IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M 129 of 2011

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF VICTORIA

BETWEEN:

TRENT KING **Appellant**

and

THE QUEEN **Respondent**

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APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. The appellant certifies that this submission is in a form suitable for publication on the Internet.

20 ## PART II: CONCISE STATEMENT OF ISSUES PRESENTED

2. This appeal raises the following questions:

   a) Did the trial judge misdirect the jury materially on the elements of the offence of dangerous driving causing death contrary to s 319(1) of the *Crimes Act 1958* (Vic)? In particular, did the judge err in directing that, for the purposes of dangerous driving causing death, the driving (a) need only have *significantly increased the risk of hurting or harming* others and (b) *need not be deserving of criminal punishment*?

30 b) If so, can it be said that the misdirections occasioned no substantial miscarriage of justice – i.e. can the proviso to s 568(1) of the *Crimes Act 1958* (Vic) be applied despite the misdirections?

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c) In considering that question, do the principles discussed by this Court in *Gilbert v The Queen* (2000) 201 CLR 414, concerning the failure to leave manslaughter adequately or at all in murder trials, apply equally to cases such as the present?

PART III: NOTICES UNDER S 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The appellant certifies that the question whether any notice should be given under section 78B of the *Judiciary Act 1903* (Cth) has been considered. There is not thought to be a need for such a notice.

PART IV: CITATION OF THE REASONS FOR JUDGMENT

4. The Court of Appeal's judgment is not reported in the authorized reports. It is reported as *King v The Queen* (2011) 57 MVR 373 and its medium neutral citation is *King v The Queen* [2011] VSCA 69.

PART V: NARRATIVE STATEMENT OF FACTS

5. Overview: The appellant was charged with two counts of culpable driving causing death, contrary to s 318 of the *Crimes Act 1958* (Vic). The charges arose out of a motor vehicle collision in 2005 in which two people were killed. Following a trial in the County Court at Melbourne in September 2008, the appellant was found guilty of both counts and sentenced to a total of seven-and-a-half years' imprisonment with a non-parole period of four-and-a-half years.[1] On 17 March 2011, the appellant's application for leave appeal to the Court of Appeal[2] against conviction was refused but his appeal against sentence was allowed; his sentence was reduced to a total of six-and-a-half years' imprisonment with a non-parole period of three-and-a-half years.[3]

6. A fatal collision: The evidence at trial included the following. At 1.00 a.m. on 13 July 2005 the appellant, who was then aged 19, was driving a car along Evans Road in Cranbourne. He had just driven a friend, Caleb Makiru, home and was driving two other friends, Michael Rendell and Ashley Pearce, to Oakleigh. The appellant was

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[1] *King v The Queen* [2011] VSCA 69 at [10].
[2] Buchanan, Redlich and Mandie JJA.
[3] *King v The Queen* [2011] VSCA 69 at [24] & [39]. Given that the appellant went into custody on 10 September 2008, excluding reductions for emergency management days, he should be eligible for parole on or about 9 March 2012 and his total sentence should expire on or about 9 March 2015.

unfamiliar with the road. He drove past a "Give Way" sign and into the intersection of Evans Road and Thompsons Road. At the same time, travelling along Thompsons Road from the appellant's left was a truck driven by Craig Grayson. Mr Grayson noticed something out of the corner of his eye to his right. Before he could brake, he collided with the left-hand side of the car driven by the appellant. Despite being familiar with the intersection, Mr Grayson was not aware until after the accident that there was a "Give Way" sign on Evans Road.[4] Mr Rendell and Mr Pearce were killed as a result of the collision.

7. Collision occurred at a "black spot" intersection: At the time of the accident, the intersection was a designated "black spot" because of the number of collisions involving injuries or fatalities that had occurred there previously. Further, following the appellant's collision a roundabout was installed, and at the time of the trial no further fatal accidents had occurred.[5]

8. No speed, bad driving or alcohol: There was expert evidence from Sgt Peter Bellion that the appellant's vehicle was travelling at about 70 kilometres per hour ("kph") just prior to the collision – well within the speed limit, which was 80 kph.[6] There was no evidence that the appellant had driven irresponsibly leading up to the collision.[7] There was no dispute that the appellant had not consumed any alcohol prior to driving.[8]

