21/06; [2006] VSCA 117

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v YUSUF (No 2)

Chernov, Vincent and Redlich JJ A

17 May 2006

CRIMINAL LAW – RAPE – CHARGE TO JURY – DIRECTIONS AS TO PROOF BEYOND REASONABLE DOUBT – FLIGHT – DIRECTIONS AS TO CONSCIOUSNESS OF GUILT – MATTERS TO TAKE INTO ACCOUNT WHEN DECIDING SUCH ISSUES.

1. Where a jury has to choose between a Crown witness and a witness for the defence, they should be told that the mere resolution of a conflict against the defence is not to be taken as concluding the issue, namely, whether the Crown has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that, even if they prefer the evidence of the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must also be told that even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. Where the evidence is entirely or substantially oath against oath it is imperative that the jury not be given any impression that in such a case the guilt of the accused will be established by the jury's preference for the evidence of the complainant. The jury must be properly instructed that if they are left unable to reject the evidence of the accused, although they do not positively accept it, they could not find guilt established beyond reasonable doubt, and even if the evidence of the accused is rejected attention must still be given to the important question whether the evidence of the complainant, or so much of it as the jury do accept, establishes the commission of the offence beyond reasonable doubt.

***Liberato v R* [1985] HCA 66; (1985) 159 CLR 507; 61 ALR 623; 59 ALJR 792; and**
***Crisafio v R* [2003] WASCA 104; (2003) 27 WAR 169; (2003) 141 A Crim R 98, applied.**

2. For a jury to be satisfied that they could properly convict the accused on the basis of his consciousness of guilt, the jury had properly to reject or exclude the accused's explanation for his premature departure from the hotel. If a jury accepted that the accused decamped in a prompt fashion because he knew that he had raped the complainant and wanted to avoid detection, such a conclusion amounted to very strong evidence of guilt and the jury would have to be satisfied of it beyond reasonable doubt.

CHERNOV JA:

1. The applicant, Huseyin Yusuf, was convicted in the County Court at Geelong on 16 June 2005 of two counts of rape committed on 10 April 2001.[1] After a plea in mitigation, the applicant was sentenced on 21 June 2005 to a total effective sentence of five years and six months' imprisonment, with a non-parole period of four years. His Honour also ordered that the applicant be registered pursuant to s11 and Schedule 3 of the *Sex Offenders Registration Act* 2004. The applicant has applied to this Court for leave to appeal against the convictions. Although the applicant was represented at his trial by counsel and although the Full Grounds upon which he seeks to rely were settled by counsel, as was the outline of submissions, the applicant appeared before us unrepresented and conducted the application in person. As I will mention later, although the applicant's knowledge of the English language is limited, he is capable of being understood and, before us, he was assisted by an interpreter who was duly sworn. As will become apparent, the applicant's oral argument before us was not confined to the Full Grounds or the outline of submissions. In fact, much of the oral submissions was not directed to the claims in those documents. Nevertheless, I shall deal with the substance of Mr Yusuf's oral submissions as well as the contentions in the written outline.

2. Before considering these matters, however, it is necessary to describe briefly the relevant circumstances of the offending. At the time of the offending on 10 April 2001, the applicant was aged 38 years and the complainant, who had come to Australia from Vietnam with her parents, was aged approximately 20 years. They had not known each other prior to this incident. In the early afternoon of 10 April 2001, each was waiting at the Footscray railway station to catch a train to

Geelong. The complainant was travelling from her mother's home in Footscray to Geelong, where she was studying a designer course in clothing industries at the Gordon TAFE. The applicant had arrived in Melbourne approximately one week before this from the United Kingdom. He was a Cypriot by birth but had married an Irish woman and lived there for some years. As I have said, although his grasp of the English language is limited, he could nevertheless converse and make himself understood in that language. He had been staying with his aunt in Braybrook and, like the complainant, was returning to Geelong. Whilst waiting for the train, on the platform, the applicant sat next to the complainant and engaged her in conversation. In the train, they sat next to one another and continued to talk about matters of mutual interest. In response to the applicant's enquiry, the complainant told him that she wanted to be a fashion designer. He effectively suggested that it would be advantageous for her to go to Europe and showed her his Irish passport. He said that he owned a restaurant in Geelong and that he used to be a sports teacher until he moved to Ireland.

