The combined effect of section 6(1)(d) of the IOPA Act and reg 10(1) of the *United Nations (Privileges and Immunities) Regulations* 1986 (Cth) ("the Regulations") is that if "a person holds an office in the UN" then that person is exempt from taxation. At issue therefore was whether the Respondent was such a person.

The Appellant rejected the Respondent's objections and the Respondent subsequently applied to the Administrative Appeals Tribunal ("AAT") for a review of that decision. On 29 June 2013 the AAT found that the Respondent both "held an office in the UN" *and* that he was a UN employee. He was therefore exempt from tax for the relevant income years.

On 6 June 2016 the Full Federal Court (Pagone & Davies JJ; Allsop CJ dissenting) dismissed the Appellant's appeal. The majority held that the AAT was correct to find that the Respondent held "an office" in the UN within the meaning of s 6 of the IOPI Act and reg 10(1) of the Regulations. In doing so their Honours endorsed the AAT's analysis of the nature of the Respondent's position. They found that whether a person "holds an office in" the UN within the meaning of the statute was a matter of applying that statute to the facts. It was not a matter of the contractual agreement as between the parties themselves.

Justices Pagone and Davies further found that the Respondent was also an employee of the UN. As such he was covered by TD92/153 and thereby exempted from paying Australian tax. Their Honours noted that the contractual terms as between the Respondent and UNOPS may be such to prevent him from claiming to be an employee as against UNOPS. They did not however preclude the Respondent from relying upon the fact, that for Australia taxation purposes, he also worked as an employee of UNOPS.

Chief Justice Allsop however would have allowed the Appellant's appeal. His Honour held that, according to the UN's own rules and agreements, the Respondent neither held an office in the UN, nor was he a member of staff. He

was also neither an official of, nor an officer of the UN. His Honour therefore found that the AAT had failed to approach the matter with a proper perspective on the construction of s 6(1)(d) and Regulations 10 and 11.

With respect to TD92/153, Chief Justice Allsop noted that the terms of the Respondent's engagement included the provision that, as an international individual contractor, he was considered "an expert on mission for the UN" within the terms of s 22 Article VI of the Convention on the Privileges and Immunities of the United Nations 1946. The Respondent's engagement as an expert on mission (and not as a staff member) therefore took him outside the terms of TD 92/153.

The grounds of appeal include:

- The Full Federal Court erred in failing to find that the AAT erred in finding that the Respondent held an office in UNOPS within the meaning of s 6(1)(d)(i) of the IOPI Act and reg 10(1) of the Regulations.

- The Court should have construed the expressions:

  a) "a person who holds an office is an international organisation" within s 6(1)(d)(i) of the IOPI Act; and

  b) "a person who holds an office in the UN" within reg 10(1) of the Regulations,

  as referring to a person who holds a position within the UN which the UN itself has established and designated as an office.

GRAHAM v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (M97/2016)

Date Special Case referred to Full Court: 14 November 2016

The plaintiff is a citizen of New Zealand who has been a resident of Australia since 1 December 1976. He was granted a class TY subclass 444 Special Category (Temporary) visa when he last entered Australia in 1996. This visa was cancelled by the defendant ('the Minister') on 15 June 2015. The Minister's decision was quashed by the Federal Court on 9 June 2016. Later that day, an authorised migration officer gave the Minister a submission inviting him to consider whether he wished to cancel the visa under s 501(3) of the *Migration Act* 1958 (Cth). The submission included an attachment ("Attachment ZZ") which has never been provided to the plaintiff.

At 12.12 pm on 9 June 2016, after considering the submission, including Attachment ZZ, the Minister decided to cancel the plaintiff's visa on the grounds that that the plaintiff failed the character test and that it was in the "national interest" to cancel his visa. The Minister provided a statement of reasons which referred to certain information which is protected from disclosure under s 503A of the Act. That information is the information in Attachment ZZ.

The plaintiff sought a writ of prohibition directed to the Minister to prevent action upon his decision made on 9 June 2016 to cancel the plaintiff's visa, and a writ of certiorari directed to the Minister quashing that decision. He contends that ss 501(3) and 503A(2) of the Act are invalid, in whole or in part, as they require a federal court to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power; and they so limit the right or ability of affected persons to seek relief under s 75(v) of the Constitution as to be inconsistent with the place of that provision in the constitutional structure.

On 14 November 2016 Gordon J referred the Special Case for consideration by the Full Court. Her Honour further directed that the Special Case in this matter be heard together with the Special Case in the matter of *Te Puia v. Minster for Immigration and Border Protection* (P58/2016).