9. Disputed cannabis use: However, there was a dispute as to whether the appellant had consumed cannabis prior to driving. Dr Odell and Dr Wells gave evidence to the effect that analysis of the appellant's blood taken after the collision indicated he had ingested cannabis a short time prior to the collision and that the level of cannabis in the appellant's system would have been such as to impair his driving skills significantly.[9] Mr Makiru gave evidence that he had not seen the appellant consume cannabis that evening.[10] When interviewed by police after the accident, the appellant denied using cannabis in the day leading up to the driving but admitted he had used cannabis a day

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[4] T 49-51.
[5] T 55-56 & 136; see also T 371-372[29].
[6] T 370[18].
[7] T 369[15].
[8] T 369[14].
[9] T 367[6].
[10] T 369[14].

earlier.[11] It was suggested at trial that passive smoking may have explained the appellant's cannabis reading. Analysis of the deceased men's blood showed high readings of cannabis.[12]

10. Crown case on culpable driving causing death: The Crown case on culpable driving causing death was put on two bases – first, that the appellant drove "negligently", i.e. he "fail[ed] unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case" (s 318(2)(b)); and, secondly, that he drove "whilst under the influence of [cannabis] to such an extent as to be incapable of having proper control of the motor vehicle" (s 318(2)(d)).[13] The Crown case on the "gross negligence" limb seemed to be based principally on inattention, as well as possible cannabis use, giving rise to a failure to appreciate that there was a "Give Way" intersection and the need to slow down and possibly give way.[14] The Crown case on the "driving under the influence" limb was based on the expert opinion that the appellant's driving ability would have been sufficiently impaired by cannabis ingestion so as to meet the test in s 318(2)(d).[15]

11. Verdict based on negligence, not being under the influence: The appellant was found guilty on each count of culpable driving on the basis of "gross negligence", not on the basis of "driving under the influence".[16]

12. Dangerous driving causing death left as alternative verdict: The judge also left to the jury the statutory alternatives of dangerous driving causing death, contrary to s 319(1) of the *Crimes Act 1958* (Vic).[17]

13. Crown case on dangerous driving causing death: The judge directed the jury that "[t]he way the Crown puts its case [on these alternatives] is the same analysis as with culpable

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[11] T 372[32]-373[39].
[12] T 372[31]-[32].
[13] T 274-281.
[14] T 274-283 & 285-286.
[15] T 279-280 & 284-285.
[16] T 332 & 367[1].
[17] T 294-298. See also s 422A of the *Crimes Act 1958* (Vic), which is set out below in Part VII of these submissions.

driving".[18] It is the directions of law on the elements of dangerous driving causing death that are impugned in this appeal.

PART VI: APPELLANT'S ARGUMENT

14. Impugned directions on dangerous driving causing death: In the course of her directions to the jury on the elements of dangerous driving causing death, the trial judge said *inter alia* the following:[19]

> The issue in relation to the alternative ... of dangerous driving causing death is whether the accused was driving dangerously, which is the second element, and I am now going to define that for you. ... The Crown must prove beyond reasonable doubt that the accused was driving dangerously. That is, he was not properly controlling his vehicle, thereby creating **a real risk that somebody would be hurt**. I will say that again. The Crown must prove beyond reasonable doubt that the accused was driving dangerously, that is, he was not properly controlling his vehicle thereby creating **a real risk that somebody would be hurt**.
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> This element will be met if you find beyond reasonable doubt the accused's manner of driving was dangerous to the public. Manner of driving includes all matters concerned with the management and control of the vehicle, including his driving skill. The law says that the **risk of harm** created by the accused's driving must have been greater than the **risk of harm** ordinarily associated with driving. This recognises the fact that driving is always a risky activity. Even a person drives perfectly there is a chance that he will have an accident and **hurt** somebody, and as you will be aware people do not always drive perfectly. Even the best drivers occasionally lose attention for a moment or make minor mistakes, increasing the risk to other road users. These ordinary risks of the road are not the focus of this element. For this element to be satisfied the accused must have driven in a manner that significantly increased the **risk of harming** others. **This could be because it increased the likelihood of a collision.** For this element to be satisfied you do not need to find that the accused's driving put a specific identifiable person at **risk of harm**. It will be sufficient if you find that any actual or potential road users, including the passengers, would have been put at real risk by his manner of driving. Also you do not need to find that the accused realised that he was driving dangerously. This element will be satisfied if a reasonable person in the accused's situation would have considered that his manner of driving to be dangerous regardless of what the accused himself believed.
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> There are **two important differences** between the offence of culpable driving causing death, and dangerous driving causing death that reflect the fact that the offence of culpable driving causing death is a more serious offence. First, the Crown must prove beyond reasonable doubt that the accused drove in a way that **significantly increased the risk of harming others**. There does **not** have to be **a high risk of death or serious injury**. That is only a requirement for culpable driving causing death by gross negligence. And secondly, unlike the offence of culpable driving causing death by gross negligence, in relation to the offence of dangerous driving causing death **the Crown does not have to satisfy you that the driving is deserving of criminal punishment**. The second element will be met as long [as] you find that the accused drove in a ... manner that was dangerous to the public. (Emphasis added.)