3. When they arrived in Geelong, they headed in the same direction, with the applicant carrying the complainant's bags. It was the complainant's intention to go to her boarding house. As they walked along, the applicant ascertained from the complainant that her boyfriend lived in Melbourne and he told her that he was married. He asked the complainant if she was too busy to have a cup of coffee with him and, because he seemed to her to be a nice person, she agreed. After frequenting a café they went to a restaurant where the applicant bought a bottle of wine "to celebrate their friendship". The complainant said that, although she had drunk alcohol in the past, she usually did not drink wine. At the restaurant they drank the bottle of wine with their meal, the applicant pouring the wine. When they left the restaurant, the complainant wanted to go home but the applicant suggested that they go to a pub called "Max". There he bought the complainant a drink in a cocktail glass while he had a glass of beer. He asked the complainant whether she would go to Europe if she had a chance and suggested that, if he obtained for her a passport and bought tickets to Europe, she could live with him. The complainant said that the applicant then asked her if she liked jewellery, and it was at about this time that she began to feel uncomfortable. It was the complainant's evidence that, as they were leaving the pub, the applicant told her that he needed to get his cigarettes from his hotel, which was just around the corner, and it would only take a couple of minutes to get them and that he would then take her home in a taxi. She said that, at that time, she was tipsy. Be that as it may, they went together to the applicant's room in his hotel, which was on the first floor. The complainant said that she stood by the door waiting for the applicant to get his cigarettes. He was shuffling around in his room and told her to come in. As she did so, he closed the door and the complainant believed that he locked it. The complainant said that she told him she wanted to go home and to take her to the taxi rank. The applicant sat on his bed and said that he was tired and wanted a nap for ten minutes, and that he would then take her home. He took off his jacket and lay on the bed. The complainant said that, although she stayed at the door for some time, she was frightened. Without threatening her, the applicant told the complainant to sit on the bed and she sat on the corner of it for a while. He then pulled her down and, although she struggled, he grabbed her by the arm. She claimed that she told him she just wanted to go home, that she had a boyfriend, and that she did not feel the same way about him. He then pulled off her top, although she tried to stop him. The complainant said that he started to kiss her and that she was crying and asked him to stop. She said that he took off his pants, pulled off her jeans, notwithstanding her struggle to resist, opened her legs and inserted his penis into her vagina (count 1.) She said that she was crying and begged him to stop, but he was "just doing what he wanted to do". The complainant said that he then pulled his penis out of her vagina and turned her over, holding on to her hips to keep her up. He inserted his penis into her vagina again. This was the subject of count 2 on the presentment. According to the complainant, the applicant told her she was a baby and to stop crying, and that she could have had everything. He said something like, "If you can't stop the rain, then you can't stop the way I feel about you." She then stood by the door for what seemed to be a long time, which she estimated to have been two hours. In the course of cross-examination, the complainant agreed that she had noticed a large amount of money in the applicant's bag in the corner of the room that would have amounted to at least $2,000. When the applicant finally opened the door, the complainant ran down the stairs and out into the street and kept running until she hailed a taxi to go home. The applicant had given her two $20 notes from the money that was in his bag just before she left.

4. On the following day the applicant prematurely left his Geelong hotel and travelled to

Queensland and then to Europe. Approximately one year later he returned to Australia via Queensland, where he was apprehended by the police on 28 May 2002. He participated in a long record of interview with the police, in the course of which he agreed that he had intercourse with the complainant on the day in question but essentially contended that it was consensual. He claimed that they held hands and kissed before going to his hotel, and that it was after intercourse had occurred that things "changed". The complainant asked him for $2,000. He became upset at this because he believed that she was "sleeping with him for money". The applicant said that he did not remember locking the door, but that if he did, he did it for the sake of privacy. He said that in any event it was merely a "snib" lock which could easily have been un-snibbed. He told the police that it was only after they had slept together and he rejected the complainant's request for $2,000 that she said she wanted to go home. He said that when she left the room he went with her to see if he could get her a taxi but she "walked away". He agreed that he had checked out of his hotel early but said that this was because he felt "uncomfortable" because she had demanded money and said that, if she did not get it, she would go to the police. He thought that she might carry out her threat and that she might return and demand more money.

