Supreme Court of Western Australia - Court of Appeal

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ASFOOR -v- THE QUEEN [2005] WASCA 126 (7 July 2005)

Last Updated: 18 July 2005

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : COURT OF CRIMINAL APPEAL

CITATION : ASFOOR -v- THE QUEEN [2005] WASCA 126

CORAM : MURRAY J

TEMPLEMAN J

EM HEENAN J

HEARD : 13-15 DECEMBER 2004

DELIVERED : 15 DECEMBER 2004

PUBLISHED : 7 JULY 2005

FILE NO/S : CCA 5 of 2004

CCA 16 of 2004

BETWEEN : KEIS ABD RAHIM ASFOOR

Appellant

AND

THE QUEEN

Respondent

FILE NO/S : CCA 15 of 2004

BETWEEN : THE QUEEN

Appellant

AND

KEIS ABD RAHIM ASFOOR

Respondent

ON APPEAL FROM:

Jurisdiction : DISTRICT COURT OF WESTERN AUSTRALIA

Coram : DEANE DCJ

File No : IND 1328 of 2002

Catchwords:
Criminal law - Appeal against conviction - "People smuggling" - Trial question was whether appellant identified as organiser - Whether jury directed adequately in relation to identification evidence of each Crown witness - Need for separate warnings in relation to visual and voice identification - Absence of appropriate direction that appellant's alleged radio interview could not prove guilt - Whether summary of voice identification evidence addressed the matters in issue - Whether necessary to warn jury about unsupported and potentially unreliable evidence of an indemnified witness - Whether essence of defence case conveyed to jury

Appeal against sentence - Presenting false passport - Whether sentence fair in circumstances of offence - Account to be taken of two legislative sources for the offence

Legislation:
Border Protection Legislation Amendment Act 1999 (Cth)
Migration Act 1958 (Cth), s 42(1), s 232A, s 233(1)(a), s 234(1)(a)

Passports Act 1938 (Cth), s 9A, s 10

Result:
Leave to appeal against conviction granted
Appeal allowed
Convictions quashed (except for count 56) and retrial ordered
Crown appeal against sentence dismissed
Leave to appeal against sentence granted to Asfoor
Sentence of 2 years imprisonment for passport offence quashed and sentence of imprisonment for 1 year substituted

Category: B

Representation:

CCA 5 of 2004

CCA 16 of 2004

Counsel:

Appellant : Mr D Grace QC

Respondent : Mr R J Davies QC & Mr G J Allen

Solicitors:

Appellant : Justine Fisher

Respondent : Commonwealth Director of Public Prosecutions

CCA 15 of 2004

Counsel:

Appellant : Mr R J Davies QC & Mr G J Allen

Respondent : Mr D Grace QC

Solicitors:

Appellant : Commonwealth Director of Public Prosecutions

Respondent : Justine Fisher

Case(s) referred to in judgment(s):

Alford v Magee (1952) 85 CLR 437

Bardsley v The Queen (2004) 29 WAR 338

Bromley v The Queen (1986) 161 CLR 315

BRS v The Queen (1997) 191 CLR 275

Bulejcic v The Queen (1996) 185 CLR 375

Buttsworth v The Queen (2004) 29 WAR 1

Cook v The Queen (2000) 22 WAR 67

Director of Public Prosecutions v Faure [1994] 2 VR 497

Domican v The Queen (1992) 173 CLR 555

Liang (1995) 82 A Crim R 39

Liberato v The Queen (1985) 159 CLR 507

Mule v The Queen [2002] WASCA 101

Neville (2004) 145 A Crim R 108

Pfennig v The Queen (1995) 182 CLR 461

R v Jellard [1970] VR 802

Ridgeway v The Queen (1995) 184 CLR 19

Roser v The Queen (2001) 24 WAR 254

RPS v The Queen (2000) 199 CLR 620

Case(s) also cited:

Alexander v The Queen (1981) 145 CLR 395

B v The Queen (1992) 175 CLR 599

Clarke (1997) 97 A Crim R 414

Donnini v The Queen (1972) 128 CLR 114

Festa v The Queen (2001) 208 CLR 593

Jarvis v The Queen (1993) 20 WAR 201

Jenkins v The Queen (2004) 211 ALR 116

Kotzmann v The Queen [1999] 2 VR 123

Lee v Phelan [2004] ACTSC 28

Mill v The Queen (1988) 166 CLR 59

Miranda (2002) 128 A Crim R 362

Mogg (2000) 112 A Crim R 417

Pearce v The Queen (1998) 194 CLR 610

Pinkstone (2000) 116 A Crim R 187

Postiglione v The Queen (1997) 189 CLR 295

R v Ireland (1970) 126 CLR 321

R v Latumetan [2003] NSWCCA 70

Thom (2001) 126 A Crim R 196

Tweedie v The Queen [2003] WASCA 282

Vlek v The Queen, unreported; CCA SCt of WA; Library No 990153; 29 March 1999

Von Porebski v The Queen [1999] WASCA 15

1 **MURRAY J**: This case involved an appeal against conviction and an application for leave to appeal against sentence by Mr Asfoor. There was also a Crown appeal against sentence. That appeal did not challenge the cumulative sentence of 2 years imprisonment imposed in respect of an offence under the *Migration Act 1958* (Cth), s 234(1)(a), of presenting, in connection with his entry into Australia, a false Turkish passport in the name of Imam Dogan. That was an offence to which, on the first day of the trial, the appellant, Mr Asfoor, had pleaded guilty.

2 It is convenient at this stage to note that the appellant was convicted after trial of twelve offences of organising the coming into Australia of persons whom the appellant knew would be unlawful entrants, or being reckless as to whether such persons had a lawful right to come to Australia. He had originally been charged with thirteen such offences. Each of those charges concerned a particular boat. Templeman J has referred to the structure of the indictment in more detail, including the reference to dependent alternative charges concerning the appellant's role in taking part in the process by which nominated individuals were enabled to enter the country as unlawful non-citizens.

3 Her Honour the trial Judge, on 29 January 2004, sentenced the appellant to 10 years imprisonment on each of the twelve major offences under s 232A of the *Migration Act*. Each of those sentences was to be served concurrently. The sentence for the passport offence was ordered to be served cumulatively. The total term of imprisonment imposed was therefore 12 years. Her Honour fixed a non-parole period of 8 years and backdated the sentences to commence on 5 October 2001 when, as I understand it, upon his entry into this country, Asfoor was taken into custody where he has remained ever since.

4 At the conclusion of the hearing of the appeal, by a majority, the Court, taking the view that what was in form an appeal against conviction required leave to appeal, granted such leave and allowed the appeal. The convictions of all the "people smuggling" offences were quashed and a retrial before the District Court was ordered, the Court making consequential orders as to that process. I was in the minority in relation to the making of those orders, not being of a settled view that the appeal against those convictions should be allowed. These reasons will be concerned to explain my position.

5 As to the appeals against sentence, the Crown's appeal was concerned with the inadequacy of the 10-year terms imposed for the people smuggling offences. It did not challenge the sentence of 2 years imprisonment imposed in respect of the passport offence to which the appellant had pleaded guilty. Upon the quashing of those convictions it was therefore appropriate that the Crown appeal against sentence should be dismissed, and the Court so ordered.

6 However, the Court reserved its decision on the appellant's application for leave to appeal against sentence. That application for leave involved the contention that each of the sentences imposed was manifestly excessive, as was the total term imposed. However, as argued, there was no challenge to the individual 10-year terms imposed for the people smuggling offences. That argument was presented in relation to the length of the term imposed for the passport offence and the totality argument was pressed. The latter argument, of course, falls away with the quashing of the convictions for the people smuggling offences.