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[18] T 298.

15. Directions required by authority: In *R v De Montero* (2009) 25 VR 694 at 716[80]-[81], the Court of Appeal laid down guidelines for directing juries on the minimum conduct sufficient to establish the offence of dangerous driving causing death:

> [80] It must be made clear to the jury, in appropriate language, that before the jury can convict of dangerous driving, it must be satisfied:
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> 1. That the accused was driving in a manner that involved a serious breach of the proper management or control of his vehicle on the roadway **such as to merit criminal punishment**.[20] It must involve conduct more blameworthy than a mere lack of reasonable care that could render a driver liable to damages in civil law.
> 2. That the breach must be so serious as to be in reality, and not just speculatively, potentially dangerous to others who, as members of the public, may at the time be upon or in the vicinity of the roadway.
> 3. That the manner of driving created **a considerable risk of serious injury or death to members of the public**.[21]
> 4. That the risk so created significantly exceeded that which is ordinarily associated with being on or near a highway.
> 5. That in determining whether the manner of driving was 'dangerous' the test is an objective one. Would a reasonable driver[22] in the circumstances of the accused have realised that the manner of driving involved a breach of the kind discussed in paragraphs 1 and 2, and also gave rise to the risk identified in paragraphs 3 and 4.
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> [81] In any case where dangerous driving causing death is left as an alternative to culpable driving, or where charges of dangerous driving causing serious injury and culpable driving are tried together, the offence of dangerous driving must be adequately distinguished from culpable driving. The jury should further be told that dangerous driving, though a serious offence, involves conduct which is less blameworthy than culpable driving. It should be told that while dangerous driving necessarily involves criminal negligence, it need not, like culpable driving, be grossly negligent, but as stated above, it must involve a serious breach of the proper management or control of the vehicle on the roadway. **Unlike culpable driving it does not require proof of a high risk of death or serious injury, but rather only a considerable risk thereof**. (Emphasis added.)

16. Impugned directions contrary to authority: Thus, the directions given on the elements of dangerous driving causing death were in error in two fundamental respects. First, instead of directing that the Crown must prove that the manner of driving created **a considerable risk of serious injury or death** to members of the public, the judge

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[19] T 296-298.

[20] In a footnote at this point, the Court said: "A momentary lack of attention would not be sufficient, of itself, to constitute such driving."

[21] In a footnote at this point, the Court said: "We have replaced the phrase 'real and appreciable' which appears in some cases with the word 'considerable' which we think will be more readily understood by the jury. The word 'real' adds nothing if the risk is considerable."

[22] In a footnote at this point, the Court said: "We have used the 'reasonable person' rather than 'ordinary person' because it is employed in the case of culpable driving: *R v De'Zilwa* (2002) 5 VR 408. But we see no difference of substance between the two concepts."

repeatedly directed that there need only be **a real risk of harming or hurting** others. Secondly, instead of directing that the Crown must prove that the appellant was driving in a manner that involved a serious breach of the proper management or control of his vehicle on the roadway **such as to merit criminal punishment**, the judge expressly directed to the contrary – i.e. that "the Crown does **not** have to satisfy you that **the driving is deserving of criminal punishment**".

17. Failure to take exception explicable: Neither the prosecutor nor counsel for the appellant took exception to these directions. However, that is understandable given that the trial was conducted well before the decision in *R v De Montero* (2009) 25 VR 694 and the law was still uncertain at that time.

