HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND EDELMAN JJ

THE QUEEN APPELLANT

AND

GLYN DAVID DICKMAN RESPONDENT

The Queen v Dickman
[2017] HCA 24
21 June 2017
M162/2016

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2, 3 and 4 of the Court of Appeal of the Supreme Court of Victoria made on 23 November 2015 and in their place order that the appeal against conviction to that Court be dismissed.*

3. *Remit the proceeding to the Court of Appeal of the Supreme Court of Victoria to determine the respondent's pending application for leave to appeal against sentence.*

On appeal from the Supreme Court of Victoria

Representation

G J C Silbert QC with B L Sonnet for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

M E Shaw QC with B J Doyle for the respondent (instructed by Barbaro Thilthorpe Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

The Queen v Dickman

Criminal law – Appeal against conviction – Identification evidence – Where victim's identification of accused on photoboard admitted at trial – Where police conveyed to victim that photograph of suspect would be on photoboard – Where victim had made erroneous previous identification – Whether probative value of identification evidence outweighed by unfair prejudice to accused – Whether evidence should have been excluded under s 137 of *Evidence Act* 2008 (Vic) – Whether admission of identification evidence occasioned substantial miscarriage of justice.

Words and phrases – "identification evidence", "probative value", "substantial miscarriage of justice", "unfair prejudice".

Evidence Act 2008 (Vic), s 137.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND EDELMAN JJ. The respondent was convicted following his trial in the County Court of Victoria (Judge Coish and jury) of (i) intentionally causing serious injury[1]; and (ii) making a threat to kill[2], for which offences he was sentenced to an effective sentence of eight years' imprisonment with a non-parole period of five years and six months.

2 The Court of Appeal of the Supreme Court of Victoria (Priest JA and Croucher AJA; Whelan JA dissenting) allowed the respondent's appeal against his convictions[3]. The majority concluded that the trial judge had erred by failing to exclude certain identification evidence ("the August 2011 identification") under s 137 of the *Evidence Act* 2008 (Vic) ("the Evidence Act"), and that this error had occasioned a substantial miscarriage of justice. The convictions were set aside and a new trial ordered.

3 On 18 November 2016 French CJ, Kiefel and Gordon JJ granted the prosecution special leave to appeal on grounds which challenge the conclusion that it was an error to admit the evidence and, in the alternative, the conclusion that its admission occasioned a substantial miscarriage of justice. One plank of the challenge relating to the admission of the evidence anticipated the decision in *IMM v The Queen*[4], and contends that the Court of Appeal majority erred by assessing its probative value by reference to their Honours' view that the complainant was an unreliable witness of identification. As will appear, this aspect of the appellant's challenge is not determinative. The real issue is the correctness of the Court of Appeal majority's conclusion that such probative value as the August 2011 identification possessed was outweighed by the danger of unfair prejudice to the respondent.

4 As will also appear, it is strictly unnecessary to address the question said to be raised by the appellant's alternative ground, which is whether, if the admission of the evidence was wrongful, it resulted in a substantial miscarriage of justice given that it was deployed to the advantage of the defence. The August 2011 identification remained a strand in the prosecution's circumstantial case regardless of the forensic use made of it by the defence. The issue presented by

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1 *Crimes Act* 1958 (Vic), s 16.

2 *Crimes Act* 1958 (Vic), s 20.

3 *Dickman v The Queen* [2015] VSCA 311.

4 (2016) 257 CLR 300; [2016] HCA 14.

the alternative ground is whether, assuming the admission of the August 2011 identification involved legal error, the respondent's conviction on the admissible evidence was inevitable[5].

5 For the reasons to be given, analysis of the evidence and the conduct of the trial supports the trial judge's conclusion that the risk that the August 2011 identification would unfairly prejudice the defence was minimal. The analysis also supports the conclusion that if the August 2011 identification is put to one side, the respondent's conviction was nonetheless inevitable. The appeal must be allowed and the respondent's convictions restored.

The evidence

6 Faisal Aakbari, an 18 year old German youth, was holidaying in Melbourne. In the early hours of 27 September 2009, he went into the city, where he attempted to gain entry to several nightclubs. These included the Dallas Showgirls nightclub ("the Dallas club") in King Street, Melbourne. A number of men associated with the Hells Angels Motorcycle Club ("the Hells Angels") were standing outside the Dallas club. Aakbari falsely claimed to one of them, Ali Chaouk, that he was a member of the Hells Angels in order to gain entry. Once inside the club, Aakbari was taken upstairs by the manager, a man named Smith. There, he met a person whom he described as the "old man", and a short, balding man named Daly, and a short, balding man who looked Italian ("the Italian"). The "old man" had a long beard and a ponytail and was wearing an "army" style of jacket. He looked like a "rocker" or "biker". His long beard gave him this appearance. No one else in the Dallas club looked like a "rocker" or "biker".

