IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M162 of 2016

BETWEEN

THE QUEEN
Appellant

and

GLYN DAVID DICKMAN
Respondent

RESPONDENT'S SUBMISSIONS

I. SUITABILITY FOR INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

II. CONCISE STATEMENT OF THE RELEVANT ISSUES

Grounds 1 – 3 (application of *Evidence Act* 2008 (Vic), s 137 to the identification evidence)

2. At trial and on appeal the prosecution accepted that the probative value of the evidence was low to moderate at best.

3. The issue upon which grounds 1-3 primarily turn is therefore not the (limited or negligible) probative value of the evidence (cf. AS [2.1](a)) but whether it was outweighed by a danger of unfair prejudice, in circumstances where:

   (a) the victim FA had, shortly after the assault, identified a different person as the culprit;

   (b) FA never in terms recanted from that identification but the police later **suggested** to him that (i) his first identification was wrong, and (ii) the later photo board contained the person the **police believed** was the culprit;

   (c) FA believed his task was then to select the person who was closest to his memory of the offender and that was what he did;

   (d) the evidence was of a photo board selection of poor quality nearly two years after the assault;

   (e) FA made wrong selections of other persons he believed were involved; and

   (f) there were subtle displacement risks associated with the earlier identification process and the viewing of CCTV footage.

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Ground 4 (application of *Criminal Procedure Act* 2009 (Vic), s 276(1)(b))

4. The appellant misstates the issue that arises on this ground (AS [2.1](b)). It is wrong to say the prosecution did not rely upon the evidence to prove guilt. Further, the judge left the evidence to the jury as part of the prosecution case.

5. The real issue is whether it could be said that without the photo board identification of FA selecting the respondent, a finding of guilt beyond reasonable doubt was inevitable, notwithstanding that FA's actual description of the offender was inconsistent with the respondent, that FA and the police initially identified another person (who on the Crown case looked different to the respondent) as the culprit.

III. NOTICE UNDER THE JUDICIARY ACT 1903 (CTH)

6. Notice is not required to be given under s 78B of the *Judiciary Act* 1903 (Cth).

IV. MATERIAL FACTS

7. In his statements to the police, and in his evidence at trial, FA described a number of individuals who he met and dealt with at the "Dallas club" and at the Thomastown clubrooms of the Hells Angels in the early hours of Sunday 27 September 2009. The persons referred to by FA included "Ali" Chaouk[1], "Smith"[2], "Daly/Deli"[3], "Bullring" and an "Italian guy" (CA [38]–[55]).

8. The critical issue at trial was whether the respondent was a person who beat FA with a baseball bat at the clubrooms and who had earlier been at the Dallas club, a person FA described as the "old man" because, although he had been introduced to him by name, he could not remember the name[4] (Tr 316).

9. To assist in the comparison between the probative value of the photo board selection of the respondent and the danger of unfair prejudice arising from its admission, these submissions supplement the appellant's summary[5] of the chronology of the identification evidence (see also CA [47]-[55]). These submissions also address the procedural and forensic context in which admissibility arose and was resolved at trial.

Context and detail of the evidence relevant to identification

FA's description of the "old man" not consistent with the respondent

10. The first and critical contextual matter is that FA's description of the "old man", before the photo board selection, and maintained at trial, was inconsistent with the "old man"

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1 Ali Chaouk participated in assaulting FA and was subsequently tried and convicted.

2 There was evidence that linked this name to a Victorian Hells Angels member Graham Smith (Tr 695).

3 There was evidence that linked this name to a Dale Sexton (Tr 694, 716).

4 FA never described the "old man" as being referred to as "Boris", a name by which the evidence suggested Gerrie knew the respondent.

5 Aspects of the appellant's summary cast in terms which **assume the respondent's guilt**. They refer, for example, to the respondent striking FA with a bat and threatening to kill him (AS [5.8]). Those parts of the summary are only accepted as being accurate to describe the Crown case.

who beat him being the respondent. There were significant discrepancies in facial hair colour and style, age, physique and residence.

11. When asked to describe the "old man" in his evidence in chief FA referred to a long beard, "long hair like a ponytail". The hair colour was described as "grey, white, blonde" (Tr 315). He looked like a "biker" or a "rocker" (Tr 316)[6].

12. FA also described the old man as having long white hair with some grey (Tr 384) which was straight and not "afro" (Tr 384, 402), whereas the respondent had red or ginger hair which was not white and was frizzy. The victim said the old man had a long grey beard (Tr 403-304) whereas the respondent's beard was predominantly ginger. At trial, FA adhered to the FACEview drawing (**Exhibits 2** and **12**), showing essentially grey and straight hair as an accurate reflection of his memory of the "old man" (Tr 405).

13. FA said that the "old man" was in his 50's but could have been in his 60's, and was not in his 40's (indeed, FA said he was definitely not less than 50, and that he wouldn't call someone in their 40's an "old man") (Tr 383-384, 401). He said that he was the oldest man there (Tr 315-316). The respondent was 46 years old at the time.

14. FA said the old man was fat (Tr 384). In describing the subsequent attack on him at the clubrooms, the victim said that the assailant only stopped hitting him when he was really tired and out of breath and asking for water (Tr 330-331). The respondent was not obviously overweight and video footage of him at his residence revealed a middle-aged man of a relatively athletic appearance. This is demonstrated most clearly by the stills of the video footage comprising **Exhibit 17**.

15. FA also said the old man indicated he was from Melbourne and appeared to be the boss as he introduced interstate visitors, and that it was the old man pointing out pictures of chapters from around the world in the Thomastown clubrooms (Tr 394, 396-397)[7]. However, on the undisputed evidence the respondent was himself visiting Melbourne from Adelaide. There was no suggestion he was a boss.

Sequence of investigation and identification evidence

16. A statement was commenced to be taken on 28 September 2009 at 6.17 pm by Det Blezard and this process continued over several days until it was finally signed on 6 October 2009 (CA [47]).

17. On 29-30 September 2009, Const Northfield showed a photo board (**Exhibit 1**) to FA while he was still in hospital. The photo board included (as photo no. 2) a photograph of Ali Chaouk, a Hell's Angels "hang around". FA selected this photo as being Ali, who had been at the entrance of the Dallas club when FA arrived. However, FA also incorrectly suggested that photos no. 1 and 8 depicted persons who were possibly in the car with him on the way to the Hells Angels clubhouse (Tr 364) (CA [12]-[13], [97]).