18. The misdirections occasioned a substantial miscarriage of justice: It is submitted that it cannot be said that there was no substantial miscarriage of justice as a result of these misdirections and that the appeal must be allowed in consequence. There are several reasons for this:

19. Threshold of liability set far too low: First, as is clear from the terms of s 319(1) and the reasons in *De Montero*, it is not enough that the driving create a **real** risk of **harm**; rather, it must create a **considerable** risk of **death or serious injury**. If in a case of manslaughter by an unlawful and dangerous act a judge directed that it was sufficient that, to be dangerous, the unlawful act need only present a risk of **harm** as opposed to an **appreciable** risk of **serious injury**, that would be a fundamental misdirection.[23] It is the same here. To create a real risk of harm is substantially less dangerous or blameworthy than to create a considerable risk of death or serious injury. Contrary to the Court of Appeal's conclusion, in view of the repeated references to "harm" and "hurt" and the express contrasting of those terms with "death or serious injury", it is not open to conclude that the jury would have understood that the subject of the risk was death or really serious injury rather than harm or hurt.[24]

20. Erroneous contrast in directing that culpable driving must be deserving of criminal punishment but dangerous driving need not be: Secondly, that conclusion is reinforced in view of the express direction that "unlike the offence of culpable driving causing

[23] *Wilson v The Queen* (1992) 174 CLR 313 at 330-335.

death by gross negligence, in relation to the offence of dangerous driving causing death the Crown does not have to satisfy you that the driving is deserving of criminal punishment". That misdirection was apt to cause the jury to think that dangerous driving causing death was a much less serious offence than culpable driving causing death, something akin to civil negligence, something for which the appellant would not be adequately punished. Again, contrary to the Court of Appeal's reasons, it is not open to exclude the possibility that the jury would have understood the direction to mean that a verdict of guilt of dangerous driving causing death carried with it a conclusion that the driving was not deserving of criminal punishment.[25] This is all the more likely given that, when directing on culpable driving, the judge said that the accused's conduct "must be so negligent that in your view he deserves to be punished by the criminal law".[26]

21. Misdirections went to heart of defence: Thirdly, the misdirections went to the heart of the appellant's defence. He disputed that he drove culpably or dangerously. It would only be in a very rare case (perhaps an overwhelming case), if ever, that material misdirections on the elements of an offence in issue did not amount to a substantial miscarriage of justice.

22. A more apt case of dangerous driving than one of culpable driving: Fourthly, this was not one of those rare cases. On the contrary, this was a weak case of culpable driving causing death and a viable and more apt (although hardly impenetrable) case of dangerous driving causing death. There was no speeding, no irresponsible lead-up driving and no alcohol. Whilst there was evidence of cannabis use, that was disputed or explained. The accident must have resulted from momentary inattention causing the appellant to fail to see the "Give Way" sign or notice the truck. The truck came from the appellant's left, not his right. In Australia, the general rule is that drivers are to give way to the right, not the left. Mr Grayson, who was familiar with the road, was not aware until after the accident that there was a "Give Way" sign in Evans Road. The intersection was a "black spot" that had been improved since the accident. This was a case in which the offence of dangerous driving causing death was more than a viable alternative; indeed, it was the more realistic and appropriate charge on which to conduct a trial. Thus, it was essential that the jury be properly directed on the elements of the

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[24] *King v The Queen* [2011] VSCA 69 at [22].
[25] *King v The Queen* [2011] VSCA 69 at [22].
[26] T 297-298.

offence. However, the misdirections so heavily diluted the elements of dangerous driving causing death that there is an unacceptable risk that the jury did not consider or properly consider the alternative verdict because of the risk that they erroneously considered it inapt. Had proper directions been given, there is a high chance that the appellant would have been acquitted of culpable driving and indeed he may have been acquitted outright.

23. Three further errors in Court of Appeal's reasons: It is submitted that the Court of Appeal approached its task erroneously in three further respects:

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24. Conclusion that jury would have excluded consideration of the alternatives in coming to its verdicts: First, Mandie JA considered it "highly improbable that the jury would not have first considered the appellant's guilt or innocence of [culpable driving] in accordance with the directions of law given to them, before giving consideration to the alternate offence".[27] But while the judge told the jury they "only need to consider [the alternative] if [they] find the accused not guilty of culpable driving",[28] her Honour did not instruct them that they were forbidden from considering one before the other or both together. On the contrary, the comparison the trial judge made between the two offences in the impugned directions rather invited the jury to compare and contrast the
20 two offences but on erroneous bases. If, on the other hand, the directions are to be understood as precluding consideration of the alternatives before or at the same time as the principal charges, then that only strengthens the argument that the jury is unlikely to have given proper consideration to the more viable alternatives.