7 After a time Aakbari was told that the group was going to visit another club. Aakbari did not want to go with them but he was given to understand that he had no choice. He left the Dallas club with Chaouk, Daly and a man who had a bullring in his nose ("Bullring"). Daly and Bullring got into Aakbari's car with him and directed him to the Hells Angels' Thomastown clubroom ("the Thomastown clubroom").

8 Aakbari described the Thomastown clubroom, on arrival, as "very empty". He saw the "old man", Chaouk and the Italian inside the clubroom. There was a

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5 *Baini v The Queen* (2012) 246 CLR 469 at 481 [33] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 59.

bar in the clubroom and on one of the walls there were photographs of members of the Hells Angels from chapters around the world. The "old man" showed Aakbari photographs of members of the German chapter and asked him if he knew any of them. When Aakbari said he did not, the "old man" became very angry and aggressive. At a point, he disappeared and returned with a baseball bat with which he savagely beat Aakbari about the head and body. When he ran out of breath, the "old man" passed the baseball bat to Chaouk, who continued the assault. The "old man" disappeared again and on this occasion he reappeared with a large "Ninja" knife, which he held next to Aakbari's neck as he told him "don't go to the police, otherwise I will kill you and your family". The only persons whom Aakbari described as present in the clubroom at the time of the assault were the "old man", Chaouk and the Italian, who, on the prosecution case, was a man named Michael Gerrie. Aakbari described Daly and Bullring as walking in and out. After the "old man" threatened Aakbari with the knife, a man whom Aakbari had not seen at the Dallas club intervened, saying "let him go". Daly and Chaouk helped Aakbari to his car. Aakbari was driven to an unknown location, where he was left.

9 Aakbari suffered multiple injuries in the course of the assault. These included: an extradural haematoma; a tear in the dura (the lining of the brain); bleeding on the surface of the brain; a broken fibula; lacerations to the head; abrasions to the arms and legs; a loose tooth; and a black eye. He was taken to hospital, where he underwent a craniotomy to drain the blood clot and repair the dura.

10 On 28 September 2009, while he was in hospital, Aakbari spoke to the police about the attack. The process of obtaining a statement from Aakbari took several days. On 29 September 2009, he was shown an array of photographs of 12 men (a "photoboard") from which he selected a photograph of Chaouk. Later that day, he assisted the police in compiling a "FACEview" image of the "old man". On 30 September 2009, Aakbari was shown another photoboard, from which he wrongly selected photographs of persons who he said might be Daly and Bullring.

11 On 2 October 2009, Aakbari was shown closed-circuit television (CCTV) footage of the interior stairs and exterior of the Dallas club recorded on the morning of his visit. He identified Chaouk, the "old man", Daly and the Italian. The person whom Aakbari identified as the "old man" appears to be a stocky, middle-aged, bearded male with a long ponytail, wearing a camouflage-style jacket.

12 Aakbari gave the police a description of the "old man" after he had assisted in the compilation of the FACEview image and after he had seen the CCTV footage. The "old man" was aged in his 50s or 60s, he was 170 to 180 cm in height, he was white with tanned skin, he had a long beard, his hair was worn in a long ponytail, and he was wearing a green, grey and white "army" style of jacket.

13 Detective Senior Constable Blezard, who was one of the police officers investigating the assault, thought that he recognised the person whom Aakbari identified in the CCTV footage as the "old man" as a man named Michael Cooper. On 5 October 2009, Aakbari was shown a photoboard containing photographs of 12 men, including a photograph of Cooper. The respondent's photograph was not included in the array. Aakbari selected the photograph of Cooper as the "old man". Cooper was charged with the assault on Aakbari. Further investigation, however, established that Cooper had a "rock solid" alibi and the charge was withdrawn.

14 Aakbari returned to Germany in December 2009. On 16 February 2010 the police executed a search warrant at the respondent's home in Gawler, South Australia. They located a number of items in the course of the search which suggested that the respondent is known as "Boris".

15 It is accepted that the police told Aakbari that his identification of Cooper was mistaken. In an email dated 18 February 2010, Detective Sergeant Condon said that he had spoken to two people whom he believed to be responsible for the assault on Aakbari and that he intended to make contact with police in Germany with a view to having Aakbari shown photographs. In the event, Detective Sergeant Condon was unable to make arrangements for Aakbari to participate in any identification procedures in Germany.