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6 Although he claimed in cross-examination that the "old man" was the only person in the Dallas club who was "looking like a rocker" (Tr 383), FA also described "Bullring" by reference to the description "rocker": see Tr 369.29.

7 FA also agreed he had told Det Blezard in September 2009 that at the clubrooms the "old man" at one point went and got some cannabis from inside a tin box behind the bar and started smoking it (Tr 398).

18. During the mid-afternoon of 29 September 2009, FA assisted police in compiling the FACEview image and associated description which comprises **Exhibits 2** and **12**.

19. On 2 October 2009, the victim was shown CCTV footage of the nightclub (the footage was shown to the CA during the appeal) and identified five men who were present, including Chaouk and a person he said was the "old man".

20. The police believed (Tr 700-701) (CA [49]) this person was an individual named Michael Cooper who was overweight, more than 10 years older than the respondent, had a long reddish beard and was present at the clubrooms when police attended the day after the assault (Tr 660, 668).

21. The footage, being of relatively low quality and outdoors at night, showed the person the victim identified in the footage as having whitish or grey hair. The nature of the footage did not accurately show the colour of a person's hair. (This person in the CCTV footage was said by Michael Gerrie at trial to look like "Boris", a name by which the respondent was known: Tr 645).

22. On 5 October 2009, a photo board was shown to FA containing a picture of the person police believed to be the "old man" (Cooper), and FA in fact selected Michael Cooper as the culprit (CA [50]). This identification was either not videotaped (Tr 704) or subsequently lost (Tr 715). Cooper was then charged. His arrest photo (**Exhibit 26**), reveals an older and much heavier male than the respondent (and thus more consistent with FA's description of the offender).

23. The charges against Cooper were later abandoned. In February 2010, South Australian Police, in company with Victoria Police, executed a search warrant at the respondent's home in Gawler, South Australia (the audio visual footage is **Exhibit 1**).

24. FA having returned to Germany in December 2009, in February 2010, Det Sgt Condon informed the victim that he had been mistaken in his identification of the "old man" (CA [50]). On 18 February 2010, Det Condon emailed FA in these terms (CA [70]):

> Faisal, you may be pleased to know that on 16 and 17 February 2010 I flew to Adelaide and spoke with two other people **I believe were responsible** for the assault on you. At their home address I seized some items that I believed will help you in proving that they were in Melbourne at the time you were assaulted and that they were the ones responsible for the assault on you. They have not been charged as yet. **However, I'm confident that in time I will have sufficient evidence to charge them and they will then be brought before the courts to explain their actions**. Over the next couple of weeks I hope to make contact with the police in Germany with a view to having them come out and **show you some photo boards**... [Emphasis added]

25. Det Condon subsequently spoke to FA by telephone on 25 February 2010 and he noted the effect of the conversation in an email as being (CA [72]):

> I advised him that I would ... have them show him these photo boards (three in total) of **people I believe were responsible for the assault**.
>
> As soon as I told him this, he asked me if one was a fat old bloke. I told him the photo boards [were] of **people I believed may be responsible for the assault** and that for legal reasons I could not say any more. ...[Emphasis added]

26. FA returned to Australia in August 2011 to give evidence at Ali Chaouk's trial. On 23 August 2011, almost two years after the events in question, the victim was shown a number of photo boards[8], including a photo board (**Exhibit 5**) containing a picture of the respondent, and which FA selected (photo no. 9). This of course was after he had been told he had earlier wrongly identified Cooper (CA [53]) and after he had identified a person in the CCTV footage.

27. FA accepted that by the time he participated in this process, following email and telephone communications with Det Condon, he had a preconceived view that a photo of his assailant would be included in the photo board (Tr 419). Det Condon had had substantial contact with FA prior to his departure from Germany about participating in a further identification process, and indeed picked FA up from the airport and met up with him several times during the trip and for the purposes of attending Court (Tr 414, 418-421). (He also had coffee with FA on the morning he gave evidence in this matter: Tr 379.)

28. The photo board identification was carried out by Det Condon and not an independent investigating officer, as earlier occurred with Cooper (Tr 709-710, 716).

29. FA accepted that in selecting the photograph of the respondent he had selected the photograph because of all the pictures on the board, it was closest to his memory of what the old man looked like (Tr 410-411). In cross-examination, FA said that when he saw the photo board he had the understanding that he had to find the person that was closest is appearance to the old man (Tr 422) or his memory of what the old man looked like (Tr 425.21). In that regard, he accepted that the only picture on the photo board who had a beard that he could see any length on was photo no. 9, the picture he selected (Tr 423.21). It was accepted by Det Condon that two of the photos on the board in fact showed the same person (photos no. 1 and 11) (Tr 714).

30. It will be recalled that FA's description of the assailant was of a person with grey hair or white hair with some grey or blonde tips in grey white hair, whereas with the possible exception of photo no. 10, although photo no. 9 (the respondent) shows predominantly ginger hair, unlike most of the other photographs, it has some grey in the beard.

31. On the same day, FA also viewed a number of other photo boards and made selections of persons (and items) on those boards. As the Court below noted, he made significant and numerous errors in this process (CA [12]-[13], [97]). Most relevantly:

    (i) FA was shown the photo board comprising **Exhibit 8** and he identified photo no. 3 as "Daly" and indeed at trial he adhered to the proposition that he met at the Dallas club and that it could have been one of the two in the car with him on the way to

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[8] No parade was held. When asked about taking part in a line-up the respondent indicated he wanted to talk to a lawyer. There was some controversy whether there had been any follow up in relation to this. Very shortly before trial, Det Condon produced a note of a conversation said to reflect a conversation between him and a solicitor for the respondent. He gave evidence that he had been informed the respondent did not want to participate in a line-up, although it will be noted that the relevant note appears before a reference to "Sexton" (one of the other alleged participants), and that the conversation was said to have occurred on 24 February 2010, and subsequently to the email (set out below) to FA foreshadowing the use of photo boards (CA [71]).

the clubhouse and that it looks like Daly (Tr 366-367). This was incorrect. FA did not select photo no. 5, which depicted Michael Gerrie (Tr 708);

(ii) he was also shown a photo board (**Exhibit 7**) in which he purported to identify another man said to have been present at relevant times ("Bullring"). He selected photo no. 9, and maintained at trial that that was Bullring (Tr 370), whereas the a suspect (Dale Sexton) was no. 11 (Tr 708). He confirmed at trial that no person apart from no. 9 was at the Dallas club or the clubrooms, and he was quite sure about that (Tr 371). Incidentally, it may be noted that FA's original description of Bullring was of a person with shoulder length hair (Tr 370);

(iii) also on 23 September 2011, FA was shown a photo board (**Exhibit 6**), in which he purported to identify photo no. 10 as a man who had been at the Dallas club and the clubhouse and who he referred to as the "Italian guy" (Tr 372). At trial he was sure, and quite positive, that was the short, Italian guy (Tr 373, 375). Again, he was wrong about this; the suspect Larossa was no. 2 (Tr 707-708) (CA [97]).