Notices of Constitutional Matter have been served. At the time of writing the Attorneys-General for the Commonwealth, Victoria, Tasmania, New South Wales, Queensland, and South Australia have filed Notices of Intervention.

The questions in the Special Case include:

- Are either or both of s 501(3) and 503A(2) of the Act invalid, in whole or in part, on the ground that they:

    a. require a Federal court to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power; or

    b. so limit the right or ability of affected persons to seek relief under s 75(v) of the Constitution as to be inconsistent with the place of that provision in the constitutional structure?

TE PUIA v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (P58/2016)

Date Special Case referred to Full Court: 14 November 2016

The applicant is a citizen of New Zealand who has been a resident of Australia since 22 May 2005. He was granted a class TY subclass 444 Special Category (Temporary) visa (when he last entered Australia in September 2013) which was cancelled by the defendant ('the Minister') on 27 October 2015, on the grounds that that the plaintiff failed the character test and that it was in the "national interest" to cancel his visa. Before that decision was made, an authorised migration officer gave the Minister a submission inviting him to consider whether he wished to cancel the visa under s 501(3) of the *Migration Act* 1958 (Cth). The submission included an attachment ("Attachment Z") which has never been provided to the plaintiff. The Minister provided a statement of reasons which referred to certain information which is protected from disclosure under s 503A of the Act. That information is the information in Attachment Z.

The applicant applied for judicial review in the Federal Court and sought an order setting aside the decision of the Minister made on 27 October 2015 to cancel his visa on the grounds that s 503A of the Act invalid as beyond the power of the parliament. The applicant then sought to have those proceedings removed into the High Court. On 27 October 2016 Gordon J made orders removing the matter into this Court and directing that the cause removed be heard together with the matter of *Graham v. Minister for Immigration and Border Protection* (M97/2016).

On 14 November 2016 Gordon J referred the Special Case agreed by the parties for consideration by the Full Court. Her Honour further directed that the Special Case in this matter be heard together with the Special Case in the matter of *Graham v. Minster for Immigration and Border Protection* (M97/2016).

Notices of Constitutional Matter have been served. At the time of writing the Attorneys-General for the Commonwealth, Victoria, Tasmania, Queensland, and South Australia have filed Notices of Intervention.

The questions in the Special Case include:

- Are either or both of s 501(3) and 503A(2) of the Act invalid, in whole or in part, on the ground that they:

  a. require a Federal court to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power; or

  b. so limit the right or ability of affected persons to seek relief under s 75(v) of the Constitution as to be inconsistent with the place of that provision in the constitutional structure?

FORREST & FORREST PTY LTD v WILSON & ORS (P59/2016)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2016] WASCA 116

Date of judgment: 7 July 2016

Date special leave granted: 10 November 2016

The issues in this appeal concern the proper construction of s 74, s 74A and s 75 of the *Mining Act* 1978 (WA) ('the Act') as it stood prior to the commencement of the *Mining Amendment Act* 2012 (WA). The primary issue is whether the failure to lodge, at the time of the application for a mining lease or at all, a mining operations statement or a mineralisation report pursuant to s 74(1)(ca)(ii) deprives the Mining Warden of jurisdiction to make a recommendation to the Minister under s 75 of the Act.

On 28 July 2011 applications for mining leases were lodged by the second and fourth respondents. Neither a mining operations statement nor a mineralisation report was lodged with the relevant applications. On 1 September 2011, the appellant lodged objections to the applications, which related to land within the boundaries of a pastoral lease held by the appellant. A few months after the applications were lodged, a mineralisation report for each application was lodged, but mining operations statements were never lodged. The first respondent ('the Warden') heard the applications in December 2012. In a report delivered on 31 January 2014, the Warden recommended to the Minister that he grant the applications subject to conditions. The appellant applied to the Supreme Court to quash the recommendations of the Warden. The application was dismissed by Allanson J.

The appellant appealed to the Court of Appeal (McLure P, Newnes and Murphy JJA). The main issue in the appeal was whether the lodgment of the documents specified in s 74(1)(ca)(ii) was an essential condition that must be satisfied in order to enliven the Warden's jurisdiction to hear the application under s 75(4) and then make a recommendation under s 75(5) of the Act.

The Court held that: (1) the requirement in s 74(1)(ca)(ii) of the Act, that the mining operations statement and mineralisation report be lodged contemporaneously with the application, was not a condition precedent to the existence of the jurisdiction of the Warden to hear the application; (2) non-compliance with the requirement to lodge the s 74(1)(ca)(ii) documents contemporaneously with the application did not otherwise invalidate the Warden's hearing or recommendations; and (3) the failure to lodge a mining operations statement at all did not invalidate the Warden's hearing or recommendations.

