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 REPLY

SUITABILITY FOR PUBLICATION

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

REPLY TO RESPONDENT'S ARGUMENT ON THE NOTICE OF CONTENTION

2. Contrary to the respondent's contention, the Court of Appeal in *R v De Montero* (2009)
20 25 VR 694 correctly stated the minimum requirements for proof of the offence of dangerous driving causing death. In particular, for reasons that follow, the Court was correct to conclude that the driving must create a "considerable risk of death or serious injury" and involve such "a serious breach of the proper management or control of [a] vehicle … as to merit criminal punishment".

3. First, the creation of the indictable offence of dangerous driving causing death was designed to fill a perceived gap[1] between the indictable offence of culpable driving causing death[2] and the summary offence of dangerous driving *simpliciter*.[3]

30 4. Secondly, the offence of culpable driving causing death was introduced by the legislature as a result of a perceived reluctance of juries to convict of manslaughter in

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[1] *R v De Montero* (2009) 25 VR 694 at [22].
[2] Contrary to s 318(1) of the *Crimes Act 1958* (Vic) (maximum penalty: 20 years' imprisonment).
[3] Contrary to s 64 of the *Road Safety Act 1986* (Vic) (maximum penalty: two years' imprisonment).

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driving cases. By increments, the maximum penalty for culpable driving rose from seven, to ten, to 15 and ultimately to 20 years' imprisonment (the same maximum penalty as for manslaughter). In *R v De'Zilwa* (2002) 5 VR 408 at [42]-[46], the Court of Appeal held that culpable driving causing death was a species of involuntary manslaughter and that the gross negligence required for a conviction under s 318(2)(b) was the same standard of negligence as required for manslaughter.[4]

5. Thirdly, Victoria is unique in having four tiers of criminal liability specifically directed at driving offences: (a) culpable driving causing death;[5] (b) dangerous driving causing death;[6] (c) dangerous driving *simpliciter*;[7] and (d) careless driving.[8] The first two tiers require proof that death[9] was caused by the culpable or dangerous driving; the third and fourth tiers do not require proof of such consequences. In other jurisdictions, offences of dangerous driving causing death (and similar) sit on the same rung as culpable driving in Victoria, there being no intermediate tier.[10] Thus, authorities from other jurisdictions are of limited utility in determining the ambit of the Victorian offence of dangerous driving causing death.

6. Fourthly, whilst the respondent places heavy reliance on *McBride v The Queen* (1966) 115 CLR 44 and *Jiminez v The Queen* (1992) 173 CLR 572 as supporting a (diluted) test that should be applied to dangerous driving causing death under s 319, that reliance is at least in part misplaced. First, both decisions support the view that dangerous driving stands in sharp contrast with civil negligence and instead must be potentially dangerous in a real sense to other road users. Such remarks are consistent with the test laid down in *R v De Montero*. Secondly, both decisions concerned s 52A of the *Crimes Act 1900*

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[4] *R v De Montero* (2009) 25 VR 694 at [29]-[31].
[5] There is also the companion offence of negligently causing serious injury, an indictable offence contrary to s 24 of the *Crimes Act 1958* (Vic), which carries a maximum penalty of 10 years' imprisonment (five years' imprisonment at the time of the appellant's accident).
[6] There is also the companion offence of dangerous driving causing serious injury, an indictable offence contrary to s 319(1A) of the *Crimes Act 1958* (Vic), which carries a maximum penalty of five years' imprisonment.
[7] A summary offence contrary to s 64 of the *Road Safety Act 1986* (Vic), which carries a maximum penalty of two years' imprisonment.
[8] A summary offence contrary to s 65 of the *Road Safety Act 1986* (Vic), which carries a maximum penalty of 12 penalty units or 25 penalty units for a subsequent offence.
[9] Or serious injury in the case of the companion offences in ss 24 and 319(1A) of the *Crimes Act 1958* (Vic).
[10] See s 52A of the *Crimes Act 1900* (NSW) (dangerous driving occasioning death; and aggravated dangerous driving occasioning death); s 328A(4) of the *Criminal Code 1899* (Qld) (dangerous operation of a vehicle causing death); s 19A of the *Criminal Law Consolidation Act 1935* (SA) (causing death or harm by dangerous use of a vehicle or vessel); s 167A of the *Criminal Code 1924* (Tas) (causing death by dangerous driving); s 59 of the *Road Traffic Act 1974* (WA) (dangerous driving causing death); s 174F of the *Criminal Code* (NT)

(NSW) which, unlike s 319, did not (and still does not) require proof that the impugned driving caused death or grievous bodily harm (absence of causation only providing a defence).[11] However, since s 319 requires proof that the dangerous driving caused death, and since that offence must be distinguished from careless driving and dangerous driving *simpliciter* (neither of which require proof of death) and culpable driving (which requires proof of causation of death and that there be a high risk of death or grievous bodily harm), it is necessary and appropriate that the fault element for an offence under s 319 include a considerable risk of death or serious injury.[12]

10 7. Fifthly, the Court of Appeal was correct to conclude that culpable driving causing death and dangerous driving causing death cannot be distinguished on the basis of a requirement that the driving must merit criminal punishment. As the Court said, "driving which merits criminal punishment is apposite to describe the offence of dangerous driving created by s 319 because of its inherent quality, its potential consequences for other road users, and the maximum sentence for the offence.[13] That the legislature has increased the penalty for dangerous driving causing death from five to ten years' imprisonment only reinforces that view. Further, to have a requirement that the driving merit criminal punishment in the case of culpable driving causing death but not in the case of dangerous driving causing death, and to instruct a jury along those
20 lines (as happened in the appellant's trial), would (and did in this case) serve only to risk causing a jury to perceive that a conviction for the offence of dangerous driving causing death is not likely to result in any significant punishment and thereby to consider it an inapt alternative.