32. It may also be noted that the witness Gerrie, called by the Crown, accepted that at the clubhouse on the afternoon before the assault, there were a few fat people and old people and lots of them with long beards and grey hair (Tr 651) (cp AS [6.72]). When the police attended the clubrooms after the assault there were several cars in the street (Tr 657) and ladies were leaving the premises (Tr 658). There were six or seven rooms upstairs at the clubhouse (Tr 668).

33. It should also be noted that although the appellant submits that Gerrie's testimony that the person depicted in CCTV footage was the respondent was not challenged (AS [6.28]), in fact, when shown the relevant portion and asked if he recognised anyone in the footage, he simply said: "Yeah, well, it looks like Boris, but it's not very good footage" (Tr 645). In circumstances where the police and FA considered the person in the video footage was Cooper, a challenge to Gerrie's evidence was in effect disclosed within the Crown case.

Procedural context: the application for exclusion

34. There was an application at trial to exclude the photo board identification evidence relating to **Exhibit 5**, involving ss 114[9] and 137.

35. There was a *voir dire* at which evidence was taken from Det Condon on Thursday and Friday 9-10 October 2014 (days 3-4) (Tr 88-219). Submissions were then heard commencing on 10 October 2014 and continued on Monday 13 October 2014. Before submissions were completed and the judge was able to rule, the judge heard an application by the prosecutor to take FA's trial evidence in the absence of a jury pursuant to s 198 of the *Criminal Procedure Act* 2009 (Vic), prior to him returning to Germany. The respondent's counsel opposed this on the basis that a ruling on the *voir dire* would underpin the approach to cross-examination (Tr 295-296). The prosecutor submitted that

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9 The "preliminary issue" now identified by the appellant concerning ss 114 and 115 (AS [6.13]-[6.26]) can be put to one side. It was not argued before the Court of Appeal, and is not raised by any ground of appeal. The appeal to this Court concerns only s 137, albeit that some of the arguments relevant to that section were also raised with respect to s 114.

these aspects of the evidence in chief and cross-examination could be hived off and not shown to the jury if the ruling was to exclude the evidence (Tr 297). The judge ruled in favour of the prosecutor (Tr 297). FA's evidence was then taken on all topics on Monday and Tuesday 13-14 October 2014 (days 5-6) (Tr 310-426) and then submissions continued on the *voir dire* on Wednesday and Thursday 15-16 October 2014 (days 7-8) (Tr 430-598), and the judge then ruled on Thursday 16 October 2014 (Tr 519).

36. Accordingly, the evidence and cross-examination respecting the photo board identification had been heard by the judge before he ruled on admissibility.

37. The trial judge considered that the evidence was admissible pursuant to s 114 and not liable to be excluded pursuant to s 137, notwithstanding his opinion that the impugned evidence had "relatively low" probative value. As to prejudice he said the relevant concept was whether the jury would misuse the evidence in some unfair way, and he assessed the risk of that occurring as "minimal" (CA [101]).

38. On appeal, Priest JA and Croucher AJA considered that the evidence should have been excluded pursuant to s 137. The essential reasoning is set out at CA [102]-[114]. Whelan JA agreed with their assessment of the probative value of the impugned evidence (CA [2]) but took a different view as to the risk that the jury would give it disproportionate weight (and therefore took a different view as to whether there was a danger of unfair prejudice) (CA [4], [7], [8], [23]-[24]).

Forensic context and inter-relationship with the Cooper identification

39. The appellant makes a number of submissions to which it is necessary to respond, namely:

(a) the identification of Cooper by police and FA was mistaken (AS [5.12], [6.27]) and it was not suggested by the defence at trial that Cooper was a possible alternative assailant (AS [5.13]);

(b) FA's identification of the respondent in the photo board exercise in August 2011 was "led in effect to counter-balance the Cooper misidentification evidence" (AS [51.8]) and the prosecutor stated it was not evidence relied on to prove the case (AS [6.75], see also AS [2.1](b));

(c) the respondent's counsel made much in closing of the "photo board identification" (AS [6.79]);

(d) it was "somewhat remarkable" for the majority to contend that the line of cross-examination concerning identification evidence "would have been avoided by the defence but for the prosecution seeking to adduce the August 2011 identification of the respondent by FA" (AS [6.80]);

(e) the mistaken Cooper identification evidence was led by the prosecution and then relied on 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)" (AS [6.81]);

(f) when the evidence is assessed as a whole, Whelan JA was correct in concluding that the admission of the "photo board evidence did not result in a substantial miscarriage of justice" and indeed the admission of the impugned evidence was "advantageous" to the defence (AS [6.82]).

40. In respect of proposition (f), the appellant must presumably mean that the photo board evidence **including the Cooper identification** was advantageous to the respondent. It is impossible to see how, standing alone, evidence that FA selected the respondent from a photo board was advantageous to the appellant.

41. In relation to proposition (e), it is unclear to what principle the appellant is referring when it submits that somehow if the prosecution leads evidence which may undermine its case (on the Crown hypothesis, the Cooper identification was wrong, so the selection of Cooper undermined the credibility or reliability of FA) fairness then dictates that the prosecution must be permitted to lead evidence which would in effect restore the credibility or reliability of the prosecution witness[10]. In fact, the evidence did not restore his credibility or reliability but merely sought to contradict the witness's initial identification of Cooper as the "old man".