16 In August 2011, Aakbari returned to Australia to give evidence at Chaouk's trial. During his stay in Melbourne he was shown a number of photoboards prepared by a police analyst. One photoboard included a photograph of the respondent. Aakbari was asked if he could identify the "old man" in this photoboard and he selected the photograph of the respondent. This is the August 2011 identification. In cross-examination, Aakbari agreed that the police had given him to understand that the photoboard would contain a photograph of the person whom they suspected of being the "old man". Aakbari also agreed that he had selected the photograph of the respondent because his photograph bore the closest resemblance to his recollection of the "old man". On the same day Aakbari wrongly identified photographs of persons as the Italian, Daly and Bullring and failed to identify a photograph of Michael Gerrie.

17 Gerrie, a "prospect" for membership of the Hells Angels, gave evidence in the prosecution case. Gerrie had driven from Adelaide to Melbourne on 26 September 2009 with a member of the Hells Angels whom he knew as Boris. It was not in issue at the trial that the respondent is Boris. Gerrie and Boris were at the Dallas club on the morning of Sunday 27 September 2009. He, Boris and Chaouk left the Dallas club together and travelled by car to the Thomastown clubroom. Gerrie was shown the CCTV footage taken at the Dallas club and he identified the stocky figure with the long beard and ponytail wearing the camouflage-style jacket as Boris. He identified himself, Boris and Chaouk walking from the Dallas club towards a car. Gerrie claimed to have fallen asleep behind the bar at the Thomastown clubroom following their arrival and not to have witnessed any assault.

18 Records of text communications and calls made to and from mobile telephone services associated with Gerrie and the respondent were in evidence. These showed that a text message had been sent from the respondent's mobile telephone to Gerrie's mobile telephone at 7.55 am on Saturday 26 September 2009. Thereafter, calls made to, and from, these mobile telephones were relayed through various telephone towers consistently with Gerrie's account that they had driven from Adelaide to Melbourne that day. The telephone records were consistent with Gerrie's account that on arrival he and Boris had driven to the Thomastown clubroom and that in the early hours of Sunday 27 September they had gone to the Dallas club.

19 The CCTV footage recorded Aakbari's arrival at the Dallas club at 3.42 am on Sunday 27 September 2009. Chaouk's mobile telephone was being intercepted in connection with another police investigation. At 3.52 am, in an intercepted call between Chaouk and a person called Diva, there was reference to a member from Germany. In the same call Chaouk stated "no, no I'm still here. I've got to take Boris there and Mick". Commencing at 4.12 am, calls were made from the respondent's mobile telephone and Gerrie's mobile telephone to the mobile telephone associated with a man named Bernard Salstufor, who it would seem was believed to have knowledge of the German chapter of the Hells Angels.

20 At 4.30 am Aakbari left the Dallas club. Shortly after 4.40 am the CCTV footage records the man in the camouflage-style jacket, Chaouk and Gerrie walking towards the car. At 4.48 am, while the three men were in the car, a call was recorded between Chaouk and one Peter Green. During the course of this conversation, the telephone records recorded a call from Gerrie's mobile telephone to Salstufor's mobile telephone. Fragments of what was suggested to have been being said to Salstufor (or the person using Salstufor's telephone) were

audible in the background of the recording of Chaouk's call. One fragment was the words "reckons he's from Frankford". It was the prosecution case that the bona fides of Aakbari's claim to membership of the German chapter of the Hells Angels was being investigated as the respondent, Gerrie and Chaouk travelled to the Thomastown clubroom.

21 An intercepted call was recorded at the time of the assault and in the background Aakbari can be heard screaming "oh my God, what's happening?" and another voice can be heard saying "lying cunt" and "I mean, are you a Hells Angel?" The jury was invited to compare the respondent's voice on a recording made during the execution of a search warrant at his home with the voice speaking during the assault and conclude that the latter was the respondent.

22 The sole issue at the trial was proof that the respondent was the "old man".

23 The respondent did not give or call evidence at the trial.

The trial judge's ruling

24 The photoboard shown to Aakbari on 23 August 2011 contained photographs of 11 men[6], including a photograph of the respondent. As earlier noted, the photoboard was prepared by a police analyst. It appears that the photograph of the respondent had been taken by the police on 16 February 2010.

25 The respondent objected to the August 2011 identification and a voir dire hearing was conducted to determine its admissibility. The respondent argued that the preconditions for the admission of "visual identification evidence" under s 114 of the Evidence Act were not satisfied. Section 114 governs the admission of identification evidence based wholly or partly on what a person saw but does not include "picture identification evidence"[7]. Picture identification evidence relates to an identification made wholly or partly from the examination of pictures that are kept for the use of police officers[8]. The admission of picture identification evidence is governed by s 115 of the Evidence Act.

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6 The photoboard contained 12 photographs; two were of the same man.