7 As to the passport offence, I consider that, for the reasons given by Templeman J, to which I have nothing add, leave to appeal should be granted and the appeal allowed. I too would reduce the term imposed in the particular circumstances of this case to a term of imprisonment for 1 year which, of course, the sentences having been backdated to 5 October 2001, has long since been served. For that reason it is unnecessary to fix a recognisance release order pursuant to the *Crimes Act 1914* (Cth), s 19AC, although in these circumstances it would ordinarily be mandatory that the Court should take that course.

8 I turn then to the appeal against conviction. I propose to take the grounds in the order in which they are set out in the notice of appeal as amended. Before doing so, I record my debt to Templeman J, whose reasons set out thoroughly and carefully what one needs to know about the evidence and the case to understand the various grounds of appeal. I shall not repeat what his Honour has written in that regard.

9 Ground 1 challenges the admission of the evidence of the witness Williamson of his identification of the appellant as the person interviewed by the SBS reporter, Nakhoul, in an interview which was conducted on 24 July 2001. The interview was conducted in Arabic. In it, there is discussion about people smuggling generally in which the person interviewed makes statements, some of which might be found by the jury to relate to particular trips the subject of the indictment. The evidence was that Nakhoul often referred to the person interviewed as Keis, a first name used by the appellant. The person interviewed never denied that he was correctly referred to in that way during the course of the interview. That person spoke in terms which were, in some respects, identical with observations Williamson said had been made to him by the appellant. In particular, he expressed the point of view that people smuggling would not be a problem for Australia if the authorities simply turned back the ships that came, made them put to sea and take their chances on the open ocean.

10 Williamson's evidence was that he well knew the appellant and had been associated with him over an extended period of time in circumstances described by Templeman J. The association was close. Williamson's evidence was that he had often heard the appellant speaking in Arabic, a language he did not understand. Williamson had flown to Australia, landing in Perth with the appellant on 5 October 2001. He was asked to listen to the tape of the SBS interview on 7 October 2001. His identification was clear and powerful evidence that it was the appellant who was interviewed by Nakhoul. Given the content of the tape-recorded interview and its clear relevance to the offences charged, the proposition that this evidence was inadmissible is simply unsustainable. Nor is there any warrant for the view that it ought to be excluded in the exercise of the discretion of the trial Judge on the ground that its prejudicial

effect substantially outweighed its probative value: *cf* generally ***Neville*** (2004) 145 A Crim R 108. I agree that ground 1 may not be upheld.

11 Ground 2 is a related ground. It complains directly that the SBS interview was wrongly admitted in evidence. Templeman J discusses various aspects of the relevance of this interview. I have mentioned some aspects above. The person called Keis by Nakhoul when being interviewed, who did not deny that was his name, not only spoke generally about involvement in people smuggling activities, but he expressed attitudes and views which Williamson said the appellant had expressed to him and he did so using the same mode of expression.

12 When he spoke of his system of organising the traffic by boat, he spoke in terms consistent with the evidence of the accomplice, Syaid, who gave evidence of direct involvement with the appellant in the enterprises which were the subject of counts 4, 9, 12, 18, 22, 26 and 51 on the indictment. In other words, this evidence was corroborative of Syaid's testimony, by way of admission, if the jury concluded that the person interviewed by Nakhoul was the appellant.

13 In my view, there can be no question as to the admissibility of this evidence. The majority do not address this ground and in view of the fact that there is to be a retrial it seems to me to be important that I should express my view upon it.

14 I turn then to grounds 2A and 3, which may be taken together. They complain that the trial Judge failed to give adequate directions in relation to the use which the jury could make of the evidence of the SBS interview and of the dangers inherent in identification by voice recognition.

15 Of course, the jury could not have failed to be aware, having regard to the way in which her Honour the trial Judge approached these questions, that before any use was made of the evidence of what was said in the recorded interview with Nakhoul, they would have to be satisfied that the speaker was the appellant. The question therefore was whether they accepted the evidence of Williamson that he recognised the voice of the appellant as the person being interviewed by Nakhoul.

16 Her Honour's directions about that were given as part of her directions in relation to the question of identification generally. As to that, this Court has firmly espoused the exposition of the law by the High Court in ***Domican v The Queen*** (1992) 173 CLR 555: see ***Roser v The Queen*** (2001) 24 WAR 254. That was a photoboard identification case. The leading judgment was that of Anderson J. At 275-276 [88] – [93] his Honour dealt comprehensively with the sort of matters which should be dealt with in the trial Judge's directions to the jury. I endeavoured to summarise the present state of the law at 265[40], by saying:

> "It is abundantly clear that where evidence of identification is in issue, the jury should be warned in strong terms about the dangers of mistaken identification, about the way in which a mistaken witness may nonetheless be certain and persuasive, and about particular areas of weakness which the evidence may throw up. Such areas of weakness may be

inherent in the process of identification employed in the course of the investigation or they may arise out of particular matters affecting an identifying witness. All such matters should be drawn to the jury's attention."

17 In this case her Honour the trial Judge gave extensive directions upon the issue of identification and the somewhat different, but related, issue of recognition. Her Honour did so in general terms which were obviously related generally, as she said, to the evidence of Syaid, Williamson and the identifications made by "numerous passengers". She introduced the topic by speaking of the recognition of the law that identification is "a very difficult matter and, at times, a very uncertain matter which depends on many variables." Her Honour went on to speak of those variable circumstances; the familiarity of the identifying witness with the person being identified; whether the identification was made when the person was seen "fleetingly or perhaps in poor circumstances". Her Honour told the jury that such circumstances prevailing at the time of identification "must be carefully considered".

18 Her Honour told the jury that dock identification in the courtroom was traditionally regarded as being "of little probative value" when made by a witness who had little or no prior knowledge of the accused. She went on to explain why that was so.

19 She told the jury to consider whether there were any distinguishing features of the person being identified, whether there was any reason why the witness would have a special reason to remember the person they were purporting to identify, what they could see of the person being identified, whether the witness was under a state of stress or excitement (eg, while in detention), what time had elapsed between the witness seeing the person in question and purporting to make the identification.

20 Her Honour spoke of the quality of the photoboards. She spoke of the displacement effect which might be operating where a witness had previously identified a photograph of the appellant and was then asked to identify him in court. She discussed the fact that the photoboard identification process occurred without the appellant being present and she contrasted it with the process of identification at a line-up where the actual individual was being identified.

21 All of those observations were made in relation to the central instruction that there was "a need for caution" before convicting in reliance upon evidence of identification. Her Honour expressly mentioned the fact that an honest witness may be mistaken and so the question was whether the witness's identification was accurate. The jury must therefore "carefully examine the circumstances in each individual case where a witness makes an identification." As I have said, her Honour referred to the circumstances which would have application to the various identifying witnesses before the Court. I shall come back to this direction when discussion ground 5.

22 However, in relation to the witness Williamson and the question of voice identification, her Honour specifically mentioned Williamson in the context, not only of his identification of the appellant as Keis Asfoor, whom he had known for some time, but as the person interviewed by the SBS reporter Nakhoul. Her Honour spoke of the matters concerning the content of what was said during the interview and

Williamson's evidence about similar things being said to him, to which I have referred above. Included in those matters to which her Honour referred were an earlier attempt by the appellant to come to Australia when he had been rejected and returned to Indonesia, and Williamson's evidence that the appellant had told him that not only had he been on radio and interviewed, but that he had asked why the Australian government, if it was serious about controlling the influx of illegal immigrants, did not turn back to sea one of the illegal entry vessels, which the appellant said would solve the problem. Her Honour concluded this aspect of her directions by reminding the jury that, as with other forms of identification, they "must approach the question of ... voice identification with considerable care, taking into account all of those factors I have mentioned. However, you do not look at the evidence in a vacuum."