42. Likewise, proposition (b) may reflect the prosecutor's *intention*, but it is not a basis for, nor does it impact on, the question of admissibility under s 137. Even if it was the prosecutor's *intention* primarily to "counter-balance" the Cooper "misidentification", that does not mean it was not advanced as part of the Crown case on guilt. In fact, as the extracts from the prosecution address (AS [6.76]) reveal, the prosecutor (unsurprisingly) said that she did not rely on the photo board identification "alone" to prove her case, but said that the evidence was "in the mix so to speak"[11]. Critically, that is how the trial judge left the matter to the jury. He said that: "the prosecution case is not based on the photo board identification on 23 August 2011 alone. That evidence is however relevant" (Tr 805). Further, the trial judge gave particularly careful directions about the dangers associated with evidence reliant on the CCTV footage (Tr 793-794), so that the photo board identification would necessarily have been carefully considered by the jury.

43. Turning to proposition (c), the subject of the defence submission to which reference is made in AS [6.79] is clearly to the Cooper identification, and to the other photo board (mis)identifications undertaken on 23 September 2011, not to the identification of the respondent. That the defence focused on the photo board identification more generally as pointing up FA's lack of reliability does not mean the photo board selection of the respondent was in any sense part of the defence case or advantageous to it - as the trial transcript reveals, plainly, the defence strongly urged the exclusion of the selection by FA of the respondent in a photo board.

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10 There is no basis for a contention that had it been excluded on the *voir dire*, cross-examination concerning the Cooper identification would inevitably have justified it then being led (cf. proposition (e) and Whelan JA at CA [27]). Not only does that involve speculation (in that the situation never arose: the Crown opened on the Cooper identification) but it assumes, without justification, that had the prosecution not led the Cooper identification, and it been extracted in cross-examination, that would have justified the introduction of the photo board selection of the respondent in re-examination or by way of rebuttal evidence without the very same s 137 issues arising.

11 The Crown opened on the evidence (Further Amended Summary of Prosecution Opening at [40](a)).

44. Finally it must be noted that there was no agreed fact at the trial that Cooper could not possibly have been the culprit (cf. proposition (a)). During the course of the trial counsel indicated that as her client was not involved she was simply "relying on the history" (Tr 685) and made repeated references during her address that FA's description in fact better matched someone of Cooper's appearance than the respondent's.

V. RELEVANT STATUTORY PROVISIONS [see the appellant's submissions]

VI. STATEMENT OF RESPONDENT'S ARGUMENT

45. FA gave a description of the "old man" that was inconsistent in significant respects with the respondent, and in 2009 positively identified a different person, Cooper, as the "old man". Cooper was also thought by police to be the person in the CCTV footage.

46. Two years later, the **police having suggested to FA** that his earlier identification was wrong and that they had identified the real culprit, he was shown an array of photographs expecting the culprit to be among the images shown. He selected a photo of the respondent as it was the closest to his memory of what the "old man" looked like. He selected the only photo he believed showed a long beard with any grey or white in it.

47. This was evidence of an out-of-court assertion of resemblance given in circumstances where not only had there been an identification of a different person but where FA had been influenced to believe that the real culprit would be among those in the array.

48. This was not a case where a witness reflected on his or her evidence and came to a different conclusion. FA selected Cooper. FA was then in effect told he was wrong and to select someone else from an array which included a person the police believed was the culprit, and where the image of the respondent was one of a small number of options who could possibly be described as having a long beard with any grey or white in it.

49. If the evidence was not valueless, it was of slight probative value, and for reasons to be developed, a significant risk of prejudice arose not only from the risk of overestimation of its weight but the impact of **suggestion** (which in turn resulted in the prejudicial revelation of the belief of the police that the respondent must be the old man) and **displacement**. These dangers could not be satisfactorily neutralised by jury direction.

50. The majority was right to order a retrial. Had the evidence not been led, the respondent's conviction was not inevitable. The fact that defence counsel made much in closing of the **earlier** photo board identification of Cooper, and the frailties in the later identification of the respondent, cannot found some generalised assertion that the photo board identification was, viewed as a whole, "advantageous" to the respondent. Nor can the admission of evidence be justified by predicting or hypothesising a forensic decision that it is said defence counsel might have made had the trial been conducted differently, and then attributing controversial legal consequences to that decision.

51. The question of substantial miscarriage cannot be approached on such a counterfactual. Nor ought the question of admissibility be decided by erecting a hypothetical (false) issue about how the trial will unfold if evidence is not adduced "in chief".

Grounds 1 – 3 (exclusion of the photo board evidence)

52. Grounds 1 – 3 relate to the application of s 137 of the *Evidence Act* 2008 (Vic) to the evidence that FA made an out-of-court selection of a photograph of the respondent as most resembling[12] his memory of the "old man".

Identification evidence: common law

53. In *Alexander v The Queen* (1981) 145 CLR 395 at 426, Mason J said:

> Identification evidence is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed.

54. As the plurality said in *Domican v The Queen* (1992) 173 CLR 555 at 561, the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that the courts of criminal appeal and ultimate appellate courts felt obliged to lay down special rules in relation to it.

55. After referring to apparent misidentifications of an "astonishing character" ([1345]), and that the experience of actual miscarriages of justice has been supported by instances where the propensity to make wrong identifications has been established in artificially constructed experiments ([1350]), the learned author of *Cross on Evidence* (2015, 10th Australian ed) lists eleven possible reasons for the risk of miscarriage ([1355]), including, for example:

    (1) the complex but hidden reasoning required to assert an assertion of recognition[13];

    (3) the problem of defective memory particularly over a time interval;

    (5) the tendency for witnesses to be confident[14], dogmatic or stubborn about identification;

    (6) the propensity for witnesses to err in recognising outsiders;

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12 Evidence of resemblance is not itself capable of sustaining a finding of guilt but is potentially admissible: *Cross on Evidence* (2015, 10th Australian ed) at [1360]. Resemblance evidence qualifies as "identification evidence" as defined in the Dictionary to the *Evidence Act* 2008 (Vic).

13 In this regard, a recent and comprehensive analysis tracing from the observations of Evatt and McTiernan JJ in *Craig v The King* (1933) 49 CLR 429 at 446 through to the modern literature on the mental processes involved, may be found in *Strauss v Police* (2013) 115 SASR 90 at [17] – [25], and see also [26] – [30].

14 In *R v Hibbert* (2001) 163 CCC (3d) 129 (SCC) at 148, Arbour J said that there was a "very weak link between the confidence level of a witness and the accuracy of that witness", adopting the findings of Peter Cory in *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001) at pp 31-34. See also the literature and jurisprudence discussed in Gates, "*Perry v New Hampshire*: Abandoning the Supreme Court's Fundamental Concern with Eyewitness Reliability" (2013) 72 *Maryland Law Review* 571.