7 *Evidence Act* 2008 (Vic), s 114(1).

8 *Evidence Act* 2008 (Vic), s 115(1).

26 Consistently with the way the matter had been argued, the trial judge found that there was no evidence that the pictures included in the photoboard were kept for the use of police officers. His Honour considered that the admissibility of the August 2011 identification was governed by s 114 of the Evidence Act. It followed that the evidence would not be admissible unless the respondent had refused to take part in an identification parade or it would not have been reasonable to hold an identification parade, and the identification was made in circumstances in which Aakbari had not been intentionally influenced to identify the respondent[9].

27 The August 2011 identification was conducted by Detective Sergeant Condon and recorded on videotape. The trial judge was satisfied that Aakbari had not been intentionally influenced to identify the respondent's photograph. His Honour found that the respondent had refused to take part in an identification parade and, in any event, it would not have been reasonable to hold such a parade. His Honour was satisfied that the preconditions for the admission of the August 2011 identification were established.

28 The respondent argued in the alternative that the August 2011 identification should be excluded under s 137 of the Evidence Act because its probative value was outweighed by the danger of unfair prejudice to his case.

29 The prosecutor submitted that the probative value of photographic identification evidence was generally in the "moderate to low" range and that the probative value of this identification was further reduced because it had taken place almost two years after the assault and after Aakbari's misidentification of Cooper. She contended that the evidence was nonetheless relevant and that its admission would not result in any unfair prejudice to the respondent.

30 The trial judge found that notwithstanding its limitations, the August 2011 identification possessed "some, albeit relatively low, probative value". His Honour said that the unfair prejudice with which s 137 is concerned is the risk that the jury might misuse the evidence in some unfair way. In the circumstances, his Honour assessed that risk as minimal because the limitations of the evidence were readily apparent and would be the subject of directions as to the special need for caution before accepting it.

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9 *Evidence Act* 2008 (Vic), s 114(2).

31 The August 2011 identification was adduced in the prosecution case together with the evidence of Aakbari's initial identification of Cooper and each of his other photoboard identifications and misidentifications.

The issues at trial

32 The prosecution case, which was essentially a circumstantial one, placed significant reliance on Aakbari's identification of the "old man" from the CCTV footage taken in conjunction with Gerrie's evidence that the bearded man with the ponytail wearing the camouflage-style jacket in that footage was Boris. In closing address, the prosecutor made this submission with respect to the August 2011 identification:

> "It's also relevant that when he was shown a photo board with the accused man, he picked the accused as the old man. It's relevant information for you to take into account but it's not something either way that could either lead you or to conclude he's guilty nor can it give rise to what we call a reasonable doubt. You've got it before you. It's in the mix so to speak but it is not the evidence upon which I rely to prove my case."

33 The defence case relied on claimed inconsistencies between Aakbari's description of the "old man" and the respondent's appearance. Aakbari described the "old man" as fat whereas the video-recording of the execution of the search warrant at the respondent's home shows the respondent, who was then aged 46 years, as a person of moderately athletic appearance. Aakbari described the "old man's" hair and beard as white with grey tips. The respondent's hair and beard were described as ginger with some lighter colour. In addition to these physical differences, the respondent relied on Aakbari's belief that the "old man" was the boss of the Thomastown clubroom whereas the respondent was an interstate visitor. Prominent in defence counsel's closing address was the fact of Aakbari's initial identification of Cooper as the "old man" and the contention that Aakbari's assailant was a person who looked like Cooper.

The Court of Appeal

34 The respondent appealed against his convictions on multiple grounds, two of which challenged the admission of the August 2011 identification. The first contended that the evidence did not comply with the preconditions for admission under s 114 of the Evidence Act. Argument in the Court of Appeal in support of this ground proceeded upon acceptance that the August 2011 identification was not "picture identification evidence" under s 115. The correctness of that analysis is not an issue in the appeal in this Court.

35 The sole ground on which the respondent's appeal succeeded in the Court of Appeal was the trial judge's refusal to exclude the August 2011 identification under s 137 of the Evidence Act[10]. The Court of Appeal majority concluded that any probative value that the August 2011 identification had was so low as to be outweighed by the risk of unfair prejudice[11]. Their Honours gave five reasons for this conclusion. First, Aakbari's reliability was "significantly compromised"[12] in that he had wrongly identified Cooper as the "old man", wrongly identified persons as Daly, Bullring and the Italian, and failed to identify Gerrie. Secondly, the delay of almost two years between the assault and the August 2011 identification exacerbated doubts about his reliability. Thirdly, his memory may have been contaminated by his earlier identification of Cooper and the possible "displacement effect" of viewing the CCTV footage. Fourthly, he had been told that his earlier identification was mistaken and he had been given to understand that a photo of his assailant would be included in the photoboard. Fifthly, he would have been striving to find the photograph that best resembled his memory of the attacker[13].