25. Conclusion that jury would not have been deflected of proper consideration of more serious charges: Secondly, Mandie JA concluded that, in any event, he did not consider that the jury "would have been deflected from a proper consideration of the more serious charges by the directions given in relation to the alternate offence".[29] But it is not just proper consideration of the more serious charges that is required; it is also proper
30 consideration of the alternatives as well as the possibility of outright acquittal. As this

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[27] *King v The Queen* [2011] VSCA 69 at [23] per Mandie JA; see also [3]-[4] per Redlich JA. Both Buchanan JA (at [1]) and Redlich JA (at [2]) agreed with the reasons of Mandie JA.
[28] T 295.
[29] *King v The Queen* [2011] VSCA 69 at [23].

Court has recognized, misdirections as to available alternatives can affect a jury's findings of fact and in turn its verdict.[30]

26. Application of principles in *Gilbert v The Queen*: Thirdly, the last point raises the question whether the principles in *Gilbert v The Queen* (2000) 201 CLR 414 have any application to the present case. Whilst the Court of Appeal appeared to proceed on the assumption that, had error been shown, there would be no occasion to apply the proviso to s 568(1) of the *Crimes Act 1958* (Vic) and the appeal would be allowed, it is not clear whether the Court sought to apply to the present case the principles discussed in *Gilbert v The Queen* concerning the failure to leave manslaughter adequately or at all in murder trials.

27. Errors of similar type in murder/manslaughter trial would result in retrial: A failure to leave or adequately to leave manslaughter where it is open on the evidence in a murder trial is a wrong decision on a question of law. In such a case, it is no answer that the misdirections must have been irrelevant given the correct directions on murder and the jury's verdict of guilty of murder. Rather, whether an appeal will be allowed or dismissed in such a case turns on the application of the proviso to s 568(1) of the *Crimes Act 1958* (Vic) and in particular whether it can be said that, despite the misdirection, no substantial miscarriage of justice has actually occurred. In this context, that proviso question is usually framed in terms whether it is clear that a jury, properly instructed, would necessarily have returned a verdict of guilty of murder.[31] It is submitted that, if misdirections of a similar order to those made in the present trial were made in respect of directions on the elements of manslaughter in a murder trial where manslaughter was a viable alternative, there is little doubt that, unless it were clear that a jury, properly instructed, would necessarily have returned a verdict of guilty of murder, an appeal against the murder conviction would succeed and a retrial would be directed.

28. The principles in *Gilbert v The Queen* should apply equally to the present case: There has been a good deal of discussion in the cases about whether the principles in *Gilbert v*

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[30] *Gilbert v The Queen* (2000) 201 CLR 414 at [16]-[21] per Gleeson CJ and Gummow J & [101] per Callinan J.
[31] *Gilbert v The Queen* (2000) 201 CLR 414 at [1]-[2] & [18]-[20] per Gleeson CJ & Gummow J and [99]-[103] per Callinan J; *Gillard v The Queen* (2003) 219 CLR 1 at [26]-[29] per Gleeson CJ & Callinan J, [32]-[34] per Gummow J and [129]-[134] per Hayne J; *The Queen v Nguyen* (2010) 271 ALR 493; 85 ALJR 8 at [50] per Hayne, Heydon, Crennan, Kiefel & Bell JJ.

The Queen apply equally to cases other than murder-manslaughter.[32] However, it is submitted that there is no reason why the same principles should not apply to a case such as the present. The rationale underlying the principle – that it cannot be assumed that a jury's findings of fact are divorced from a consideration of the consequences of their findings – is equally applicable to cases such as the present. As Gleeson CJ and Gummow J observed in the murder-manslaughter context in *Gilbert v The Queen*,[33] in the present age of concern for the victims of violent crime and their relatives, a jury may hesitate to acquit an accused and may be glad to take a middle course which is offered to them. So too in the present age of concern for victims of road accidents and their relatives, and of saturation advertising about the terrible consequences that can result from such accidents, a jury that is directed in a manner that places the threshold for liability – and therefore culpability – of the alternative offence far too low, and/or is told that, in contradistinction to culpable driving causing death, the driving giving rise to the alternative offence of dangerous driving causing death need not be deserving of criminal punishment, may well tend to shy away from the alternative verdict because it does not represent, to the jury, an appropriate correlation between legal responsibility and moral blameworthiness.