(7) the difficulties arising from the fact that in identification parades (and photographic arrays) the witness expects to find the guilty person present, and that the images are two-dimensional and static; and

(8) the difficulty in assessing the risk of error by effective cross-examination.

56. As is noted in *Cross* (at [1340]), some evidence of identification is of so little weight that the trial court in a criminal case must consider whether or not it should be excluded in its discretion on the ground that it is unfairly obtained or that its prejudicial effect exceeds its probative value. While the risks of identification evidence are primarily and ordinarily dealt with by the framing of appropriate directions to the jury, a discretion to exclude prejudicial evidence of low weight is recognised at common law: see, eg, *Alexander* at 402 (Gibbs CJ), *Festa v The Queen* (2001) 208 CLR 593 at [20], [23] (Gleeson CJ), [51] (McHugh J), [161] (Kirby J), cf. *Smith v The Queen* (2001) 206 CLR 650 at [16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [64] (Kirby J)[15].

57. The approach at common law, largely mirroring the so-called *Christie* discretion, is reflected by the observations of Gibbs CJ in *Alexander* at 402-403:

> The authorities support the conclusion that ... as a matter of law, evidence of an identification made out of court by the use of photographs produced by the police is admissible. However, a trial judge has a discretion to exclude any evidence if the strict rules of admissibility operate unfairly against the accused. It would be right to exercise that discretion in any case in which the judge was of the opinion that the evidence had little weight but was likely to be gravely prejudicial to the accused.

58. Prejudice may inhere in the risk that evidence will suggest a fact which is of a kind that is ordinarily excluded from evidence in the interests of fairness to the accused (ie. by suggesting a criminal propensity), or because the evidence is relevant but likely to be given excessive weight by the jury[16].

59. As to the former, the prejudice is likely to be case-specific, and turn on the type of identification evidence involved[17].

60. As to the latter form of prejudice, there is a necessary relationship with the limitations upon the weight that can safely be attributed to identification evidence; the risk of over-estimation arises because juries are likely to be less capable of recognising and respecting the limitations. As McHugh J said in *Festa* at [64]:

> **Experience has shown that juries are likely to give positive-identification evidence greater weight than that to which it may be entitled**. Few witnesses are as convincing as the honest – but perhaps mistaken – witness who adamantly claims to recognise the accused as the person who committed the crime or was present in incriminating circumstances. [Emphasis added]

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15 The United States jurisprudence recognises that exclusion may be necessary where the identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification": see, eg, *Simmons v United States* 390 US 377 (1968).

16 The risk of a jury attributing more weight to evidence than it deserves a well accepted form of unfair prejudice (see, eg, the discussion by Gleeson CJ of an aspect of the prejudice associated with propensity evidence in *HML v The Queen* (2008) 235 CLR 334 at [12]), and it is a form of unfair prejudice which particularly informs the often-expressed concerns attending identification evidence.

17 For example, the "rogues gallery effect" arises where the use of photographs may suggest an accused is known to police: *Festa* at [22] (Gleeson CJ).

61. Sometimes the reasons why identification evidence may lack significant evidential value are subtle and difficult for a jury to assess, such as where a displacement effect may be operating, or where there may be a risk the process involved **suggestion** (cf. *Pitkin v The Queen* (1995) 69 ALJR 612) but where cross-examination on that topic would be counter-productive because it would serve only to emphasise the authorities' belief in the accused's guilt. Thus, there is a dual aspect to suggestion on the part of the police:

(a) first, it is wrong to overlay a witness' recollection with a suggestion that the person to be shown in a photograph is the person suspected of or charged with the crime: see, eg, *Davies v R* (1937) 57 CLR 170 at 181-182;

(b) secondly, if defence counsel has to introduce the fact of or risk of suggestion by cross-examination this inevitably causes some risk of prejudice because it is well accepted that it is prejudicial to an accused for the jury to receive evidence revealing or suggesting the police hold an opinion that the accused is guilty: see *R v Ireland* (1970) 126 CLR 321 at 332 (Barwick CJ), cp. *Whitehorn v The Queen* (1983) 152 CLR 657 at 668 (Deane J).

62. There is a further dimension to be considered when the identification occurs out-of-court using photographs. It is essentially hearsay evidence, not tested at the relevant time by cross-examination (see *Cross* (2015, 10th Australian ed) at [1355] (7) and (8)). While the witness who adopts the out-of-court identification may be cross-examined at trial, there may be a tendency for a witness to harden their position in relation to the earlier identification, and for cross-examination to be ineffective at revealing the extent to which that has occurred. Where the out-of-court identification, or here, selection, appears to precipitate a trial, there will also be a sense in which that will tend to confirm in the witness' own mind the correctness of their selection[18].

63. Ordinarily, to tell a witness their out-of-court evidence is wrong, and to suggest that they reconsider their evidence, would be seen as inappropriate, and as detracting from if not eliminating the value that can be placed on the evidence[19]. Yet that is in effect what occurs when a witness makes one identification, and is then implicitly or explicitly told they are wrong by being invited to try again. The risk of suggestion is heightened where, on the second occasion, the witness is not constructing an image from their own memory but selecting from a group of images which they have been led to believe includes an image of a person the police believe is the culprit. Suggestion is a particular problem where there may be a conscious or subconscious desire to assist or please the person or party making the suggestion.

64. Finally, it is accepted that photographs, being two-dimensional, static and in circumstances where the lighting may not reflect the circumstances in which the witness saw the culprit, are problematic: *Alexander* at 409.

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18 Recognising the risk of suggestion after the identification, it has been said that neither the police nor the Crown should comment on the identifications made by an eye-witness: *R v Powell* [2007] CanLII 45918 (Ontario Superior Court of Justice) at [15](10) (Ducharme J).

19 Compare the position relating to similar fact evidence, which has no probative value where it is "reasonably explicable" on the basis of concoction by collusion: *Hoch v The Queen* (1988) 165 CLR 292. Suggestion can "severely reduce" the value of identification evidence: see the discussion of *R v Manh* (1983) 33 SASR 515 at 575 in *Strauss v Police* (2013) 115 SASR 90 at [24].