36 Their Honours rejected any suggestion that directions could address any prejudice occasioned by admitting the evidence[14]. Their Honours went on to say[15]:

> "Had the evidence [of the August 2011 identification] been excluded – as the defence had sought – in our view it is highly unlikely that defence counsel would then have run the risk of having it admitted by undisciplined cross-examination of [Aakbari] directed to his misidentification of Mr Cooper. Very experienced senior counsel would well have appreciated that – in circumstances where the evidence had

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10 Section 137 of the *Evidence Act* 2008 (Vic) provides: "In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused."

11 *Dickman v The Queen* [2015] VSCA 311 at [102].

12 *Dickman v The Queen* [2015] VSCA 311 at [104].

13 *Dickman v The Queen* [2015] VSCA 311 at [105]-[108].

14 *Dickman v The Queen* [2015] VSCA 311 at [111].

15 *Dickman v The Queen* [2015] VSCA 311 at [112].

> been excluded – it would be inevitable that the evidence would be made admissible by any cross-examination on the misidentification of Mr Cooper (if only to rehabilitate [Aakbari's] credit). It is unthinkable that astute defence counsel would be so unwise."

37 Having found that s 137 of the Evidence Act required the exclusion of the August 2011 identification, their Honours concluded that its admission had occasioned a substantial miscarriage of justice without further examination.

38 Whelan JA, in dissent, agreed with the trial judge that the probative value of the August 2011 identification was low and that the danger of its misuse was minimal[16]. Whelan JA took into account that the trial judge proposed to, and did, give warnings concerning identification evidence in careful and detailed terms. His Honour considered that the problems to which the warnings were directed were plainly exposed in the evidence and that the trial judge was right to conclude that there was no danger that the jury would give the evidence disproportionate weight[17].

39 Whelan JA considered that it was highly unlikely that the respondent's case would have been conducted without reliance on Aakbari's initial identification of Cooper. His Honour framed the issue not as the possibility of a lack of discipline in cross-examining Aakbari, but rather whether defence counsel would be prepared to forgo the very substantial benefits to the defence of adducing evidence of the Cooper identification[18]. His Honour pointed to defence counsel's final position in closing address[19]:

> "[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."

40 As Whelan JA noted, in her closing address the prosecutor acknowledged that Aakbari had made numerous mistakes in the photoboard identification of other persons and that there were "real problems with that type of evidence".

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16 *Dickman v The Queen* [2015] VSCA 311 at [3].

17 *Dickman v The Queen* [2015] VSCA 311 at [5]-[9].

18 *Dickman v The Queen* [2015] VSCA 311 at [27].

19 *Dickman v The Queen* [2015] VSCA 311 at [16].

The prosecutor disavowed that the August 2011 identification could be relied upon "alone" and conceded that Aakbari's earlier identification of Cooper was "obviously relevant"[20]. In the way the trial was conducted, far from the identification being prejudicial to the respondent, Whelan JA reasoned it had been used as a principal component of the defence case. In Whelan JA's view no substantial miscarriage of justice had been occasioned by the admission of the August 2011 identification[21].

The probative value of the August 2011 identification

41 The majority and minority analyses in the Court of Appeal proceeded upon acceptance of the prosecutor's stance at the trial, which was that evidence of Aakbari's initial identification of Cooper would only be adduced in the prosecution case if the August 2011 identification was also admitted. In the event the latter identification was rejected, the prosecutor flagged the likelihood that cross-examination would make it admissible "in rebuttal". In this Court, the respondent contests this analysis, submitting that the prosecutor was obliged to lead evidence of Aakbari's identification of Cooper. In circumstances in which Aakbari had not resiled from the Cooper identification, he submits that its admission did not require that the August 2011 identification, made subsequently, also be received.

42 In this Court, the appellant accepts that discharge of its duty of fairness required that it adduce evidence that within days of the assault Aakbari identified Cooper as his assailant, and that the admission of this evidence did not necessitate that the August 2011 identification also be admitted. While cross-examination of Aakbari may have enabled the prosecution to adduce the August 2011 identification, the appellant's concession should be accepted. The determination of whether s 137 required the exclusion of the August 2011 identification, as the trial judge appreciated, did not turn on whether Aakbari's identification of Cooper was, or was likely, to be received in evidence.

43 In written submissions, the appellant complains that the Court of Appeal majority wrongly took into account their Honours' assessment that Aakbari was an unreliable witness of identification. As the appellant acknowledged on the hearing of the appeal, the complaint is not to the point in circumstances in which there is no dispute that the probative value of the evidence was rightly assessed

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20 *Dickman v The Queen* [2015] VSCA 311 at [17].

