IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M162 of 2016

BETWEEN:

THE QUEEN

Appellant

- v -

GLYN DAVID DICKMAN

Respondent

APPELLANT'S REPLY

Part I: Suitability for internet publication

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

Part II: Reply to argument of respondent

Nature of prosecution case

2.1 As is accepted at para [97] of the Respondent's Submissions, the prosecution case indeed was a circumstantial one. It was not an identification case in the true sense. It was a circumstantial case involving various strands of proof – several strands involved various identifications of the respondent by two main witness [FA and Gerrie].

2.2 The appellant disputes the general contention made at para [99] of the Respondent's Submissions – the prosecution did not rely on the August 2011 identification in order to convict the respondent – whilst the evidence remained in the mix, it was being used as a "shield" rather than as a "sword". As the majority observe in their joint judgment:[1]

> As we have observed, the prosecution sought to introduce the evidence pre-emptively to address the anticipated cross-examination of FA by defence counsel directed to his misidentification of Michael Cooper. If that tactic was adopted by the defence, the prosecutor wanted to be able to say, "Yes, but [FA] did actually pick out the accused when given a photoboard with him in it".

2.3 Again, contrary to the general contention made at para [100] of the Respondent's Submissions, the major strands of the prosecution case can be summarised as such – FA picked out the "old man" in the CCTV footage, Gerrie stated that the person so selected was "Boris" (the respondent was known as "Boris"), and Gerrie stated that "Boris" attended the Thomastown clubrooms that morning. Of course other evidence was led in support of these three main strands, but that is the bedrock of the prosecution case. For example, FA states the "old man" and the persons known as Gerrie and Chaouk were at the Thomastown clubhouse at the time of attack; and the CCTV footage depicts these 3 men entering a car together after leaving the Dallas nightclub.

[1] *Dickman v R* [2015] VSCA 311, at [109]

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2.4 Thus, when viewed in its proper context, the photoboard identification evidence was a peripheral issue of which much was made of by defence counsel at trial.

The photoboard identifications

2.5 Something needs to be said by the appellant about the admission of the photoboard identification of both Cooper in October 2009 and the respondent in August 2011, particularly in light of the challenge found at para [41] of the Respondent's Submissions.

2.6 The trial in this case was conducted by an experienced Crown prosecutor. A prosecutor is always under a duty to ensure that a criminal trial is conducted in a manner that is fair to an accused person. An important incident of this duty is to ensure that all relevant evidence, whether it is favourable or unfavourable to a party, is adduced at trial so as to avoid a possible miscarriage of justice.

2.7 It is not to the point to speculate what defence counsel might have been done if the prosecutor had not led the August 2011 photoboard identification evidence or if it had been excluded by the trial judge. In this trial, the prosecutor in this case discharged her duty by adducing both sets of photoboard identifications.

2.8 The October 2009 photoboard identification (commonly referred to as the Cooper identification evidence) was an essential part of the narrative of events – it related to a complainant purporting to identify his assailant some days after the attack. The failure to lead such evidence in this trial would have constituted a miscarriage of justice. Again, it is not to the point that the defence would have had the opportunity to leads the evidence if the prosecution declined to do so, for the vice relates to the ability of a party to cross-examine on the relevant evidence. As explained by Whelan JA in his dissenting judgment:[2]

> FA was not cross-examined on his photoboard identification of Cooper. The evidence of that identification had been led in chief without amplification or explanation. By not cross-examining him senior counsel for the applicant could submit to the jury that FA still adhered to that identification of Cooper as the "old man", as she did.

2.9 This obligation to lead the Cooper identification evidence explains the prosecutor's desire to lead the later August 2011 photoboard identification evidence on the ground of fairness. The evidence again involved a purported identification of his assailant. The prosecutor was likewise required to lead this evidence (subject to, of course, discretionary exclusion). Again, as explained by Whelan JA in his dissenting judgment:[3]

> FA made a number of photoboard identifications. A number of them could be shown to have been mistaken. Some supported the Crown case. I cannot see any basis upon which the selective admission of photoboard evidence could have occurred.