29. Weiss v The Queen (2005) 224 CLR 300 and the proviso: These principles have been applied in the murder-manslaughter context both before and since the decision of this Court in *Weiss v The Queen* (2005) 224 CLR 300, the leading case on the proviso in recent years.[34] However, nothing said in *Weiss v The Queen* suggests that the principle should be qualified in any way or that it should not apply to cases other than those involving murder and manslaughter. On the contrary, the misdirections still amount to "a wrong decision on any question of law" within the meaning of the second limb of s 568(1) of the *Crimes Act 1958* (Vic). As a result, the provision dictates that the appeal must be allowed unless the proviso to s 568(1) is engaged.

30. Proviso inapplicable in view of reasoning in *Weiss v The Queen* as well: Given the nature of the misdirections in the appellant's trial, the weakness of the Crown case on culpable driving causing death, the comparative viability of the case on dangerous

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[32] See, e.g., *R v Nous* (2010) 26 VR 96 at 102[31]-107[50] and the cases discussed therein.
[33] *Gilbert v The Queen* (2000) 201 CLR 414 at [13]-[20]; see also Callinan J at [96] & [101].
[34] *Gilbert v The Queen* (2000) 201 CLR 414 and *Gillard v The Queen* (2003) 219 CLR 1 were decided before *Weiss v The Queen*; and *The Queen v Nguyen* (2010) 271 ALR 493; 85 ALJR 8 was decided post-*Weiss*.

driving causing death (although that charge was not without its difficulties either, particularly given that it was arguable that the accident resulted from momentary inattention at a "black spot" intersection unfamiliar to the appellant[35]), the recognition in *Gilbert v The Queen* that juries' findings of facts and their verdicts can be affected by the perceived consequences of those findings, and the limitations of proceeding wholly on the record, to use the language of this Court in *Weiss v The Queen*, it is submitted that it cannot be said that the evidence properly admitted at trial proved, beyond reasonable doubt, the appellant's guilt of the offences of culpable driving causing death.[36]

31. Serious breach of presuppositions of trial: Alternatively, again to use the language in *Weiss v The Queen*, given the matters in issue at trial, the misdirections here amount to such a serious breach of the presuppositions of the trial as to deny the application of the proviso irrespective of whether the appellant is thought to have been proved guilty beyond reasonable doubt.[37]

PART VII: APPLICABLE LEGISLATION

32. Section 319(1): Dangerous driving causing death (or serious injury): As at the date of the incident (13 July 2005) and for the purposes of the appellant's trial, s 319(1) of the *Crimes Act 1958* (Vic) provided as follows:

> A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes the death of, or serious injury to, another person is guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

33. Subsequent amendments to s 319: Subsequent to the incident in the present case, s 319(1) was amended and s 319(1A) was inserted, which had the effect of separating the offences of dangerous driving causing death and dangerous driving causing serious injury into different sub-sections with different maximum penalties – ten years'

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[35] See *R v De Montero* (2009) 25 VR 694 at 716[80], proposition 1, including the footnote thereto.
[36] *Weiss v The Queen* (2005) 224 CLR 300 at [44].
[37] *Weiss v The Queen* (2005) 224 CLR 300 at [44]-[46].

imprisonment for dangerous driving causing death and five years' imprisonment for dangerous driving causing serious injury.[38]

34. Section 422A(1): Leaving alternative verdict: As at the date of the incident and for the purposes of the appellant's trial, s 422A(1) of the *Crimes Act 1958* (Vic) provided as follows:

> If on the trial of a person charged with an offence against section 24 (negligently causing serious injury) or 318 (culpable driving causing death) the jury are not satisfied that he or she is guilty of the offence charged but are satisfied that he or she is guilty of an offence against section 319 (dangerous driving causing death or serious injury), the jury may acquit the accused of the offence charged and find him or her guilty of the offence against section 319 and he or she is liable to punishment accordingly.

35. Subsequent amendments to s 422A(1): Subsequent to the incident, s 422A(1) was amended to correspond with the amendments to s 319 mentioned above.

36. Section 568 of the *Crimes Act 1958* (Vic): The determination of the appellant's application to the Court of Appeal was, and his appeal to this Court is, governed by s 568 of the *Crimes Act 1958* (Vic), which provided as follows:

> (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:
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> Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided n favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

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[38] See ss 5(1) and (2) of the *Crimes Amendment (Child Homicide) Act 2008* (Vic).