The Court gave three reasons for their decision. First, they noted that courts are ordinarily reluctant to characterise a fact or legislative criterion as jurisdictional because it has the automatic and inevitable consequence of invalidity of all that follows. In this case, the consequences would be that (1) the Warden's recommendation would be void; (2) the lack of a recommendation would deprive the Minister of the power to grant or refuse the application; and (3) the applicant would have to start from scratch by lodging a new application and accompanying payments and documents under s 74(1). The additional delay, gridlock in the administration of the Act and other prejudice were significant factors.

Second, the statutory expression *'shall be accompanied by'* applies to the requirements in s 74(1)(b) (payment of the prescribed rent) s 74(1)(c) (payment of the prescribed application fee) and s 74(1)(ca)(i) (lodgment of a mining proposal). It could be inferred that the statutory expression was intended to have the same meaning when used within the same, or contextual, provisions. Having regard to the variety in the nature of the requirements and the serious consequences of non-compliance however minor or technical, there was no justification in principle or purpose for concluding that contemporaneous lodgment was a condition precedent to the mining registrar or the Warden making a recommendation.

Third, the statutory expression *'if an application for a mining lease is accompanied by the documentation in section 74(1)(ca)(ii)'* in s 74A(1), s 75(2a), s 75(4a) and s 75(8) did not require a conclusion that compliance with the requirement in s 74(1)(ca)(ii) was jurisdictional. The statutory expression was descriptive, not prescriptive and it meant in effect 'when an application for a mining lease must be accompanied by the documents in section s 74(1)(ca)(ii)'. That conclusion is mandated by the statutory text and context.

The grounds of appeal include:

- The Court erred in law in concluding that the requirement to lodge a mineralisation report at the time an application for a mining lease is lodged, as specified in s 74(1)(ca)(ii) of the act is not a condition precedent to the existence of jurisdiction in the Director, Geological Survey to prepare a report under s 74A(1) of the Act or the jurisdiction of the warden to hear an application under s 75(4) of the Act.

The respondents have filed submitting appearances. The Attorney-General for the State of Western Australia has been granted leave to appear amicus curiae.

IL v THE QUEEN (S270/2016)

Court appealed from: New South Wales Court of Criminal Appeal [2016] NSWCCA 51

Date of judgment: 8 April 2016

Special leave granted: 16 November 2016

On 4 January 2013 Mr Zhi Min Lan suffered severe burns and smoke inhalation in a house fire. IL, who was also in the house, tried to prevent attending police from entering. The apparent source of the fire was an apparatus in the bathroom (where the fire was almost completely contained), comprising a ring burner attached by hose to a gas cylinder. Atop the ring burner was a pot containing a liquid from which methylamphetamine could be extracted.

Mr Lan later died from his injuries. IL was then charged with various offences, including the manufacture of a large commercial quantity of methylamphetamine. She was also charged with the murder, or alternatively the manslaughter, of Mr Lan.

At the trial of IL, the Crown case against her in respect of Mr Lan's death was one of constructive murder or of involuntary manslaughter by an unlawful and dangerous act. Both alternatives were based on IL having taken part in a joint criminal enterprise with Mr Lan, the foundational crime being the manufacture of methylamphetamine. IL was thereby liable, according to the Crown case, for all acts contemplated by the enterprise. This included the ignition of the ring burner, causing a fire which in turn caused the injuries and death, even if that act of ignition had been carried out by Mr Lan.

At the direction of the trial judge, Justice Hamill, the jury returned verdicts of not guilty on the charge of murder and the alternative charge of manslaughter. This was after his Honour had found it likely that Mr Lan had started the fire. Justice Hamill held that, in order for IL to be found guilty of murder, it was necessary that she had contemplated the possibility of Mr Lan intentionally setting a fire that could cause a death (thereby committing murder) within the scope of their criminal enterprise. Since it was not possible for Mr Lan to be convicted of his own murder, IL could not be found guilty on the basis of derivative liability. In relation to both murder and manslaughter, his Honour found causation to be an impediment to a guilty verdict. This was due to a lack of evidence to suggest that IL had acted together with Mr Lan in igniting the ring burner. The jury then found IL guilty of the other offences with which she was charged, whereupon Justice Hamill sentenced her to imprisonment for 11½ years with a non-parole period of 7½ years.