2.10. To test the contention in another way, what would have been the position if the August 2011 photoboard identification involved an identification of someone other than the respondent – the simple answer is that fairness dictated that such evidence be admitted at trial.

2.11 The above general contention is consistent with authority of this Court.[4] Even though the relevant authorities speak of the prosecutorial obligation to call particular witness, the same

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[2] *Dickman v R* [2015] VSCA 311, at [22]
[3] *Dickman v R* [2015] VSCA 311, at [26]
[4] See *Richardson v The Queen* (1974) 131 CLR 116; *Whitehorn v The Queen* (1983) 152 CLR 657; *The Queen v Apostilides* (1984) 154 CLR 563

principle applies to the elicitation of all relevant evidence from a particular witness if it is necessary for the proper unfolding of the narrative of events.

2.12 For example, in *Richardson v The Queen*, Barwick CJ, McTiernan and Mason JJ in a joint judgment, stated:[5]

> Any discussion of the role of the Crown Prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused. In making his decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few. [emphasis added]

2.13 Likewise, in *Whitehorn v The Queen*, this Court again considered the topic of the prosecution calling all relevant witnesses. In his judgment, Deane J observed:[6]

> The observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations. Whether or not their names appear on the back of the indictment or information, all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown unless valid reason exists for refraining from calling a particular witness or witnesses, such as that the interests of justice would be prejudiced rather than served by the calling of an unduly large number of witnesses to establish a particular point. [emphasis added]

2.14 Likewise, Dawson J observed:

> It is in this context that it is possible to speak of a Crown prosecutor being bound, or under a duty, to call all available material witnesses. It is not a duty owed by the prosecutor to the accused which is imposed by some rule of law; rather it forms part of a description of the functions of a Crown prosecutor.
>
> Nevertheless there is good guidance in the cases for what constitutes a material witness. All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye-witnesses of any events which go to prove the elements of the crime charged and will include witnesses, notwithstanding that they give accounts inconsistent with the Crown case. [emphasis added]

2.15 Finally, in *The Queen v Apostilides*, this Court unanimously observed:[7]

> So, if a prosecutor fails to call a witness whose evidence is essential to the unfolding of the case for the Crown, the central question is not whether his decision constitutes misconduct but whether, in all the circumstances, the verdict is unsafe or unsatisfactory. [emphasis added]

Witness FA

2.16 FA was the complainant witness. It was accepted by the prosecutor at trial that FA had made a number of mistakes in relation to the photoboard identifications. These mistakes prompted the prosecutor to state in her closing address that such evidence was not relied upon to prove the prosecution case – and it was this position by the prosecutor that moved defence counsel to exclaim in her closing address:[8]

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[5] (1974) 131 CLR 116, at 119
[6] (1983) 152 CLR 657, at 664
[7] (1984) 154 CLR 563, at 577-578 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ
[8] See Extract – Closing Address, 28/10/2014, at 67

> [T]he Crown really want to put it 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.

2.17 Thus, the imperfections in FA's evidence were well-ventilated throughout the trial. However, the attack on FA's reliability did not stop there – for example, defence counsel at trial (see para [102(b)] of the Respondent's Submissions) sought to exploit the fact that FA could not remember having apparently visited a different nightclub prior to attending the Dallas nightclub. FA gave evidence that he had tried to visit a number of clubs but had been refused entry due to the lateness of the hour. However, FA accepted that police located a "pass-out" from a club called "Wet on Wellington" in his property which he could not explain as he did not remember attending there. It was hardly surprising that a young male person may not remember having attended a particular nightclub when recalling events several years later, particularly when he may have visited a number of clubs on the night in question.

2.18 The relevance of this line of questioning is difficult to fathom given that there was no dispute that FA was seriously assaulted at the Thomastown clubrooms and that he had attended at the Dallas nightclub. However, the relevance of defence counsel eliciting from Detective Blezard the "exact" nature of Wet on Wellington" [gay massage parlour] and the questions put to Detective Condon as to the location of the card [card could not be located at trial] escapes the appellant.