5. I turn first to Mr Yusuf's oral submissions. It was apparent that he had given a good deal of consideration to the matters that he put to the Court. He presented his case respectfully and without taking up unnecessary time. Essentially, he contended that his conviction breaches what he said was Article 6 of the International Human Rights Convention because he did not obtain a fair hearing, given the circumstances to which he pointed, including the following. First, he said that he should not have been charged with the offence because the prosecuting authorities did not have evidence that established his guilt. He claimed that he was, in effect, "set up" by the authorities in respect of the alleged offence. In that context, Mr Yusuf referred to the photographs that were Exhibit A in the trial and pointed out that they do not show, as he claimed was the fact, that a police station could be seen through the window of his bedroom. He claimed that other photographs depicted the police station through that window but that the "police" did not want those photographs in evidence because they could be used to attack the complainant's version of the events by making it apparent that, if she had been raped as she claimed, she could have made the complaint at the police station.[2] What Mr Yusuf put before us in relation to the photographs does not, in my view, amount to fresh evidence and does not otherwise warrant setting aside the verdicts on that basis. If his claim as to the photographs had any merit, it could have been raised below. In the circumstances, it is not a matter that calls for interference by this Court. The same may be said about the other criticisms that he now advances against the investigators.

6. Mr Yusuf also referred to a number of inconsistencies in the complainant's evidence as to what occurred in his hotel room. They included the complainant's error in the claim that, after she entered the room, the applicant locked the door. It was plain on the photographs, he said, that there was no lock on the door. Mr Yusuf also pointed to the complainant's admission that she saw a large amount of cash in his bag and that, contrary to her claim that it was dark outside his hotel at the relevant time, street lights illuminated the area. But to the extent that these and like matters to which Mr Yusuf referred went to the complainant's credit and reliability, they were put to the jury by his counsel at his trial.

7. Mr Yusuf also contended that his lawyers had not properly represented him. It seems that this is not the first time that the applicant has made such a claim. He terminated his counsel's retainer at the conclusion of the trial and he did that again in respect of counsel who settled the Full Grounds and the outline of submissions. Be that as it may, I consider, as the trial judge did, that the applicant was competently represented by counsel at his trial and the same may be said about the terms of the Full Grounds and the outline of submissions. Thus, I consider that there is absolutely no basis for Mr Yusuf's claim that his representation at trial was a factor that made the trial unfair.

8. I now turn to consider the written outline of submissions that was filed on the applicant's behalf.

Ground 1 – Failure to direct as to satisfaction beyond reasonable doubt about evidence and vital issues

9. Under cover of ground 1 it was submitted on behalf of the applicant that his Honour failed to make clear to the jury that mere preference for the complainant's version of events was not

sufficient to convict him of the offence in question. The jury should have been told that even if they preferred the evidence of the complainant, they could not convict the applicant unless they were satisfied beyond reasonable doubt of the truth of her relevant evidence. It was also claimed that his Honour failed to direct the jury that even if they did not positively accept the applicant's account on a critical issue, they could not find against him in relation to it if they had a reasonable doubt about it. Reference was made to a number of authorities[3] which, it was said, support the claim that the jury should have been charged as the applicant now contends. In *Liberato*, for example, Brennan and Deane JJ made it plain that, where the jury had to choose between a Crown witness and a witness for the defence, they should be told that the mere resolution of a conflict against the defence is not to be taken as concluding the issue, namely, whether the Crown has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that, even if they prefer the evidence of the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must also be told that even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. And in *Crisafio*, Murray J said[4] that, in a case of this kind, where the evidence is entirely or substantially oath against oath:[5]

> "It is imperative that the jury not be given any impression that in such a case the guilt of the accused will be established by the jury's preference for the evidence of the complainant. The matters discussed in *Liberato* are of critical importance and the jury must be properly instructed that if they are left unable to reject the evidence of the accused, although they do not positively accept it, they could not find guilt established beyond reasonable doubt, and even if the evidence of the accused is rejected attention must still be given to the important question whether the evidence of the complainant, or so much of it as the jury do accept, establishes the commission of the offence beyond reasonable doubt."