Identification evidence and s 137

65. Both prior[20] and subsequently[21] to the Court's ruling in *IMM v The Queen* (2016) 90 ALJR 529; [2016] HCA 14, evidence of identification has been excluded pursuant to s 137.

66. While that section involves the exercise of a rule rather than a discretion, and subject to the discussion of "reliability" (addressed below), similar considerations govern the application of s 137 as were applied at common law in respect of identification evidence. In particular, there is no reason why the risk of a jury attributing excessive weight to identification evidence does not present a relevant and significant "danger of unfair prejudice".

Probative value

67. The correct approach to the determination of the probative value of evidence exclusion of which is sought under s 137 was the subject of extensive commentary and consideration prior to the Court's decision in *IMM*.

68. While it was held by the plurality in *IMM* that a consideration of the probative value of evidence for the purposes of s 137 calls for an assessment of the capability of evidence to prove a fact in issue and does not import a consideration of credibility or reliability, the plurality went on to say (at [50]):

> It must ... 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 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.

69. In the present case, the evidence itself was given in a form which effectively disclaimed significant probative value, because the witness in terms described what he was doing as selecting, some years after the event, the photograph, from a limited sample which he had been led to believe included a photograph of the culprit, the photo which most resembled his memory of what the "old man" looked like, in circumstances where he had provided an earlier identification of a different person which, it had been suggested to him, was wrong.

70. In one sense, it was not really evidence of identity. Rather, it was evidence to the effect that of a limited number of photographs the photograph of the appellant most closely resembled a memory of someone who the witness had earlier identified by reference to a

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20 *R v Blick* (2000) 111 A Crim R 326; [2000] NSWCA 61, *R v Fisher* [2001] NSWCCA 380, *R v Marshall* (2000) 113 A Crim R 190; [2000] NSWCCA 210.

21 *Bayley v The Queen* [2016] VSCA 160.

different photograph, made in circumstances where he never in evidence recanted from the Cooper identification.

71. As Odgers explains, circumstances surrounding an identification can render the evidence weak, unconvincing and of low probative value, consistently with the approach of the plurality in *IMM*: Odgers, *Uniform Evidence Law* (2016, 12th ed) at [EA137.90]. See also *Bayley v The Queen* [2016] VSCA 160 at [55]. In this regard, Odgers has suggested:

> It is possible to explain the approach taken in the majority judgment as follows. Assume the witness testifies: "I identify [the accused] as the offender". For the purposes of determining the probative value of that evidence in the context of s 137, the evidence of the witness is to be accepted as credible and reliable. However, the evidence may be seen as evidence of an opinion ("in my opinion, the accused person is the offender"). Accordingly, it is to be assumed that the witness is being truthful when he or she testifies that this opinion is held and is reliably recounting the content of the opinion (thus, probative value may not be assessed on the basis that the witness actually holds a different opinion). This does not mean that the opinion itself must be assumed to be reliable. Other evidence, including "the circumstances surrounding the evidence" of the witness, may indicate that it has low probative value.
>
> The example given by Heydon is one where the probative value of the identification evidence is low because the circumstances in which the observation of the offender was made show that the subsequent identification (the opinion itself) is "weak" and "unconvincing" and, accordingly, of low probative value. It would necessarily follow that another example would be where the circumstances in which the (first) identification of the accused as the offender also render that identification "weak" and "unconvincing" and, accordingly, of low probative value (for example, where there was a high level of "suggestion" that the accused was the offender).

72. Here, the evidence is of an opinion, first expressed out of court, that although FA thought Cooper was the "old man", a two dimensional photo of the respondent was the closest of the options presented to FA nearly two years after the relevant events based on his then memory affected as it may have been by the subsequent course of the investigation. It is inherently unconvincing evidence of identity for a variety of reasons.

73. Accordingly, although Priest JA and Croucher AJA proceeded by reference to the approach in *Dupas v R* (2012) 40 VR 182, rather than *R v Shamouil* (2006) 66 NSWLR 228 and *R v XY* (2013) 84 NSWLR 363, this was a case where, consistently with the majority approach in *IMM*, it was proper to regard the probative value of the evidence as slight. It is not surprising that the trial judge and all members of the Court of Appeal treated the probative value as very limited, because the relative lack of probative value has at all times been effectively conceded by the prosecution.

Danger of unfair prejudice

74. Critically, the plurality judgment in *IMM* did not cast any doubt on the proposition that, when considering the danger of unfair prejudice to the accused, it may be relevant and necessary for the trial judge to consider the reliability of the evidence, at least in so far as that may be necessary in considering the risk that a jury would treat the evidence as more reliable (or weighty) than the evidence merited.

75. Indeed, the plurality referred, without disapproval, to observations to that effect by Basten JA in *XY* at 367-377 [48]. Basten JA had (at [46]-[47]) referred to the fact that, in *Shamouil*, Spigelman CJ had discussed the risk of unfair prejudice by reference to the observations of McHugh J in *Festa* set out earlier.

76. Further, although the plurality held that the complaint evidence sought to be impugned in *IMM* was properly received, their Honours noted (at [74]):

> Neither at trial nor in the Court of Appeal did the appellant suggest that there was a risk of the jury misusing the evidence or giving it more weight than it deserved, as he now seeks to do.

77. The plurality did not cast doubt on the proposition that the risk of a jury attributing excessive weight to evidence is a form of unfair prejudice. By contrast with the position that obtained at trial and on appeal in *IMM*, in the present case, it was that risk which was at the forefront of the application for exclusion at trial and on appeal.

78. As at common law, so under s 137, has it been recognised that the question of unfair prejudice must be considered by reference to the warnings and directions that the trial judge must or will give in relation to the evidence.

79. In practical terms this means that, as Redlich JA (Weinberg and Bongiorno JJA agreeing) observed in *MA v R* (2011) 31 VR 203 at [25], deficiencies in identification evidence will ordinarily be addressed by appropriate cautionary directions being given by the trial judge, and the need to exclude such evidence would generally only arise when the trial judge concludes that no direction can adequately remove a danger that the evidence will be given undue weight or will be impermissibly used.