8. Sixthly, the respondent's argument that the test in *R v De Montero* for dangerous driving causing death requires a higher degree of culpability than manslaughter is simply misplaced. First, the test for negligent manslaughter incorporates reference to a high risk of death *or* serious bodily harm.[14] Thus, the references to death or serious bodily harm are disjunctive. The test for culpable driving by gross negligence is the same.[15]

(driving motor vehicle causing death); and s 29 of the *Crimes Act 1900* (ACT) (culpable driving of motor vehicle).

[11] See *Giorgianni v The Queen* (1985) 156 CLR 473 at 498 per Wilson, Dean and Dawson JJ and s 52A(3) of the *Crimes Act 1900* (NSW) as it was at that time, and s 52A(8) as it is today.

[12] *R v De Montero* (2009) 25 VR 694 at [80].

[13] *R v De Montero* (2009) 25 VR 694 at [32] & [80].

[14] See *Nydam v R* [1977] VR 430 at 444.

[15] *R v De'Zilwa* (2002) 5 VR 408 at [42]-[46].

The test for dangerous driving causing death in *R v De Montero*, by referring to a considerable risk of death *or* serious injury, is also disjunctive. A considerable risk is a lower threshold of risk – or a lower level of culpability – than is a high risk. Secondly, the test for manslaughter by an unlawful and dangerous act requires not only an appreciable risk of serious injury but also that the act be unlawful – usually an assault of some description – which must be performed with the *mens rea* required to make the act causing death relied on unlawful (for example, an intention to assault).[16] Thus, both forms of manslaughter are more culpable than dangerous driving causing death under the test in *R v De Montero*.

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9. As this Court recognized in a related context in *Wilson v The Queen* (1992) 174 CLR 313 at 334, it is important to ensure that there is a close correlation between moral culpability and legal responsibility. That is precisely what the legislature sought to do by introducing s 319 into the scheme of driving offences in Victoria. The decision of the Court of Appeal in *R v De Montero* appropriately and harmoniously places the level of culpability for dangerous driving causing death below that which is required for culpable driving causing death but above that which is required for dangerous driving *simpliciter* or careless driving. That approach conforms to basic principle, the words of the statute and the statutory scheme of offences designed to deal with motor vehicle
20 accidents resulting in death or serious injury. Acceptance of the respondent's contention, on the other hand, would be a backward step in the development of the law in this area in Victoria.

REPLY TO RESPONDENT'S ARGUMENT ON THE APPEAL

10. On the assumption that *R v De Montero* accurately states the law, and that the directions given at trial were therefore erroneous in the two respects identified, the respondent submits that the trial judge's directions to the effect that the jury need not consider the counts of dangerous driving causing death unless they found the appellant not guilty of
30 culpable driving rendered the errors meaningless. In reply, the appellant refers to and repeats the *Appellant's Submissions* at [24]-[25].

11. The respondent submits that the directions did not so dilute the requirements of dangerous driving causing death that the jury would have considered the alternative

[16] See, e.g., *Wilson v The Queen* (1992) 174 CLR 313.

verdict to be an unrealistic alternative. In reply, the appellant refers to and repeats the *Appellant's Submissions* at [25], [28] and [30].

12. In an apparent attempt to show that directions of the type given in the present case would not have led to a miscarriage of justice, the respondent has extracted directions on dangerous driving causing death from another case where there was either no appeal (*R v Towle*) or the Court of Appeal held there was no miscarriage of justice (*R v De Montero*). Directions from a trial in which there was no appeal are hardly instructive. In any event, the directions given in *R v Towle* make clear that for the purposes of dangerous driving causing death there must be a risk of serious injury or death.[17] As for the directions in *R v De Montero*, they too made clear that, for the riding to be dangerous, there had to be "a risk of serious injury or death" or "a serious risk of death or injury"; and that it was "driving or riding which is therefore to be regarded as a serious crime".[18] Those directions are far closer to the directions required by the Court of Appeal in *R v De Montero* than those given in the present case.

13. The respondent submits that the applicability of *Gilbert v The Queen*[19] does not arise. However, whether the case is analysed in terms of the principles discussed in *Gilbert v The Queen* or simply by reference to s 568(1) of the *Crimes Act 1958* (Vic), since the errors in the directions amount to a wrong decision on a question of law, the only question that remains is whether the proviso is engaged. For the reasons given in the *Appellant's Submissions*, the proviso cannot be engaged and the appeal must be allowed in consequence.

Dated this 7th day of November 2011.

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[17] *Respondent's Submissions* at [6.37].
[18] *R v De Montero* (2009) 25 VR 694 at [86].
[19] (2000) 201 CLR 414.