An appeal by the Crown was unanimously allowed by the Court of Criminal Appeal ("the CCA") (Simpson JA, R A Hulme & Bellew JJ). Their Honours held that Justice Hamill had erred by considering the relevant question to be whether IL had contemplated a fire causing fatal injury. Rather, the relevant question was whether IL had contemplated the ignition of the ring burner. The CCA held that IL's liability did not derive from, but was co-extensive with, Mr Lan's and that her liability was for all acts undertaken by Mr Lan in the drug manufacturing enterprise. It did not matter whether IL had been directly involved in igniting the ring burner with Mr Lan.

The CCA ordered that IL be retried on the charges of murder and manslaughter. This was after rejecting an argument by IL that the element of malice required by s 18(2)(a) of the *Crimes Act* 1900 (NSW) ("the Act") could not be satisfied in relation to the act that had caused Mr Lan's death. The CCA held that malice could be found by a jury on the basis of recklessness, since the chemical operation undertaken was a primitive one that was plainly dangerous. Acts done recklessly remained "malicious" within the meaning of s 18 despite the repeal in 2007 of s 5 of the Act. This was because the extended definition of "maliciously" prescribed by s 5 was preserved by a saving provision, cl 65 of Sch 11 to the Act ("clause 65"). The CCA further held that even if clause 65 did not have that effect, it was nevertheless open to a jury to find that the ignition of the ring burner was "malicious" in the legal sense of an act done deliberately and with a foresight of potential harm.

The grounds of appeal are:

- The Court below erred in determining, for both the murder and manslaughter charges, that if the deceased physically did the act which caused his death this was irrelevant; and/or in not requiring a sufficient connection between the accused and the act causing death if this was the case.

- The Court below was in error in its definition of recklessness, to find the act of the accused causing death sufficiently malicious to amount to murder, such that its exercise of discretion to quash the acquittal for murder miscarried.

<u>SZTAL v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ANOR</u> (S272/2016);
<u>SZTGM v MINISTER FOR IMMIGRATION & BORDER PROTECTION & ANOR</u> (S273/2016)

Court appealed from: Full Court of the Federal Court of Australia [2016] FCAFC 69

Date of judgment: 20 May 2016

Special leave granted: 16 November 2016

The facts in both of these matters are relevantly identical. Both Appellants are Sri Lankan citizens who left Sri Lanka illegally. Both claimed that they would be imprisoned in substandard conditions if they were returned to their homeland.

In each matter the then Refugee Review Tribunal, now known as the Administrative Appeals Tribunal, ("the Tribunal") accepted that illegal departure from Sri Lanka was an offence under the Sri Lankan *Immigrants and Emigrants Act* 1945. It further found that this Act was applied to "all persons who have departed Sri Lanka illegally". In doing so the Tribunal acknowledged that prison conditions in Sri Lanka were poor, a fact that was accepted even by the Sri Lankan authorities. It went on to conclude however that a returnee who was remanded in custody temporarily would not face a real risk of "cruel or inhuman treatment or punishment" ("CITP") or "degrading treatment or punishment" ("DTP") amounting to significant harm. It also found that, despite the Sri Lankan Government being aware that its prison conditions were poor, it did not have an intention to "inflict cruel or inhuman punishment or cause extreme humiliation". The Appellants' applications for protection visas were therefore refused.

In dismissing each subsequent application for judicial review, Judge Driver found no error in the way the Tribunal approached the construction of the "intent" requirement (to inflict cruel or inhuman punishment or cause extreme humiliation) amounting to significant harm. His Honour found that an actual, subjective intention to cause such harm was required.

In a combined judgment of the Full Federal Court, neither Justices Kenny nor Nicholas found fault with either Judge Driver's or the Tribunal's approach to the Appellants' claims. Their Honours rejected the submission that the "intent" requirement was satisfied if someone performs an act knowing that it will, in the ordinary course of events, inflict pain, suffering or humiliation. Justice Buchanan however found that the Tribunal had disposed of the claims on the basis that the harm faced by the Appellants "did not amount to a level of harm which met the physical or mental elements" of the definitions of CITP or DTP and "so could not be regarded as intentional conduct which satisfied the definitions".

The grounds of appeal in both matters are:

- The Federal Court erred in law in holding that:
  a) the expression *"intentionally inflicted"* in the definitions of *"torture"* and *"cruel or inhumane punishment"* in s 5(1) of the *Migration Act* 1958 (Cth) ("the Act"); and

b) the expression "intended to cause" in the definition of *"degrading treatment or punishment"* in s 5(1) of the Act;

require an actor to have "an actual, subjective, intention" to inflict pain or suffering, or to cause extreme humiliation, by the actor's acts or omissions, being an intention that cannot be proved by the actor's knowledge of the consequences of the actor's acts or omissions, no matter how certain that knowledge may be.

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).