23 To my mind, that was a fair and sufficient direction, well-calculated to cause the jury to approach the question of voice identification, as any other form of identification, with considerable care and caution. Her Honour did, in that context, tell the jury that honest witnesses can make mistakes in the identification process. She did not, as the particular to ground 3 asserts was necessary, specifically warn the jury "to scrutinise whether Mr Williamson was sufficiently familiar with the appellant's speaking voice, in Arabic, in order to make the identification that he did."

24 But the whole point of this voice identification was precisely that and, in evidence, considerable attention was given to that aspect. It was led from Williamson that he had often heard the appellant speak in Arabic and was familiar with his voice using that language. The jury had the tape of the recording and so they had direct evidence in that form of its clarity or lack of clarity. Her Honour specifically reminded the jury of Williamson's evidence in that regard and she said, "You will recall the circumstances and nature of [Williamson's] dealing with the [appellant] over time".

25 I cannot think that more was required by way of instruction and comment on the evidence to allow the jury to clearly understand the issue in relation to the question of voice identification and the care with which they should approach the matter. Indeed, had her Honour discussed, at greater length, the aspects of Williamson's evidence which concerned his familiarity with the appellant speaking in Arabic it could only have served to enhance the reliability of Williamson's evidence.

26 I turn then to the question of whether further directions were required in relation to the use which the jury could make of the evidence of the SBS interview. For the appellant, reliance was placed particularly on the statement of the law in ***BRS v The Queen*** (1997) 191 CLR 275 in relation to the direction required in respect of propensity evidence. That was a case concerned with similar fact evidence in relation to sexual offences. The High Court held that the jury must be warned that they ought not to use that evidence as evidence of guilt in relation to any of the offences charged if the jury was of the view that the similar fact evidence merely established that the accused was the sort of person who would engage in the conduct which was the subject of the charges. In this Court it is useful to refer, in that context, to ***Cook v The Queen*** (2000) 22 WAR 67, and the judgment of Anderson J, particularly at 84[68]. That case was approved by a bench of five in ***Buttsworth v The Queen*** (2004) 29 WAR 1, at 10[40] – [41].

27 But those were cases of the admission, for a strictly limited purpose, of what may truly be described as propensity evidence, evidence of other facts and circumstances like those alleged in the charges before the Court. In those circumstances it is clearly appropriate that the jury should, for example, have drawn to their attention that while it is permissible to use that evidence as establishing a particular type of relationship between the complainant and the accused, given that the evidence may establish a particular propensity in the accused to commit offences like those committed upon the complainant, the jury may not adopt the line of reasoning that if the accused is found to have committed the uncharged acts of a similar kind to those charged, then he may be taken to have committed the offences charged and that may be direct evidence of his guilt. The danger that the jury might reason in this way is readily apparent and therefore needs to be identified and prevented to secure a fair trial.

28 However, this is not a case of that kind. Nothing of what was said in the SBS interview by the appellant, if on Williamson's evidence the jury found him to be the person interviewed, was capable of constituting an admission of the commission of any of the offences charged. The appellant spoke in generalities. I would not be prepared to hold that the omission to tell the jury that the evidence was limited in that way, which must have been apparent to them, has caused the trial to miscarry. In my opinion, this was not a case where the trial Judge was required to give the jury a warning in terms appropriate to the use of similar fact evidence or propensity evidence where concrete facts may be taken to be proved which might lead the jury to the impermissible inference that because of their similarity to the offences charged they would sustain a conclusion of guilt of those offences.

29 That brings me to ground 4 and the proposition that the trial Judge was obliged to treat Williamson as an unreliable witness in respect of whom the jury should have been directed that there was a need for careful scrutiny of his evidence, given his status as an indemnified witness, a registered Australian Federal Police informer, a person said to be of generally bad character, and a person who was alleged to have his own interests to serve.

30 Her Honour summarised Williamson's evidence. She described him as a charter boat operator, living in Indonesia. He met a person called Mahmoud in 2001. Mahmoud inquired if he was interested in smuggling people to Australia using his charter boat. Williamson told the AFP in Jakarta of this approach and he was asked to provide information to them. He became a registered informant. There is certainly nothing dishonourable about that. Mahmoud introduced him to the appellant. The appellant repeated the offer to pay Williamson large sums of money if he would take people to Broome.

31 The appellant also wanted a visa to enable him to come to Australia. Her Honour summarised the efforts made by the appellant, according to Williamson and other evidence, to travel to this country on a Turkish passport on the name of Imam Dogan. During all of this, Williamson maintained contact with the AFP, who were aware of what was happening and who assisted in organising visas, which were not in fact utilised, until finally the trip was made in October 2001, to which I have already referred.

32 Williamson, in the meantime, had regular contact with the appellant. He spoke to him about his people smuggling business. Williamson arranged for equipment to be provided by the AFP to enable

him to record some of the conversations. That was done. They were before the jury. As to Williamson's status as a registered informant, the trial Judge reminded the jury of the evidence about the moneys he had received to cover various costs incurred. Her Honour reminded the jury that Williamson's evidence was that he was not motivated by financial considerations in his activities as an informant, but by his concern about the nature of the people smuggling activities.

33 Her Honour reminded the jury that Williamson had, in some respects, led the appellant on to foster a close relationship. She reminded him of lies that Williamson had told the appellant. Her Honour reminded the jury that a long time ago, in 1979, Williamson had pleaded guilty to 14 counts of imposition. He had been gaoled for 3 months. Her Honour reminded the jury that in the course of fostering the relationship with the appellant, Williamson had sought to present the appellant as his adopted child so as to make it easier for him to enter Australia. Williamson had forged a certificate of adoption.

34 Her Honour reminded the jury that although there was no evidence that Williamson had been involved in any unlawful activity in the sense that he had been a party to the commission of any offence concerning the activities of the appellant, he had been uncertain of his position, had raised it with his contact in the AFP, and had ultimately been assured that he would not be prosecuted, an assurance confirmed by an indemnity provided in general terms by the Commonwealth Director of Public Prosecutions.

35 Williamson had been the subject of a lengthy attack upon his credibility by cross-examination and in the debate which occurred between counsel in their closing submissions. The obvious purpose of her Honour's review of the material evidence was to remind the jury of the factors raised relative to their assessment of Williamson's credibility as a witness. In that regard, in the end, he was properly left to the jury for their assessment of his credibility as a person who had been guilty of offences of dishonesty many years ago, as a person who had been dishonest in his dealings with the appellant, as a person who had forged an adoption certificate for the appellant, and as an indemnified registered AFP informer, if the latter matter, in truth, provided any cause for concern about his honesty as a witness.

36 The question raised by this ground is whether the trial Judge should have gone further by effectively commenting adversely on Williamson's credibility as if he was an accomplice, which he clearly was not. The danger of relying upon the evidence of an unreliable witness where that evidence is unsupported by the testimony may, in a proper case, be required to be pointed out to a jury by the trial Judge: ***Bromley v The Queen*** (1986) 161 CLR 315, 319. But in my opinion a trial Judge ought to hesitate long before giving such a direction, and none was sought in this case. The courts have moved far from the proposition that there are categories of witnesses who are inherently unreliable. Accomplices are still so regarded, for obvious reasons, but we have long since ceased to place persons such as children and complainants in sexual assault cases in that category of witness. In my respectful opinion, rightly so.

37 In ***Director of Public Prosecutions v Faure*** [1994] 2 VR 497, a case relied upon by the appellant,

the Court of Criminal Appeal of Victoria considered that in the circumstances of that case such a warning was required in relation to the wife of the applicant in a murder case in which the prosecution alleged that the motive for the killing arose from a dispute between the deceased, on the one hand, and the applicant and his wife on the other. The applicant's wife was the main witness against him at the trial and, in truth, it was necessarily either the applicant or his wife who killed the deceased. One can well understand, in those circumstances, why a warning by the trial Judge that particular care needed to be taken before relying upon the evidence of the wife was appropriate. She had an obvious purpose to serve in giving evidence against the appellant. But that is by no means this case.