80. The same approach in practice has been applied in New South Wales. For example, in *R v Carroll* (2013) 234 A Crim R 233; [2013] NSWSC 1031, Hall J said (at [80]-[81]):

> A court in considering an application to exclude evidence under s 137 therefore is required, inter alia, to be **astute** to the danger of unfairness and in particular to the risk that evidence of an identification from photographs may be given greater weight than it deserves: *R v Carusi* (1997) 92 A Crim R 52 at 55.
>
> **The discretion to exclude is an important one in identification cases.** One test in determining whether evidence as to identification generally should be excluded is whether the quality of that evidence falls short of the point where its frailty or frailties cannot be cured by an appropriate direction to the jury: *Carusi* at 55-56. [Emphasis added].

81. The approach to prejudice when considering the common law discretion, as reflected in *Carusi*, has been treated as informing the assessment of unfair prejudice for the purposes of s 137: see, eg, *R v Blick* (2000) 111 A Crim R 326; [2000] NSWCCA 61.

82. While the capacity to give curative directions is to be considered, nevertheless, on numerous occasions, it has been felt necessary to exclude identification evidence pursuant to s 137. See, eg, *R v Smith (No. 3)* [2014] NSWSC 771, *R v Hawi (No 11)* [2011] NSWSC 1657; *R v Bakir* (2009) 8 DCLR (NSW) 220; *R v Rich [No 6]* [2008] VSC 436 (Lasry J); and *R v Mayne, Noll and Airey* (Unreported, Supreme Court of Victoria, Coldrey J, 1 July 1994), *Blick* (supra), *R v Fisher* [2001] NSWCCA 380, *R v Marshall* (2000) 113 A Crim R 190.

83. It is one thing to articulate the frailties of identification evidence, and to formulate a direction accordingly, but it is another thing to accept that a jury without previous experience of identification evidence can, by listening to and seeking to follow the direction, resist the dangers of over-estimation of weight and unfairly prejudicial use. After all, the whole point of a direction is to alert the jury to matters likely to be outside

their experience: cf. in a different context *Bromley v The Queen* (1986) 161 CLR 315 at 323-324 (Brennan J). Indeed, a common form of identification direction alerts juries to the particular knowledge that judges and the courts have (due to experience) of the frailty of such evidence.

84. In the particular field of identification evidence, because the danger of unfair prejudice is so often tied up with the risk that juries lack the courts' experience in appreciating the weakness of identification evidence, an assessment of those weaknesses is critical to an assessment of the risk of unfair prejudice.

The differing approaches in the Court of Appeal

85. Both the majority and Whelan JA proceeded on the footing that the "probative value" was low (reflecting the basis upon which the matter was argued at trial and on appeal, and that no challenge to *Dupas* was made). At all events, the critical passage in the majority reasoning was addressed not just to probative value but to **unfair prejudice**. Priest JA and Croucher AJA said (at [102]-[112]):

> With respect, although we agree with his Honour's conclusion that any probative value that the visual identification evidence possessed was low, we are **unable to agree with the conclusion that the risk of unfair prejudice was minimal**. Plainly, in our opinion, any probative value that the evidence had was so low as to be outweighed by the risk of **unfair prejudice**.
>
> There are, in our view, 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 been an unreliable witness so far as identification was concerned. Less than a week after the assault on him he wrongly identified Michael Cooper as his attacker. Thereafter, on 23 August 2011, he both purported to identify persons whom he thought might have been present at relevant times — but who were not — and failed to identify an individual, Mr Gerrie, who undoubtedly was present. Thus, FA's reliability was, in our view, significantly compromised.
>
> *Secondly*, there had been a delay of almost **two years** between the assault and FA's purported identification of the applicant as the 'old man' on 23 August 2011. That delay serves to exacerbate the doubts we already harbour about FA's reliability.
>
> *Thirdly*, there is, in our view, 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 the Dallas CCTV footage.
>
> *Fourthly*, by the time FA selected the applicant'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 photo board on 23 August 2011, by his own admission, FA had a **preconceived view** that a photo of his assailant was included in it.
>
> *Fifthly*, and allied to the fourth point, 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. [Emphasis added, citations omitted]

86. The majority also referred (at [111]) to the "seductive quality" of the evidence (citing *Domican* at 561-562) which was "difficult to ameliorate by judicial direction".

87. By contrast, Whelan JA accepted that there were cases where identification evidence had a seductive quality which could be difficult to ameliorate but he considered that here,

because there was to be cross-examination which would demonstrate the frailty of the evidence, the risk of misuse was minimal (CA [8]-[9]).

88. Whelan JA considered that, viewed globally, the photo board evidence had become a principal component of the defence case (CA [23]). By this he meant the photo board evidence as a whole, including that FA had first identified Cooper from a photo board as the culprit. Whelan JA approached the matter on the basis (not accepted by the respondent) that there could not be selective admission of photo board evidence (CA [26]). He took the view it was likely that had the Crown not introduced the evidence, defence counsel would have introduced the topic of the Cooper identification, and it was then inevitable all of the photo board evidence would have to be admitted (CA [27]).

89. Priest JA and Croucher AJA took a different view, considering it was unlikely defence counsel would have run the risk of having it admitted by undisciplined cross-examination of the victim directed to misidentification of Cooper (CA [112]).

The danger of prejudice here outweighed the probative value

90. The circumstances which rendered the victim's photo board identification of the respondent dangerous were unusual and extreme. The case involved a unique combination of virtually all of the types of dangers sometimes associated with identification evidence.

91. Briefly, in addition to the difficulties and dangers which attend all photo board identifications of persons not previously known to the witness, to recapitulate:

(a) FA's actual description of the culprit **differed in fundamental respects** from the respondent's appearance (as evidenced by video footage of the respondent at his home and more or less as evidenced by the photo in the photo board array). Far from being an old, fat or unfit man with grey, greying or grey/blonde straight hair who was a "boss" from Melbourne introducing interstate people, he presented as a reasonably athletic middle-aged man with predominantly ginger and frizzy hair, and he was visiting Melbourne from Adelaide;

(b) FA **positively identified Cooper as the culprit**, and was unable to identify from photo board arrays other persons who were plainly present and part of the activities which unfolded (and in fact wrongly identified others in their stead) FA did not actually abandon his Cooper identification;

(c) FA's subsequent selection of the respondent, **nearly two years** after the offending, was prompted by in effect being told his earlier identification was wrong, and was inappropriately infected by the **suggestion** that this time there would be a person in the array who **police believed** was the culprit;

(d) the risk of misidentification was further enhanced by the victim's own understanding that his task was to identify the person **closest** to the old man he had described, that is, a man with, inter alia, a long beard;

(e) the only photo on the photo board that FA thought should a long beard was the respondent, and there were other shortcomings in the array;

(f) there was also a potential displacement effect by reason of his earlier identification of Cooper (who he evidently believed was the culprit). It is important to note that the photo of Cooper shown to FA (**Exhibit 4**) had a long beard and straight hair on the sides of his face, as FA had originally described, but **ginger** hair. The other photos in **Exhibit 5** were inconsistent with FA's description in critical respects, meaning photo no. 5 was the closest to the relevant description despite Cooper having ginger hair. This posed a real risk of displacement when FA later viewed a photo of the respondent's ginger hair;

(g) the impugned photo board identification took place after an earlier identification of video footage taken at night outside the nightclub from which FA had identified a person, giving rise to a further potential displacement effect;

(h) no video of the Cooper identification was available for the jury to compare FA's degree of confidence when making selections.