21 *Dickman v The Queen* [2015] VSCA 311 at [23]-[24].

by the trial judge as low. This was an estimate that did not depend upon his Honour's assessment of Aakbari's truthfulness or reliability as a witness[22]. Assuming that the jury would accept the August 2011 identification at its highest, it was identification with limited capacity to rationally affect the assessment of the probability that the respondent was the "old man". This is to recognise not only the limitations of photographic identification, but also that the August 2011 identification was evidence of Aakbari's opinion that of the 11 men whose photographs were included in the array, the respondent's photograph bore the closest resemblance to his recollection of the appearance of the man who had assaulted him two years earlier[23].

44 Aakbari's opinion that the photograph of the respondent resembled his assailant was nonetheless a relevant circumstance. The fact that standing alone its probative value was low did not require its exclusion unless that value was outweighed by the danger of unfair prejudice[24]. Yet each of the reasons that the Court of Appeal majority gave for the conclusion that the evidence required exclusion was concerned with its low probative value. The only unfair prejudice to which the Court of Appeal majority referred was the "seductive quality" of identification evidence, which, their Honours said with reference to a passage in the joint reasons in *Domican v The Queen*, is difficult to ameliorate by directions[25].

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22 The Dictionary to the *Evidence Act* 2008 (Vic) defines "credibility of a witness" to mean the credibility of any part or all of the evidence of the witness, and to include the witness's ability to observe and remember facts and events about which the witness has given, is giving or is to give evidence.

23 The Dictionary to the *Evidence Act* 2008 (Vic) defines "identification evidence" to include evidence of an assertion that the accused resembles a person who was present at the place where the offence was committed.

24 *Festa v The Queen* (2001) 208 CLR 593 at 598-599 [10]-[11], [13]-[14] per Gleeson CJ, 614-615 [66]-[67] per McHugh J, 644 [171] per Kirby J (dissenting, but agreeing as to the admissibility of the Hill identification evidence), 658 [216] per Hayne J; [2001] HCA 72.

25 *Dickman v The Queen* [2015] VSCA 311 at [111] citing (1992) 173 CLR 555 at 561-562 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1992] HCA 13.

45 Recognition of the seductive effect of identification evidence led their Honours in *Domican* to state a requirement of the common law of evidence that where evidence of identification represents a significant part of the prosecution case, the judge must warn the jury of the dangers of convicting on it in a case in which its reliability is disputed[26]. Their Honours did not suggest that the seductive effect of identification evidence cannot be addressed by judicial direction. The point made in *Domican* was the need for cogent and effective directions tailored to the circumstances of the case[27].

46 Section 116 of the Evidence Act, as at the date of trial, reflected the concerns voiced in *Domican* respecting identification evidence[28]. It required the judge to warn the jury of the special need for caution before accepting identification evidence and of the reasons for that need for caution both generally and in the circumstances of the case.

47 Aakbari's evidence of the August 2011 identification was unlikely to have the seductive effect of an identifying witness who is adamant that the accused is the offender[29]. The Court of Appeal majority did not explain the error in the trial judge's conclusion that directions drawing attention to the readily apparent limitations of the August 2011 identification would minimise any risk that the jury might give the evidence disproportionate weight.

48 Unfair prejudice may be occasioned because evidence has some quality which is thought to give it more weight in the jury's assessment than it warrants or because it is apt to invite the jury to draw an inference about some matter which would ordinarily be excluded from evidence[30]. The "rogues' gallery" effect of picture identification evidence creates a risk of the latter kind because

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26 *Domican v The Queen* (1992) 173 CLR 555 at 561 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

27 *Domican v The Queen* (1992) 173 CLR 555 at 561-562 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

28 Section 116 of the *Evidence Act* 2008 (Vic) has since been repealed: *Jury Directions Act* 2015 (Vic), s 73(1). Division 4 of Pt 4 of the *Jury Directions Act* contains provisions relating to identification evidence in criminal trials.

29 Cf *Festa v The Queen* (2001) 208 CLR 593 at 614 [64] per McHugh J.

30 *Festa v The Queen* (2001) 208 CLR 593 at 602-603 [22] per Gleeson CJ.

the appearance of some photographs kept by the police may invite the jury to infer that the accused has a criminal record[31]. On the appeal in this Court, the respondent's argument concentrates on the danger of unfair prejudice of this latter kind, which is said to arise from unsatisfactory features of the August 2011 identification.