38 In my opinion, it was not only not necessary that Williamson should be singled out with the accomplice Syaid as a witness in respect of whom a particular warning about the danger of relying on his evidence should have been given by the trial Judge, but it would have been unfair to the prosecution and to Williamson to treat him in that way. I would not uphold this ground of appeal.

39 The majority uphold ground 5, which complains that the trial Judge erred by failing to give an adequate direction in relation to identification evidence, in particular by failing to relate the ***Domican*** warning, which was certainly given, to the circumstances of each prosecution witness.

40 I have referred to the way in which her Honour structured her warning and directions to the jury about the dangers of relying upon evidence of identification, both photoboard identification and dock identification. I have expressed the view that her Honour's directions in that regard were entirely satisfactory. She went on then to discuss the evidence of each witness who was a passenger in the various boat trips and to describe their contact with the appellant, the identification made, if any, the circumstances in which they had seen him and been involved with him, and in that way identified the strengths and weaknesses of their evidence that it was the appellant with whom they dealt.

41 I accept entirely the view of the majority that it is necessary to identify, in relation to a particular process of identification, the evidence available and its strengths and weaknesses, by a process in which the trial Judge relates the warnings to the particular evidence in relation to each of the charges. In my respectful opinion, the process adopted by her Honour did that effectively. Having heard the general warning and the reference by the trial Judge to particular matters relevant to the reliability of the identification process, in the review of the evidence of each witness her Honour referred to and reinforced the particular matters which might affect, one way or the other, the reliability of the witness's identification of the appellant as the person with whom they dealt as the organiser of the trip in which they were involved. In my opinion, no more was required and again I note that there was no complaint about the way in which her Honour's address was structured.

42 In the course of those observations, her Honour referred to those cases where witnesses had given positive evidence that the appellant was not the person with whom they had dealt. In light of her Honour's direction that it was for the prosecution to prove beyond reasonable doubt that the appellant was that person, the jury could not have been under any misapprehension that if they thought it might be the case that this evidence of the witnesses who gave it might be right, they could not convict. In my

respectful opinion, there is no cause for concern that the jury might have considered that they might convict in those cases, even though they did not reject the evidence of witnesses who said that the appellant was not the person with whom they dealt as the organiser of their trip.

43 Of the substantive grounds, that leaves only ground 6, a complaint of lack of balance in the summing up of the trial Judge in that she failed to put adequately the case for the defence. Again, the majority would uphold this ground, but in my respectful opinion it has no merit.

44 In one sense, the appellant presented no case. He gave no evidence. In an out of court statement, of which her Honour the trial Judge reminded the jury, he said that he had never used the name Keis Asfoor and he was known only by the name Imam Dogan. He said he knew nothing about people smuggling activities and had not in any way at any time been involved in any such activity. Given that his use of the name Dogan might, in the circumstances of Williamson's evidence, be regarded as a declaration against interest, this was a mixed statement and admissible upon that basis. His denials were therefore before the jury as evidence in that form. Her Honour did not direct the jury, as she might, that they may regard this material as being of less weight because it was presented in a way which was not subject to being tested by cross-examination.

45 Against that background, the defence case was a challenge to the reliability of the Crown witnesses, particularly the passengers who gave evidence identifying the appellant as being involved in the organisation of the particular trip with which they were concerned. In addition, as I read

the transcript, there was a challenge to the veracity of the accomplice Syaid and the witness Williamson.

46 Her Honour discussed the evidence of each of the witnesses. She summarized it and, in the course of the discussion of the evidence, referred in relation to each witness to the way in which the credibility of the witness had been challenged. It was appropriate in the circumstance of a defence case presented in that way that her Honour should conclude her remarks, as she did, by reminding the jury of the onus and standard of proof. Her Honour told the jury that even if they rejected the evidence from the accused he would still be entitled to be acquitted if, upon the whole of the evidence they did accept, they were left with a reasonable doubt of his guilt of any particular count in the indictment: ***Liberato v The Queen*** (1985) 159 CLR 507.

47 In my opinion, her Honour amply and appropriately discharged her duty to make such comments upon the evidence as would expose the true issues in the case and assist the jury to their resolution. That was most effectively done in the form that her Honour employed, by discussing, in relation to each witness upon whom the prosecution relied to prove guilt, what was able to be put positively in support of the witness's credibility and negatively by way of challenge to it. Her Honour was not obliged to regurgitate the arguments of counsel and she was not obliged to choose a mode of presentation which separated out and separately presented the defence case by way of challenge to the reliability of the witness's called. Indeed, such a mode of presentation would have been, in my opinion, less helpful to the jury than that employed by her Honour.

48 In my opinion, the appeal against the convictions should have been dismissed.

49 **TEMPLEMAN J**: On 19 December 2003, the appellant was convicted after a trial by Judge and jury in the District Court of 12 "people smuggling" offences under the *Migration Act 1958* (Cth). The appellant was sentenced to 10 years' imprisonment on each count, the terms to be served concurrently with each other.

50 The appellant was sentenced also to 2 years' imprisonment for the offence (to which he pleaded guilty) of presenting a false passport, contrary to s 234(1)(a) of the *Migration Act*. The sentence was to be served cumulatively with the 10 year sentences imposed on the other counts. A non-parole period of 8 years was ordered.

51 The appellant appealed against his convictions, and (if his appeal should fail) sought leave to appeal against the sentences imposed on him in relation to the people smuggling charges. The appellant sought leave to appeal in any event against the sentence imposed on him in relation to the passport offence.

52 The Crown appealed also, contending that the sentences imposed in respect of the people smuggling offences, and the non-parole period, were manifestly inadequate.

53 The appeals and applications were heard on 13 - 15 December 2004. At the conclusion of the hearing the Court, by a majority, allowed the appeals against conviction and ordered a retrial. The Crown appeal was therefore dismissed. The Court reserved its decision in relation to the appellant's application for leave to appeal against the sentence imposed in relation to the passport offence.

54 I now set out my reasons for allowing the appeals against conviction.

Background

55 The indictment contained 56 counts. In 55 of the counts, it was alleged that the appellant had organised the bringing of people to Australia from Indonesia by boat. The remaining count related to the passport offence. The people smuggling charges fell into two categories. There were 13 head counts. In three counts (1, 4 and 9), it was alleged that the appellant had:

> "... organised the bringing or coming to Australia of a group of 5 or more people to whom subsection 42(1) of the Migration Act 1958 applied, and did so knowing that the people would become, upon entry into Australia, unlawful non-citizens, contrary to section 232A of the Migration Act 1958."

The other 10 head counts (12, 18, 22, 26, 30, 33, 38, 41, 47 and 51) also charged offences contrary to s

232A of the *Migration Act*. However, the allegation in each of those counts was that the appellant had organised the bringing or coming to Australia of a group of five or more people to whom s 42(1) of the *Migration Act* applied and that he did so "reckless as to whether the people had a lawful right to come to Australia ...".

56 The change in the wording reflected an amendment to the *Migration Act* by the operation of the *Border Protection Legislation Amendment Act 1999* (Cth) which came into effect on 8 December 1999. The charges to which counts 1, 4 and 9 related were said to have arisen from offences committed before that date. Nothing turns on the change in the legislation for the purposes of this appeal.

57 Each of the head counts referred to above related to a different boat. Each head count was followed by a number of alternative counts relating to individual passengers on the boats the subject of the preceding head count. Thus, counts 2 and 3 charged the appellant with taking part in the bringing or coming to Australia of an identified non-citizen:

> "... under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Migration Act 1958, contrary to subsection 233(1)(a) of the said Act."