10. It was said, as I have noted, that the judge failed so to direct the jury. Moreover, it was claimed for the applicant that his Honour told the jury to the effect that, if there was uncertainty in their minds about the complainant's evidence, "it is obviously more difficult for the Crown to get you to accept its version beyond reasonable doubt". Such a direction, it was inferentially claimed, was inconsistent with the need to emphasise to the jury that they must be positively satisfied about the truth of the complainant's evidence before they could act on it. It was also said that the judge repeatedly equated the acceptance of the complainant's evidence with proof of the Crown case.

11. I consider that the applicant's complaint under this ground is without merit. It is trite that, in order to determine if his Honour erred as is alleged, the impugned passage must be considered in the context of the charge as a whole. Thus, it is relevant to note that, near the outset of the charge, his Honour gave the standard directions as to proof and onus of proof and no complaint is made about that. Importantly, for present purposes, his Honour then told the jury that mere preference for the complainant's evidence or version of events is not sufficient, and that before they could find the applicant guilty they must be satisfied that the elements of the charge (which the judge later identified to the jury) had been made out beyond reasonable doubt. In this context, his Honour told the jury: "You have to be satisfied that what she said is truthful and reliable." The learned trial judge also directed the jury that they should put sympathy and prejudice to one side. This was apposite in this case. His Honour's statement that it would be difficult for the jury to accept the Crown case beyond reasonable doubt if there was uncertainty in their minds as to an important issue was made in the context of the judge's summary of the submissions of the applicant's counsel to the effect that, given the way in which the complainant expressed herself in the course of the evidence, there must be uncertainty about what she was saying about the relevant events. Given the context, I consider that the judge's impugned remark is unexceptional. I also consider that in his charge the judge did not equate the acceptance of the complainant's evidence with the Crown case as alleged. Thus, although the learned trial judge did not use the words of Brennan J in *Liberato* and those suggested by Murray J in *Crisafio*, to which I have referred, the charge as a whole would have made those principles plain to the jury.

12. I also note that no exception was taken to his Honour's charge along the lines of ground 1. This indicates that the applicant's experienced counsel did not consider that the judge's charge contained the error or the injustice contended for under cover of this ground.[6] In the circumstances, as I have said, I think that this ground must fail.

Ground 2 – Failure to give adequate directions as to the applicant's account in his record of interview

13. It was claimed for the applicant under ground 2 that the charge was unfair and unbalanced because the jury was not provided with an effective summary of the applicant's version of the relevant events as described by him in his record of interview, and it was not explained to them how they could use that material in their deliberations. It was pointed out that this difficulty arose in a context where the judge had put the Crown's case to the jury "extensively by reading slabs of evidence". By way of contrast, it was claimed, very little was said about the defence case. In particular, it was claimed that, notwithstanding that the record of interview was 109 pages that contained 950 questions and answers, his Honour only provided the jury with a two-page summary of the record of interview. In support of the claim that the charge was so unbalanced, reference was made to what was said in that regard by Ormiston JA in *R v Crockett*.[7] That case was concerned with a charge that contained so many errors that this Court concluded that the conviction could not stand. In the course of illustrating the nature of the errors, Ormiston JA referred to the failure by the trial judge to put the applicant's defence that was contained in his record of interview. His Honour noted[8] that most of the Crown case was recounted to the jury in "inordinate detail, largely by reading the transcript and no attempt was made to summarise the applicant's version contained in the record of interview This was clearly unbalanced and manifestly unfair." His Honour acknowledged, however, that sometimes a failure to summarise evidence may be excused having regard to the context of the case. The trial in that case lasted for six sitting days.