49 The respondent points out that Aakbari did not volunteer that he had any doubts concerning his identification of Cooper. The police told Aakbari that he was mistaken and that they had identified the persons who were in fact responsible for the assault on him. This was the context in which Aakbari was told that arrangements would be made for him to look at further photographs. This background made it necessary for defence counsel to cross-examine Aakbari to elicit his agreement that he understood at the time of the August 2011 identification that the array would contain a photograph of the man whom the police suspected of being the "old man". The cross-examination was necessary in order to expose a weakness in the identification but it inevitably served to highlight that the police suspected the respondent of being the offender.

50 Before addressing this aspect of the prejudice on which the respondent's argument relies, the question of the propriety of the police advising Aakbari that his identification of Cooper was mistaken should be addressed. It would have been wrong to tell Aakbari that his identification was a mistake if the police did not have cogent evidence that Cooper was not the "old man".

51 On the hearing of the appeal in this Court, it was not clear that the respondent accepted that the police had correctly excluded the possibility that Cooper was the "old man". Senior counsel for the respondent submitted:

> "[T]here was a circumstantial case against Mr Cooper. That circumstantial case included that he was from Melbourne, he was in fact at the club rooms on the Monday when the police came, that he looked like Mr – the person – or he was identified by Mr Aakbari as the offender. Those matters were put to raise a reasonable doubt about the reliability of the CCTV and of course the [August 2011 identification], which the defence were endeavouring to meet."

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31 See *Alexander v The Queen* (1981) 145 CLR 395 at 409-414 per Stephen J; [1981] HCA 17.

52 Contrary to the tenor of the submission, the trial was not conducted on the basis that the prosecution had failed to exclude the reasonable possibility that Cooper was the offender. That question first arose in the course of the voir dire. The prosecutor asked Detective Sergeant Condon a question about the inquiries that had been made concerning Cooper's alibi. Defence counsel interrupted, submitting that she could "short-circuit" this aspect of the hearing. In the exchange that followed, the prosecutor indicated that she wished to clarify whether it was to be suggested that Cooper should still have been a suspect. The trial judge inquired whether that was the suggestion, to which defence counsel replied "no, your Honour, obviously not". The prosecutor did not press questions on the topic of Cooper's alibi.

53 In a later exchange during the trial, the prosecutor again raised the question of whether the defence proposed to suggest that Cooper was, or could have been, the offender. The prosecutor stated that if that suggestion were to be made she was in a position to lead evidence to rebut it. Defence counsel stated, somewhat enigmatically, "Your Honour, I've made my position plain all the way along. I agreed to my learned friend she could open in that general way". This led the trial judge to ask "correct me if I'm wrong, but I've never understood the defence to be suggesting that it could have been Cooper … Unless I'm missing something … that's how I'm interpreting [defence counsel's] comments. I haven't got it wrong, have I, [defence counsel]?" To the last query, defence counsel replied "No. I've been saying to my learned friend - I said in my opening my client wasn't there". In the absence of a clear indication that the defence was not proposing to suggest that Cooper may have been the "old man", it would perhaps have been prudent to lead evidence of the Cooper alibi. In the event it would seem that the issue was dealt with by evidence being led from Detective Sergeant Condon that following receipt and investigation of further information the charges against Cooper had been withdrawn. Consistently with the way the case had been conducted, before closing addresses defence counsel stated "I won't be putting to the jury it is Mr Cooper. I'll be submitting that it's a person who clearly Mr Aakbari believes is Mr Cooper and therefore looks like Mr Cooper".

54 There was nothing to prevent the respondent from exploring the strength of Cooper's alibi. A forensic decision was made not to do so. The admissibility of the August 2011 identification is to be determined upon acceptance that the police were in possession of evidence that excluded Cooper as the offender. In these circumstances it was not improper for the police to tell Aakbari that he appeared to have been mistaken and to ask him to participate in a further attempt to identify his assailant.

55 It was wrong, however, to convey to Aakbari that the suspect's photograph would be included in the photoboard presentation. It appears that the photoboards that were shown to Aakbari in August 2011 contained a printed "preamble", stating that the viewer should not assume that the presentation included a photograph of any person suspected of being the offender. The value of this instruction was effectively undermined by Detective Sergeant Condon's earlier advice to Aakbari that the police had spoken to the men whom the police believed to be responsible for the assault and that they would arrange for him to be shown further photographs. Nonetheless, criticism of the police for the conduct of the identification should not have resulted in the exclusion of relevant evidence unless such probative value as it possessed was outweighed by the danger of unfair prejudice[32].