58 The appellant was convicted on head counts 1, 4, 9, 12, 18, 22, 26, 30, 33, 38, 41 and 51. He was acquitted of head count 47 and of the alternative counts, 48, 49 and 50.

59 There could hardly have been any doubt that the individual non-citizens the subject of the alternative counts had intended to enter Australia illegally. The principal issue at trial was, therefore, whether the jury could be satisfied beyond reasonable doubt that the appellant had organised those activities. In short, the crucial question was the identification of the appellant.

60 As to that, the prosecution relied on four kinds of evidence. First, a number of the individual passengers identified the appellant as being the person who had organised their travel to Australia or who had assisted in some way in that enterprise. These witnesses identified the appellant from photo boards or by a dock identification, or a combination of both. However, some of the passenger witnesses did not identify the appellant: and others stated positively that the appellant had not been involved.

61 Secondly, the prosecution relied on the evidence of Michael John Anthony Williamson who claimed to have identified the appellant's voice in a recording of an interview broadcast on SBS radio, in which, it was alleged, the appellant had made certain relevant admissions.

62 The interview was conducted in Arabic by a journalist, Ghassan Nakhoul. The prosecution relied, thirdly, on admissions said to have been made by the interviewee that he was the appellant and that he had been engaged in people smuggling.

63 Fourthly, there was evidence from Maidin Abdul Syaid, who admitted he was a people smuggler and an accomplice of the appellant in relation to the voyages the subject of seven of the head counts.

The grounds of appeal

64 There are eight grounds of appeal. I shall deal first with ground 5, which was in the forefront of the submissions made by senior counsel for the appellant.

Ground 5

> "The learned trial Judge erred in law by failing to direct the jury adequately in relation to identification evidence generally, thereby giving rise to a substantial miscarriage of justice.
>
> **Particulars**
>
> The learned trial Judge failed to relate the *Domican* warning to the circumstances of each Crown witness."

65 The reference to "***Domican***" is to the decision of the High Court in ***Domican v The Queen*** (1992) 173 CLR 555. In that case, in the joint judgment of Mason CJ and Deane, Dawson, Toohey, Gaudron and McHugh JJ at pp 561 - 562, their Honours said that:

> "The seductive effect of identification evidence has so frequently led to proven miscarriages of justice that Courts of Criminal Appeal and ultimate appellate courts have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue.
>
> Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial Judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence." (At 561 - 562)

66 A little earlier in their judgment, their Honours observed that the conduct of a case necessarily bore on the extent to which the trial Judge was bound to comment on or to discuss the relevant identification evidence:

> "Discussion or comment which is justified or required in one case may be neither required nor justified when a similar case is conducted in a different way." (At 561)

This observation is particularly pertinent to the present case, having regard to the number of charges the jury was required to consider.

67 In dealing with identification evidence, the learned trial Judge referred to identification being "a very difficult matter and, at times, a very uncertain matter which depends on many variables". The Judge referred to a number of matters of general application. They included difficulty in subsequent recognition after a previous fleeting glimpse or identification in "poor circumstances". The Judge went on to say that the circumstances of any identification must be considered carefully, it being well-known that there are "vagaries of human perception".

68 The Judge then referred to dock identification as being of little probative value when made by a witness who had little or no prior knowledge of the accused. The Judge noted that some witnesses who had been asked whether they could see the appellant in court said they knew he was likely to be sitting in the dock. For that reason, the witnesses were not asked by the prosecutor to proceed further with identification.

69 The Judge went on to refer to the risk of an unreliable identification made by a witness who had not known the accused previously. For that reason, the Judge said, the jury must consider whether the person identified by the witness was someone with whom the witness was familiar as a result of previous dealings.

70 A little later in the charge, the Judge referred to the fact that some identification evidence had been based on photo boards, some of which were of poor quality. The Judge noted that:

> "... some witnesses were definite that it was this accused. Other witnesses were not so sure saying there was a resemblance or they were not certain and some said quite categorically that the person they recall dealing with was not present in this courtroom. Some witnesses were able to identify him earlier from a photo board but were unable to identify him in this courtroom. Many witnesses remarked that in their view the accused in court appeared physically quite different from the man Keis they recalled seeing or dealing with in Indonesia or the person they selected as Keis in a photo board.
>
> There is a question as to whether they, having selected the accused from a photo board earlier, and this is at a later point and it may go or affect - having identified him earlier from a photo board may have impacted upon that witness identifying the accused in court

as the same person." (TS 2829)

71 The Judge concluded the general direction on identification by saying that because of the difficulty likely to be experienced by the jury in remembering all the evidence given over a six week period:

> "... it's incumbent upon me in a trial of this nature to remind you yet again in a fairly potted way the summary form of what various witnesses said. ... I stress, before I embark upon this procedure, that it is in summary form only. I do not purport or intend to reproduce the evidence of all of the witnesses ... there is nothing magic in what I am about to say by way of summary of the evidence; it is a potted version only.
>
> You decide from your memory and observation and assessment what evidence is important, what you accept and what you reject and what evidence is of no significance, so please bear that in mind in relation to the remarks I am about to make." (TS 2831)

72 The Judge then went on to refer to the evidence of all the witnesses who had given identification evidence. This was a substantial task. The Judge took a little over a day to summarise the evidence of some 50 witnesses.

73 The Judge started with Mr Syaid, who was in a different category from the various passengers. The Judge summarised Mr Syaid's evidence generally. According to that evidence, Mr Syaid had been involved to a considerable extent with the appellant in providing and provisioning the vessels to be used for the smuggling activities and in assisting in other ways. So far as identification evidence was concerned, Mr Syaid was shown a photo board which included a photograph of the appellant when he was interviewed on 24 June 2003 by a Federal Police officer. That identification was made only on the third occasion on which Mr Syaid viewed the photo board. He said first that he knew no-one on it. He made the same response when shown the board a second time after having been taken through each photograph by the police officer. However, Mr Syaid then changed his mind and said that photograph F on the photo board was a photograph of the appellant (t/s 2344). The identification procedure had been tape-recorded. The jury had a transcript of that recording.

74 On his evidence, Mr Syaid was an accomplice of the appellant. The trial Judge gave an appropriate warning relating to that aspect of the matter.

75 The trial Judge then summarised Mr Williamson's evidence. This included evidence that although he and the appellant always conversed in English, he had frequently heard the appellant speaking to others on the telephone in Arabic. Mr Williamson said he identified the appellant's voice in a recording of the SBS interview.

76 In ground 1, to which I shall refer below, the appellant contends that the Judge erred in admitting this evidence. But assuming for present purposes that the evidence was properly admitted, the fact remains that Mr Williamson was not a witness to any unlawful activity. That is to say, he was not

involved in any of the activities on which the 13 head counts were based. His identification evidence alone could not have been used to convict the appellant. That was accepted by the prosecution. On the prosecution case, it was the combined evidence of Mr Williamson and Mr Nakhoul which was incriminating.

77 Following the summary of Mr Williamson's evidence, the trial Judge summarised that given by Mr Nakhoul about the telephone call he made to the interviewee in Indonesia:

> "He asked (t)his person if he was Keis and the person said yes" (TS 2859)

78 The Judge said she did not intend to go through the interview, because the jury had an English translation of the transcript: and the prosecutor had suggested "a particular view you may care to take towards it".

79 The Judge went on to summarise the evidence of the passengers on the voyages the subject of the head counts and some "extra witnesses". They were non-citizens who had come to Australia by boat but who had not been charged with any offence.

80 As I have noted above, there were 50 passenger witnesses. Some had identified the appellant from photo boards. Some identified the appellant in court. However, 12 of the witnesses either stated positively that the appellant was not the person who had organised their respective voyages or were unsure whether the appellant was that person.