92. While each of these considerations demonstrates the limited (or negligible) probative value of the evidence, they also lead to a risk of over-estimation of the proper weight to be afforded to the evidence (a recognised form of prejudice).

93. Moreover, and critically, the fact that the entire process was **precipitated by a suggestion** by police to the witness that his earlier identification evidence was not right and that based on their belief he should undertake a further identification gave rise to the unfairness that, in order to demonstrate that the further identification was not unprompted, the respondent was forced to introduce prejudicial evidence of the belief of the police (and then warn the jury about being influenced by that belief: Defence Address Tr 50.3-50.22).

94. When the full context is considered, the majority was plainly justified in considering this was a case where the gulf in experience between the criminal courts and a jury was such that it could not be bridged by directions. The minority approach should be rejected: the fact that the prosecution chose to pre-empt that the defence might introduce evidence of the Cooper misidentification by itself leading both the Cooper identification and the highly contentious identification of the respondent does not dictate that, on an assessment of the risk of unfair prejudice, the Court should conclude by reference to **other** evidence, there may be some overall benefit to the accused.

Ground 4 (substantial miscarriage)

95. The appeal was governed by s 276(1)(b) of the *Criminal Procedure Act* 2009 (Vic), the provision considered in *Baini v The Queen* (2012) 246 CLR 469[22].

96. It was there held by the plurality (at [28]-[33]) that where there has been an error such as the non-exclusion of identification evidence, the Court of Appeal could only be satisfied,

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22 Subsequent consideration of the decision and the provision may be found in: *Andelman v The Queen* [2013] VSCA 25, *Benson v The Queen* [2014] VSCA 51 and *Fletcher v The Queen* [2015] VSCA 146.

on the record of the trial, that it did not amount to a substantial miscarriage of justice if the court could conclude from its review of the record that conviction was inevitable. The inquiry is whether a guilty verdict was inevitable, not whether it was open. Further, where it is submitted that the verdict was inevitable, an appellant need not prove his or her innocence to meet the point; an appellant will meet the point by showing no more than, had there been no error, the jury may have entertained a doubt as to his or her guilt. In considering the record, the appeal court must acknowledge the natural limitations. Finally, a finding that the conviction was inevitable does not necessarily conclude the issue of substantial miscarriage.

97. The present case was circumstantial. In *Peacock v The King* (1912) 13 CLR 619, Griffith CJ, after referring to the comments of Alderson B in *R v Hodge* (1838) 168 ER 1136; 2 Lewin CC 227 at 228, noted that the circumstances must be such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused. Here, the circumstances inconsistent with guilt were that:

(a) FA's description did not correspond with the respondent in numerous respects;

(b) FA identified a different person who, on the prosecution's case, looked very different to the respondent, as the "old man";

(c) the police believed that the person in the CCTV footage was the same person.

98. This was not a case where it can be concluded that had the impugned evidence been excluded the respondent would inevitably have been found guilty beyond reasonable doubt (and indeed, Whelan JA, in dissent, did not undertake the process of reasoning necessary to reach that conclusion).

99. Further, the verdict cannot be used to support such a conclusion. The premise upon which that submission is made by the appellant is wrong – it is incorrect to say that the prosecution did not "rely" on the evidence. It was led as part of the case. It was "in the mix". The trial judge did not direct the jury they could not rely on it, and could only use it to "counterbalance" the Cooper identification, whatever that might mean. (In truth, it did **not in fact rebut** the Cooper identification, because it was only by reason of the police inviting him to make a further selection that the selection of the respondent came about, and since he never disowned or recanted from the Cooper identification, it was not in fact undermined by the impugned evidence.) In any event, the perceived need to "counterbalance" the Cooper identification is actually an acknowledgment that if not answered or explained, it might or would result in an acquittal.

100. The case cannot be reduced to the proposition that FA said the man in the CCTV footage was the old man and Gerrie thought that man was "Boris" (the respondent), and that a finding beyond reasonable doubt of guilt on that evidence alone was inevitable.

101. One cannot overlook that FA's first (and likely best) description of the "old man" simply did not correspond with the respondent in key respects: age, physique, hair colour, and residence. This alone, and particularly when coupled with the police belief that the person in the CCTV footage was someone who the prosecution submitted (Prosecution Address Tr 32.25-26) looked different to the respondent, gave rise to a reasonable doubt.

102. At all events, it was open to a jury to entertain a reasonable doubt, particularly given that:

(a) Gerrie was clearly a reluctant witness who gave somewhat strange evidence;

(b) FA's evidence had many unsatisfactory elements. Apart from the difficulties with his identification evidence, it may be noted, for example, that he claimed (Tr 393) not to recall having been at clubs prior to the Dallas club, including a gay massage parlour called "Wet on Wellington", and could not explain the "pass out" card from that club dated 27 September 2009 that was in his belongings (Tr 695, 714);

(c) a reasonable jury might consider that there were many possible culprits at the Dallas club and or the Hell's Angels' clubrooms (see, eg, [32] above), and much scope for confusion on questions of identity).

103. The majority was right to find a substantial miscarriage of justice resulted from the admission of the impugned evidence.

104. Whelan JA's speculation as to the course the trial might have taken had it been excluded is not a permissible approach to s 276; apart from anything else that approach arrogates to the Court the forensic decisions to be made by an accused and attributes contestable consequences to the decisions.

VII. SUBMISSIONS ON CROSS-APPEAL/NOTICE OF CONTENTION [n/a]

VIII. ORAL ARGUMENT

105. The respondent estimates that the presentation of his oral submissions will require two hours.

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