56 The unfair prejudice occasioned by the disclosure of Detective Sergeant Condon's suspicion that the respondent was the offender was the risk that the jury would infer that his suspicion was based on matters about the respondent known to Detective Sergeant Condon which were not in evidence. That risk, however, does not appear to have been a real one in the context of this trial. The evidence shows that police attended the Thomastown clubroom at about 6.40 am on Sunday 27 September 2009 and took details of the registration numbers of four cars parked outside it. One of these was a car bearing a South Australian plate which was associated with Gerrie. The text message transmitted from the respondent's mobile telephone to Gerrie's mobile telephone on the morning of 26 September 2009 linked the respondent to Gerrie. Telephone records placed the respondent in the vicinity of the Thomastown clubroom around the time of the assault. The reasons that the investigation came to focus on the respondent were explained in the evidence. Whether the evidence proved the respondent's guilt was the issue for the jury but there is no reason to conclude that the suspicion that the police entertained as to his guilt was based on information apart from the material that was before the jury.

57 The appellant is right to contend that the jury was not required to grapple with "abstract notions as to the dangers of identification evidence", as the limitations of the August 2011 identification were apparent. The trial judge's conclusion that the danger of unfair prejudice was minimal and could be adequately addressed by direction was justified. It follows that the admission of the August 2011 identification did not involve error.

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32 *Alexander v The Queen* (1981) 145 CLR 395 at 430 per Mason J.

Substantial miscarriage of justice

58 Even if there had been an error in admitting the evidence it did not follow, as the Court of Appeal majority appear to have concluded, that the error necessarily occasioned a substantial miscarriage of justice[33]. The appellant rightly complains that the Court of Appeal majority proceeded to the conclusion that there had been a substantial miscarriage of justice[34] without reference to the evidence or the conduct of the trial. Such an analysis, it is suggested, would have demonstrated that, without the August 2011 identification, the respondent's conviction was inevitable.

59 The force of the appellant's submission is illustrated by consideration of unchallenged aspects of the evidence. Aakbari met the "old man" in the Dallas club and the "old man" looked like a "rocker" or a "biker". Whatever Aakbari intended to signify by that description, he was unchallenged in his account that there was only one person in the Dallas club who answered it. Aakbari was not challenged on his identification that the bearded man with the ponytail wearing the camouflage-style jacket seen in the CCTV footage was the "old man".

60 It was not in issue that the respondent is the person Gerrie knew as Boris. Gerrie's account of his trip with the respondent from Adelaide to Melbourne and their visit to the Dallas club in the early hours of Sunday 27 September 2009 was not in issue. Nor was it in issue that Gerrie, Chaouk and the respondent left the Dallas club together and travelled by car to the Thomastown clubroom together.

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33 The determination of the appeal was governed by s 276(1) of the *Criminal Procedure Act* 2009 (Vic), which provides:

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

34 *Dickman v The Queen* [2015] VSCA 311 at [113]-[114].

It was not suggested that the bearded man with the ponytail wearing the camouflage-style jacket identified by Aakbari in the CCTV footage is not the same man identified by Gerrie as Boris. The quality of the CCTV images may be grainy and the lighting may have differed between images taken by the cameras inside and outside the club. Nonetheless the bearded man with the ponytail wearing the camouflage-style jacket is clearly visible.

61 The persons Aakbari nominated as being present at the Thomastown clubroom were the "old man", Chaouk, the Italian, Daly and Bullring (and the man who later intervened on Aakbari's behalf and whom he had not seen earlier at the Dallas club). The submission that without the August 2011 identification the prosecution had not excluded that another bearded man with a ponytail, who answered Aakbari's description of being "fat" with grey and white hair, might have been his assailant fails to address the unchallenged evidence that Aakbari first encountered the "old man" at the Dallas club.

62 The submission that the bearded man with the ponytail wearing the camouflage-style jacket appears to be stockier than the respondent is hardly to the point given that it was not put to Gerrie that the apparently stocky bearded man with the ponytail wearing the camouflage-style jacket who can be seen walking with him and Chaouk to the car was not Boris. Gerrie's evidence in material respects concerning his and the respondent's movements at critical times was supported by the telecommunications records.

63 In light of the evidence and the issues that were live at the trial, the appellant's submission that the prosecution case was overwhelming should be accepted. The possibility that a person other than the respondent was the "old man" was excluded beyond reasonable doubt. The respondent's conviction was inevitable[35].

Orders

64 For these reasons there should be the following orders.

1. Appeal allowed.

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35 *Baini v The Queen* (2012) 246 CLR 469 at 481 [33] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

2. Set aside orders 2, 3 and 4 of the Court of Appeal of the Supreme Court of Victoria made on 23 November 2015 and in their place order that the appeal against conviction to that Court be dismissed.

3. Remit the proceeding to the Court of Appeal of the Supreme Court of Victoria to determine the respondent's pending application for leave to appeal against sentence.