81 At the conclusion of the Judge's summary, her Honour said to the jury:

> "So that, members of the jury, really completes the summary of the passenger's evidence, and I stress to you it is a summary only, and remind you, because it is important, that what I have said about their evidence does not have to be accepted by you. If you recall something I have neglected to mention, or you don't think aspects of the evidence that I have reminded you about are important, so be it." (T/s 2949)

In my view, with all respect to the trial Judge, that was an inadequate way of dealing with the identification evidence. The Judge did not direct the jury about the significance of the negative identification evidence: that is, the evidence of witnesses who said positively that the appellant had not been the person involved in the organisation of their respective voyages. The jury should have been told that if they accepted the evidence of those witnesses, or could not exclude that evidence beyond reasonable doubt, they could not convict the appellant on the relevant counts: ***Mule v The Queen*** [2002] WASCA 101 at [40].

82 It has long been recognised that:

> "... it was of little use to explain the law to the jury in general terms and then leave it to

> them to apply the law to the case before them ... the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are."

Alford v Magee (1952) 85 CLR 437 at 466, followed in ***R v Jellard*** [1970] VR 802, ***RPS v The Queen*** (2000) 199 CLR 620 at [41] and ***Bardsley v The Queen*** (2004) 29 WAR 338 at [63].

83 In the present case, in my view, the general ***Domican*** warning given at the commencement of the identification section of the charge was insufficient to discharge this responsibility, given that there were 13 head counts and 43 alternative counts. In my view, it is regrettable that so many counts were prosecuted in one trial, with the consequential risk of confusion of the jury. But because the trial did take that course, it was, I think, necessary for the warning to be given in relation to each head count and to the groups of individual counts which were alternatives to the respective head counts. In other words, the warnings should have been given in such a way that the identification issues arising in relation to each head count and its alternatives were explained to the jury. I do not think it was sufficient merely to summarise the identification evidence. That was not a direction having the authority of the Judge's office behind it which satisfied the ***Domican*** requirement. I therefore consider that ground 5 is made out.

84 Although this ground is concerned with inadequacies in the ***Domican*** direction, it cannot be overlooked that the trial Judge included the evidence of Mr Williamson and Mr Nakhoul in the general category of identification evidence. That was not evidence of the kind considered in ***Domican***, and, in my view, it required a separate warning. As to Mr Williamson's evidence, the jury should, I think, have been warned about the danger inherent in the purported recognition of a voice speaking in a foreign language. In my view, that was particularly important given that the jury had not heard the recording and therefore had no means of assessing the weight of this evidence for themselves. The jury should have been told further that Mr Nakhoul's evidence was not, strictly, evidence of identification, and given a direction about the way it might be used.

85 For these reasons, I consider that ground 5 is made out.

Ground 1

> "The learned trial Judge erred in law in the exercise of discretion, or otherwise, by admitting the evidence of prosecution witness Michael Williamson, which evidence purportedly identified the appellant's voice spoken in the Arabic language in an interview conducted and taped by Mr Ghassan Nakhoul (an SBS reporter) ('the SBS interview') on 24 July 2001, thereby giving rise to a substantial miscarriage of justice."

86 I have referred above to the evidence given by Mr Williamson in relation to the SBS interview.

87 In ***Neville*** (2004) 145 A Crim R 108, Miller J at [42], with whom Malcolm CJ agreed, held that in

this jurisdiction, the law of Victoria ought to be applied in relation to voice identification. That is:

> "That there is no rule of law which obliges the trial Judge to exclude such evidence in the absence of evidence of prior familiarity or distinctiveness, although he may, in the exercise of his discretion, exclude it on grounds of prejudice or unfairness."

E M Heenan J was of a similar opinion at [88].

88 The present case was somewhat unusual in that the identification evidence alone had no probative value. That is because Mr Williamson did not understand Arabic and could say nothing about what was said in the course of the SBS interview by the person he recognised as the appellant.

89 However, because it was identification evidence which was not of itself prejudicial or unfair, I do not think it can be said that the admission of that evidence resulted in a miscarriage of justice.

90 For these reasons, I would not uphold ground 1.

Ground 2

> "The learned trial Judge erred in law in admitting into evidence the contents of the SBS interview, thereby giving rise to a substantial miscarriage of justice."

91 The SBS interview was recorded in the course of a telephone conversation in July 2001 between Mr Nakhoul in Australia and a person in Indonesia. According to Mr Nakhoul, that person admitted his name was "Keis". However, the interviewee did not make that admission in the recording.

92 In the course of the conversation, the interviewee said he was involved in smuggling people into Australia from Indonesia. He referred also to aspects of his system: that only two people were involved and that the crew of the vessels were paid wages to compensate for the time they would spend in prison in Australia if intercepted. This was the same system as alleged against the appellant. It was consistent with Mr Syaid's evidence.

93 The prosecution relied also on evidence given by Mr Williamson that the appellant told him he had talked on the radio and that on one occasion he had flown to Australia but had been denied entry and had been returned to Indonesia. The SBS interviewee spoke of a similar experience.

94 Further, Mr Williamson gave evidence that on one occasion, the appellant asked him why the Australian authorities had not sent back one vessel carrying illegal immigrants. The SBS interviewee had asked the same question.

95 In these circumstances, the jury might well have been satisfied that the interviewee was the

appellant. However, he made no admission which was directly relevant to any of the charges on the indictment. That being so, the SBS interview could have been used only as proving the propensity of the appellant (assuming that he was the interviewee) to commit offences of the kinds charged.

96 In my view, therefore, it was necessary for the trial Judge to consider the test for admissibility of propensity evidence as propounded in the joint judgment of Mason CJ, Deane and Dawson JJ in ***Pfennig v The Queen*** (1995) 182 CLR 461 at 482-483. That is, the trial Judge should have applied the same test as must be applied by a jury in considering circumstantial evidence and ask:

> "Whether there is a rational view of the evidence that is consistent with the innocence of the accused."

97 The appellant submits that given the shortcomings in the voice identification evidence, there is indeed a reasonable view consistent with innocence: namely that he was not the interviewee. However, in my view, it is not necessary to decide whether this ground has been made out. Assuming the evidence was properly admitted, it required an appropriate direction. Ground 2A, to which I now turn, is concerned with the absence of such a direction.

Ground 2A:

> "Further, and in the alternative to ground 2, the learned trial Judge failed to direct the jury, adequately or at all, in relation to the use which could be made of the evidence of the SBS interview."

98 This ground focuses on the following direction given by the trial Judge:

> "Finally, were you to accept that it is the [appellant] who is the person being interviewed by Mr Nakhoul on the SBS tape, which is a matter for you subject to the directions I have given you at law about the issue, then the answers and statements made by the [appellant], if you find it is him that is being interviewed, would also constitute evidence from him." (TS 2962)

99 In my view, there was a serious risk that if the jury were satisfied beyond reasonable doubt that the interviewee was the appellant and that he had been involved in people smuggling, they would use that evidence as proof of his guilt.

100 The risk was exacerbated by the way in which the prosecutor dealt with the SBS interview in his closing address to the jury. The prosecutor read extracts from the SBS interview and emphasised passages which, he suggested to the jury, proved that the interviewee was the appellant and that he was a people smuggler.

101 What was required, in my view, in addition to a direction which referred to or explained the prosecution case, was a warning that even if satisfied beyond reasonable doubt that the interviewee was the appellant, the jury could not rely on the interview as proving that the appellant had committed the offences charged, and could not therefore convict him on that basis. In my view, in the absence of any such direction, the appellant was denied a fair trial: ***BRS v The Queen*** (1997) 191 CLR 275 at 295, 301-303, 305-306, and 329-331. I therefore consider that ground 2A is made out.

Ground 3

> "Further and in the alternative to ground 2, the learned trial Judge erred in law by failing to direct the jury adequately as to the issue of voice identification, thereby giving rise to a substantial miscarriage of justice."