(2) Subject to the special provisions of this Part the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal or direct a new trial to be had.

37. Section 276 of the *Criminal Procedure Act 2009* (Vic): As from 1 January 2010, s 568 was repealed,[39] although it continues to apply to those appeals where sentence was passed prior to that date (as in the present case). For appeals against conviction in which sentence was passed on or after 1 January 2010, the situation is governed by s 276 of the *Criminal Procedure Act 2009* (Vic), which provides as follows:

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(1) 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.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.[40]

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38. Principles in *Weiss v The Queen* held to apply to s 276: It is likely that the influence of *Weiss v The Queen* on notions of what constitutes a substantial miscarriage of justice will continue to be authoritative in Victoria, despite the repeal of s 568(1) of the *Crimes Act 1958* (Vic). Thus, as was observed recently by Nettle JA in *Sibanda v The Queen* [2011] VSCA 285 at [5], "the test for the application for the proviso to s 568(1) ..., which was laid down by the High Court in *Weiss v The Queen*, applies *mutatis mutandis* with equal force to the determination of whether there has been a substantial miscarriage

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[39] Part VI of the *Crimes Act 1958* (in which s 568 and other appeal provisions were to be found) was repealed by s 422(4) of the *Criminal Procedure Act 2009* (Vic), with effect from 1 January 2010. By virtue of s 439 and cl. 10(4), Schedule 4, of the *Criminal Procedure Act 2009*, Division 1 of Part 6.3 of the Act, which contains s 276, applies "to an appeal where the sentence is imposed on or after the commencement day", i.e. 1 January 2010. The sentence was passed in this case on 30 October 2008.

[40] Section 274 permits a convicted person to appeal to the Court of Appeal against the conviction "on any ground of appeal if the Court of Appeal gives the person leave to appeal".

of justice for the purposes of ss 276(1)(b) and (c) of the *Criminal Procedure Act 2009*".[41]

PART VIII: ORDERS SOUGHT

39. Proposed orders: The appellant seeks orders that:
    a) the appeal to the Court be allowed;
    b) the judgment and orders of the Court of Appeal made on 17 March 2011 be set aside; and
    c) in lieu thereof:
        i) the application for leave to appeal against conviction be granted;
        ii) the appeal be allowed;
        iii) the appellant's conviction and sentence be quashed;
        iv) a judgment and verdict of acquittal be directed or, in the alternative, a new trial be directed; and
        v) the appellant be granted an indemnity certificate pursuant to s 14 of the *Appeal Costs Act 1998* (Vic).

40. Discretionary acquittal instead of retrial: If the appeal is allowed, it is submitted that the Court should exercise its discretion to direct a judgment and verdict of acquittal rather than a retrial. There are several reasons for this:
    a) First, the case on culpable driving was and remains weak.
    b) Secondly, it is respectfully submitted that it would be difficult for a jury to exclude the possibility that the accident resulted from a momentary lack of attention at a "black spot" intersection unfamiliar to the appellant. In those circumstances, a conviction for dangerous driving causing death is also unlikely (see *R v De Montero* (2009) 25 VR 694 at 716[80], proposition 1, including the footnote thereto).
    c) Thirdly, by the time this appeal is heard and determined, the appellant will have served all (or nearly all) of the non-parole period of his sentence for culpable driving. (Barring emergency management days, which would bring forward his release date, the appellant must be due for parole on or about 9 March 2012.)
    d) Fourthly, were he retried and acquitted of culpable driving causing death but convicted of dangerous driving causing death, given current sentencing practices, the appellant to this moment would have served well beyond the non-parole period, and

[41] See also *Sibanda v The Queen* [2011] VSCA 285 at [61]-[65] per Sifris AJA.

at least as long as the total sentence, that would be imposed for dangerous driving causing death.

e) Fifthly, the accident giving rise to the charges occurred over six years ago (on 13 July 2005) when the appellant was only 19. Given the usual delays that apply in the County Court, a retrial would be unlikely to occur before late-2012, over seven years after the incident.

41. Factors pointing to a retrial are outweighed: It is conceded that there are other considerations to balance against these, including the fact two young lives were lost as a result of the accident and the interests of the State and the relatives of the deceased in pursuing a retrial. But it is submitted that the better view is that there should be no retrial.

Dated this 29th day of September 2011.

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