2.19 Further, the respondent now asserts FA's failure to "recall having been at clubs prior to the Dallas club, including a gay massage parlour called 'Wet on Wellington'" was an "unsatisfactory" element of his evidence. Apart from being an incorrect summation of the evidence [FA stated that he did remember trying to enter various clubs before the Dallas nightclub], the line of questioning should not have been allowed by the trial judge. FA stated he could not remember having visited the particular club (which was amongst a number of clubs he had visited) – thus there was no denial of attendance. The issue at trial was his identification of the "old man", and not what club or clubs he had visited prior to the attack. In this context, it must be noted that the attack was not a fleeting one and was something that one would ordinarily expect any victim to remember (and displace other relatively minor matters).

Witness Gerrie

2.20 The ability of the prosecution to call the witness Gerrie transformed the case – the witness had earlier been the subject of a compulsory examination application and it was expected that the witness would be "unfavourable" at trial. In relation to para [102(b)] of the Respondent's Submissions, the only "strange" feature of his evidence was that he was prepared to give prosecution evidence against the respondent (who was a member of the Hells' Angels at the relevant time). The evidence of this witness was damning and converted the prosecution case into a compelling one.

2.21 Contrary to the contention found at paras [21] and [32] of the Respondent's Submissions, Gerrie unequivocally selected "Boris" from the shown CCTV footage.[9] Further, the lack of challenge to Gerrie's testimony cannot be adequately explained by reference to the Cooper misidentification given that Gerrie was familiar with the respondent and both FA and Victorian investigating police were not.

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[9] See Trial Transcript, 23/10/2014, at 645-647

Response to grounds of appeal

2.22 As to paras [45]-[48] of the Respondent's Submissions, it must be noted that the identification by FA of Cooper as the "old man" from the photoboard shown to him in October 2009 involved a flawed police investigative process – for the photoboard did not contain a photograph of the respondent. However, the later photoboard identification conducted in August 2011 did. But, more importantly, the jury was in a position to assess the probative value of the later identification by reference to FA's statement that the selected photograph was the "closest" to his memory of what the "old man" looked like. Importantly, notwithstanding that the witness expected that a photograph of the assailant to be included in the array, the witness was not prepared to select the relevant photograph and positively assert that it was the assailant.

2.23 As to paras [53]-[64] of the Respondent's Submissions, it is important to note that this was not a prosecution case centrally based on a positive photoboard identification of the respondent as the offender by FA, but rather a circumstantial case which included as a weak strand the photoboard identification of the respondent by FA in August 2011. In short, the major strand involved the identification of the "old man" by FA from CCTV footage taken from the Dallas nightclub and the identification of that person as "Boris" by the witness Gerrie. It was of course accepted by defence counsel at trial that if these two strands of evidence were accepted by the jury, proof of the respondent's guilt would be established.

2.24 As to para [69] of the Respondent's Submissions, each of those limitations identified was amply exposed before the jury at trial – both in evidence and in closing addresses. It is this very feature which moved Whelan JA in his judgment to observe that the limitations in the identification evidence were not only stated, but demonstrated, before the jury.

2.25 As to para [70] of the Respondent's Submissions, FA selected the respondent's photograph as resembling his assailant in August 2011 – that of course was inconsistent with the earlier evidence of the Cooper identification in October 2009. Whilst FA did not directly recant the Cooper identification, other evidence given by FA amply demonstrated the error made by the witness.

2.26 As to para [90] of the Respondent's Submissions, the appellant disputes the proposition that the August 2011 photoboard identification of the respondent presented "unusual and extreme" dangers. Importantly, it was not a positive identification; and nor was it left to the jury on that basis.

2.27 As to para [91] of the Respondent's Submissions, any prejudice was very minimal in light of the absence of any evidence demonstrating that investigating police had assisted FA in selecting the respondent's photograph (as the assailant).

Dated: 10 February 2017

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