102 The following particulars are given:

> "The learned trial Judge should have warned the jury to scrutinise whether Mr Williamson was sufficiently familiar with the appellant's speaking voice, in Arabic, in order to make the identification that he did; also that mistakes are sometimes made in the recognition of voices, even in respect of close friends and relatives."

103 I have dealt with this contention above in the context of ground 5. However, I add the following observations.

104 In ***Neville*** (*supra*) at [90], E M Heenan J, with whom Malcolm CJ agreed, held that if a witness had any familiarity with the voice to be identified, his or her evidence as to that mater would be admissible. However, in ***Bulejcic v The Queen*** (1996) 185 CLR 375 at 396, Toohey and Gaudron JJ said:

> " ... the issue here is not whether the appellant's voice was so distinctive as to be embedded in the listener's memory or whether the jury had prior familiarity. Rather, the question is whether there was enough material of sufficient quality to make the comparison and whether the jury were properly warned of the difficulties involved."

105 In the present case, the jury were directed that they must approach the question of voice identification "with considerable care", taking into account a number of factors mentioned by the trial Judge. These factors included statements made by the appellant to Mr Williamson which were very similar to statements made by the interviewee to Mr Nakhoul in the course of the SBS interview. In my view, it was proper for the jury to take those matters into account. However, they were not matters which went to the issue of voice identification. That issue turned only on the extent of Mr Williamson's familiarity with the appellant's voice when speaking Arabic. The trial judge did not advert to any of the difficulties and dangers inherent in voice recognition of that kind. I therefore consider that this ground is

made out also.

Ground 4

> "The learned trial Judge erred in law by failing to instruct the jury as to the need for careful scrutiny of the sworn evidence given by Michael Williamson, given Mr Williamson's status as an indemnified witness, a registered Australian Federal Police informer, a person of generally bad character, and a person who had his own interests to serve."

106 As I have noted above, Mr Williamson was not a witness to any of the offences alleged in the indictment, nor was he involved in those activities. However, Mr Williamson gave evidence about being asked by the appellant whether he was interested in taking eight people who were from Iraq to Australia in his boat. Mr Williamson's evidence was that his boat was then out of action because of mechanical problems and that the appellant offered to pay for the necessary repairs and to pay $100,000 if he would take the people in question to Broome from a beach in Jakarta.

107 According to Mr Williamson, the appellant also told him that there were thousands of such persons ready to come to Australia. In other words, there was a suggestion of an ongoing business opportunity of that nature. This was further propensity evidence. It also required a direction of the kind to which I have referred above.

108 Mr Williamson gave evidence also about providing assistance to the appellant to obtain a visa for him to enter Australia. According to Mr Williamson, he told the appellant that his Iraqi passport would not be a suitable basis on which to obtain a visa, but that a Greek or Turkish passport would be acceptable.

109 Later, Mr Williamson said, the appellant produced a Turkish passport in the name of Iman Dogan. That passport did not contain the appellant's photograph. Mr Williamson said he told the appellant that the passport would have to contain his photograph if it was to be used to travel to Australia; and if that was done, he (Mr Williamson) would be able to organise a visa and sponsor the appellant.

110 The appellant did produce the Iman Dogan passport with his photograph in it: and Mr Williamson arranged for a visa to be granted.

111 By this time, Mr Williamson had become a police informant. He kept the Australian Federal Police informed about these matters.

112 In the event, the appellant did not use the visa Mr Williamson had obtained for him. He later requested Mr Williamson to obtain another visa, which he did. However, the second visa was not used: and the appellant asked Mr Williamson to obtain a third visa for him. Mr Williamson agreed to do so. A

third visa was obtained and the appellant used it to enter Australia with Mr Williamson in October 2001.

113 All three visa applications were made in the name of Iman Dongan, on the basis of a passport Mr Williamson must have known to be false.

114 On Mr Williamson's evidence, he was not an accomplice of the appellant in relation to the offences charged in the indictment. However, Mr Williamson was, on his own evidence, a person of bad character. Some 14 years previously, in 1979, he pleaded guilty to 14 counts of imposing on the Commonwealth and was sentenced to 3 months imprisonment. Further, Mr Williamson forged an adoption certificate relating to his adoption of the appellant. Indeed, the trial Judge commented on Mr Williamson's skill as a forger. Mr Williamson forged the document in order to facilitate the appellant's entry to Australia.

115 Although Mr Williamson contended that he had not been involved in any illegal activity, he was nevertheless granted indemnity from prosecution. He was apparently reassured before he gave evidence that he would not be prosecuted.

116 Mr Williamson's conduct towards the appellant was, to say the least, disingenuous. He told a number of lies to the appellant in order to encourage him to come to Australia. For example, he told the appellant he regarded him as a son and that he wanted to be involved in the upbringing of the appellant's then unborn child.

117 In ***Bromley v The Queen*** (1986) 161 CLR 315 at 319, Gibbs CJ, with whom Mason, Wilson and Dawson JJ agreed, held that where the evidence of a witness might be potentially unreliable but was evidence which did not fall within an established category which required a full corroboration warning:

> " ... the jury must be made aware, in words which meet the justice of the particular case, of the dangers of convicting on such evidence. Where a warning is required as to the way in which the jury should treat the unsupported evidence of a witness whose evidence is potentially unreliable, the question is 'Was that warning sufficient? Did it in clear terms bring home to the jury the danger of basing a conviction on the unconfirmed evidence of the complainants?' There is nothing formal or technical about this rule."

118 That principle is, I think, applicable to Mr Williamson's evidence in the present case. Whether or not he was an accomplice, the jury should, I think, have been warned of the dangers of convicting on his evidence.

119 Although the trial Judge referred to the matters I have summarised above, she did not mention their significance. Her Honour referred to Mr Williamson's conviction for imposition and said of it:

> "That is obviously a matter that *if you think it's relevant*, you will factor into an assessment of him as a witness." (My emphasis).

120 In my view, the convictions and the other matters demonstrating Mr Williamson's dishonesty *were* relevant and the jury should have been so directed, albeit on the basis that it was for them to give those matters such weight as they thought fit.

121 For these reasons, I consider that ground 4 is made out also.

Ground 6

> "The trial miscarried because the learned trial Judge's summing up was imbalanced, in that she failed to put adequately the case for the defence."

122 In ***RPS v The Queen***, Gaudron ACJ, Gummow, Kirby and Hayne JJ, in their joint judgment, summarised the matters about which a trial Judge is to instruct a jury in order to ensure a fair trial. In so doing, their Honours said:

> "It will require the judge to put fairly before the jury the case which the accused makes." ([41])

123 In my view, the trial Judge did not satisfy this requirement. Towards the end of the charge, her Honour referred to statements made by the appellant in the course of an interview with a police officer in which the appellant had said he had never used the name Keis Asfoor, that he did not know who that person was and that he was known only by the name of Iman Dogan. The appellant said also that he knew nothing about people smuggling activities and had not been involved at all in that activity.

124 Later in the charge, her Honour directed the jury:

> "You may or may not accept the case put forward on behalf of the accused in full, in part or at all, but an accused person is still entitled to be acquitted unless every element of the Crown case in any instance has been proved against the accused to that standard of proof, being beyond reasonable doubt, the onus being on the Crown to do so. There is no onus on an accused to prove their innocence or indeed anything at all. If on all of the evidence relevant to a particular count you are satisfied beyond a reasonable doubt of the guilt of the accused on that count, then of course you must convict the accused of that count.
>
> If in relation to any count you are left with a reasonable doubt as to any matter that the Crown must prove beyond a reasonable doubt with respect to that count, then you must acquit the accused. In other words, if you cannot determine where the truth lies in any particular matter, the accused is entitled to the benefit of that doubt." (TS 2962)

125 Those directions were, with respect, appropriate. However, in my view, they did not convey the

essence of the defence case to the jury. It was not sufficient to rely on the fact that the appellant's counsel had addressed. It was necessary for the defence case to be put with the authority of the Judge's office.

126 I regard this ground as an extension of ground 5, or an alternative way of expressing that ground. As I have said in relation to it, I do not think it was sufficient, in the context of a trial involving 55 counts, to tell the jury simply that if they were left with a reasonable doubt as to any matter that the Crown must prove beyond a reasonable doubt with respect to that count, they must acquit on that count. A direction in those terms, in the circumstances of this case did not, I think, identify sufficiently the issues arising in relation to each count or group of counts: it did not relate the law to the issues arising in relation to each count.

127 In my view, therefore, this ground is also made out.

Ground 7

> "As a result of an aggregation of errors that occurred throughout the trial, the appellant did not have a fair trial in accordance with law, giving rise to a substantial miscarriage of justice."

128 Having regard to my view that the appeal should succeed in relation to at least five of the seven grounds referred to above, I have no doubt in concluding that this ground should succeed also.

129 For these reasons, I joined in the decision to allow the appeal against conviction and order a retrial.

The application for leave to appeal against sentence

130 The appellant (as I shall continue to refer to him) seeks leave to appeal against the sentence imposed on him in relation to the passport offence on two grounds. The second is no longer relevant. It raises a question of totality. The convictions having been quashed, this question no longer arises.

131 Ground 1 is in the following terms:

> "The Learned Sentencing Judge erred in law by imposing sentences which were manifestly excessive, having regard to the circumstances of offending and of the offender."

132 The offence to which the appellant pleaded guilty was set out in count 56 of the indictment in the following way:

> "On the fifth day of October 2001 at Perth in the State of Western Australia [the appellant] in connection with the entry of a non-citizen, namely himself, into Australia presented to an officer exercising powers or performing functions under the *Migration Act 1958* a document which was false, namely a Turkish Passport in the name of IMAM (sic) DOGAN, contrary to section 234(1)(a) of the said Act."

133 The maximum penalty for contravention of section 234(1)(a) of the *Migration Act* is 10 years' imprisonment.

134 The learned sentencing Judge considered that the appropriate sentence would have been 21/2 years' imprisonment. However, her Honour reduced that to 2 years' imprisonment to take account of the appellant's plea of guilty, albeit late (it was made on the morning of the first day of the trial) and despite the "extremely strong case" against the appellant.

135 I am not persuaded that in sentencing the appellant, the Judge gave insufficient weight to his personal circumstances. The appellant's counsel referred to these matters in considerable detail in the course of a plea in mitigation made on the day the appellant was sentenced. Counsel referred to his birth in Iraq as a Palestinian refugee with few, if any, rights. Counsel referred to the difficulties experienced by the appellant in his upbringing and the fact that at the age of 25, he escaped from Iraq to Jordan at very short notice being then in fear of his life. Being, effectively, a stateless person, the appellant was unable to stay in Jordan. He was able to obtain a visa to enter Indonesia where he was given refugee status by the United Nations. However, because the appellant had initially overstayed his entry visa, he was confined to a detention centre in unpleasant and overcrowded conditions. The appellant was impecunious and stateless.

136 In about February 1996, the appellant applied to enter Australia as a refugee. He was interviewed in August 1996. After nearly two years of waiting, no decision was made in the appellant's case. In desperation, he attempted to enter Australia. He obtained a false passport which enabled him to board a flight to Australia. However, on arrival, he made no attempt to use the passport. Instead, he gave the authorities a truthful account of his situation. The authorities confirmed that he had been telling the truth and informed him that his application to enter Australia was still pending. He was then returned to Indonesia. However, because the appellant had no passport or valid travel documents, he was detained for 45 days.

137 The appellant attempted to make arrangements to enter Australia again. However, these came to nothing. In desperation again, the appellant and his brother attempted to travel from Indonesia to Australia in a small boat with inadequate provisions. This voyage almost ended in disaster and was abandoned.

138 In the course of her sentencing remarks, the Judge referred to the matters I have summarised above and clearly took them into account in the sentencing exercise.

139 The weight to be given to those matters was, of course, a matter for the sentencing Judge in what was undoubtedly a difficult sentencing exercise. However, I am not persuaded that, in all the circumstances, the Judge gave insufficient weight to the appellant's circumstances. I would not grant him leave to appeal on that basis. However, there is, in my view, considerable merit in the appellant's contention that the sentencing Judge took no account of the circumstances in which the passport offence was committed.

140 As I have noted above, in dealing with ground 4, the appellant was able to enter Australia on a false passport only because Mr Williamson, in the knowledge that the passport was false, used it as a basis for obtaining three visas for the appellant.

141 There can be no doubt that Mr Williamson acted as he did with the full knowledge and support of the Australian authorities. Indeed, senior counsel for the respondent referred to the evidence of the Federal police officer concerned who said:

> "The object of the exercise of the way we used Williamson was to get [the appellant] within the jurisdiction." (TS 268)

Equally, as senior counsel for the appellant accepted, the appellant was intent on coming to Australia.

142 Given the appellant's plea of guilty to the passport offence, it would hardly have been open to him to rely on entrapment as a basis for appealing against conviction: *cf* ***Ridgeway v The Queen*** (1995) 184 CLR 19. In any event, the facts here are quite different from those of ***Ridgeway***.

143 The fact remains, however, that the appellant was encouraged to pursue his application to enter Australia by false and misleading statements made to him by Mr Williamson for the purpose of entrapping him.

144 Furthermore, the appellant was then charged with the offence under the *Migration Act* which carries a penalty of 10 years' imprisonment. It would have been open to the authorities to charge the appellant with similar offences under ss 9A or 10 of the *Passports Act 1938* (Cth) which attracted a maximum penalty of only 2 years' imprisonment.

145 In ***Liang*** (1995) 82 A Crim R 39, the Court of Appeal in Victoria (Winneke P, Ormiston JA and Crockett AJA agreeing) held that although it was for the prosecuting authority, in its absolute discretion, to determine the charge to be brought against an accused person, it was nonetheless relevant and proper for a sentencing Judge to take into account the fact that there was another and less punitive offence which was equally available or was more appropriate to the facts alleged against the accused.

146 In the present case, the sentencing Judge made no reference to the circumstances in which the passport offence was committed, nor to the principle summarised in ***Liang's*** case (*supra*). In these

circumstances, I consider that the sentencing discretion miscarried.

147 In my view, the entrapment factor is very significant. I accept the submission of senior counsel for the appellant that it was unfair to him to impose a cumulative sentence in respect of an offence which he had been encouraged to commit in order to bring him within the jurisdiction so that he might be charged with people smuggling offences.

148 The issue of concurrency is no longer alive. However, in my view, a sentence of 2 years' imprisonment was manifestly excessive in all the circumstances. I would grant the appellant leave to appeal against sentence, quash the sentence of 2 years' imprisonment and substitute a sentence of imprisonment for 1 year.

149 **EM HEENAN J**: At the conclusion of the hearing of these appeals and of the appellant's application for leave to appeal against sentence, I agreed in the decision that the appellant's appeal against his convictions after trial should be allowed and that there should be an order for a retrial in respect of each of the charges upon which he was convicted. It followed from this that the respondent's appeal against the sentences imposed in respect of those convictions should be dismissed. The decision of the Court upon the appellant's application for leave to appeal against the sentence imposed upon him for what was termed the "passport offence" to which he had pleaded guilty was reserved.

150 I now have had the advantage of reading in draft the reasons for decision of Templeman J which address all the matters raised at the hearing. With respect, I agree with those reasons and with the orders which his Honour proposes. I, too, would grant the appellant leave to appeal against sentence in respect of the "passport offence", quash the sentence imposed for that offence, and substitute a sentence of imprisonment for 1 year.