14. In my view, however, the situation here bears no relevant resemblance to that in *Crockett*. First, the applicant's trial lasted for only a little over one day and the evidence was essentially completed in an afternoon, including the playing of the tape of the record of interview. Plainly, the jury had the evidence fresh in their minds when they heard the charge and when they considered the matter. Secondly, his Honour did not recount the evidence to the jury in "inordinate detail" and he did not summarise it by reading the transcript extensively or otherwise. His Honour told the jury, on the morning of the second day of the trial, that he would remind them of some of the evidence for the purpose of stimulating their recollection of it by reading to them his notes of the evidence. And that is what his Honour did. That process took up five pages of the transcript of the charge. His Honour then effectively read to the jury his summary of the "lengthy record of interview". His Honour recounted to the jury the essentials of the applicant's defence, namely, that he had done nothing wrong – if he had committed the offence, why would he come back to Australia, he said. The judge then proceeded to tell the jury, in summary form, what the applicant contended in his record of interview had occurred in his hotel room on the afternoon in question. Importantly, the summary of the applicant's case emphasised that he believed that the sexual intercourse was consensual. It also referred to the circumstances that bore on this conclusion, such as the complainant's enjoyment of his company, their holding of hands and kissing before they had intercourse and his total inability to understand why she alleged the offence unless it was because he refused to give her the $2,000 that she demanded. The summary took up to two pages of the transcript of the charge and plainly reflected the applicant's case in defence. It is quite apparent that much of the record of interview would not have been so relevant. I consider that it must have been apparent to the jury how they could use the applicant's version of events in their deliberations.

15. Importantly, there is no absolute rule as to what is required to be addressed by the judge in the charge to the jury in order to ensure a fair trial. As Eames JA said in *R v Zilm*,[9] what is required by way of directions "may vary according to the circumstances of the case" and factors such as the length of the case, the complexity of the issues and the manner in which the case is conducted by the parties will be relevant. Where the evidence is relatively short and the issues clearly drawn, as was the case here, a detailed account of the evidence may not be determinative. [10]

16. I consider that, in the circumstances, the impugned part of the charge was fair and balanced. I also note that no exception to the effect now pressed was taken to the charge at the trial. It follows that, in my view, ground 2 should fail.

Ground 3 – Unbalanced charge

17. It was alleged for the applicant under cover of ground 3 that the charge was unbalanced

for yet another reason, namely, that it dealt with the issue of consent in a manner favourable to the Crown to the disadvantage of the applicant. It was pointed out that the prosecution's case was put extensively in the charge, whereas the applicant's version was put only briefly and was qualified and described by the judge as "not conclusive".

18. It seems to me, however, that the bulk of the impugned charge, in so far as it dealt with the Crown case, was concerned with explaining to the jury the requirements of s37 of the *Crimes Act* 1958 in accordance with *Yusuf No.1*, including the evidence that related to the matters identified in that provision. Thus, for example, the judge dealt with the need for the jury to consider whether the Crown had established that the complainant was not relevantly consenting. Plainly, this and like issues required careful analysis in the charge. This was obviously done by his Honour and no complaint is made in that regard. In this context, his Honour discussed the respective matters that could be taken into account by the jury as pointing for and against the contention that the complainant consented to sexual intercourse with the applicant. In those passages of his charge, his Honour also necessarily dealt with matters such as the applicant's state of mind at the relevant time, whether he believed the complainant was or might not be consenting and whether his belief was reasonable. In my view, his Honour's charge on this aspect of the case was balanced.

19. I refer for completeness to the claim that in his charge his Honour described the applicant's case as being "not conclusive". This submission, however, shows a misunderstanding of what the judge said. Looking at the matter in context, it is apparent, I think, that his Honour was speaking, not of the applicant's case, but about the factors that he was about to recount to the jury as possibly going to the question of the applicant's belief, which, the judge said, were not exhaustive. His Honour said that those matters "are not conclusive, they are not exhaustive, but they are some of the factors that occur to me that may be relevant on this issue, of the way he may have viewed the situation". It is quite plain, therefore, I think, that his Honour did not tell the jury, as is claimed, that the applicant's version of events was "not conclusive".

20. Thus, I consider that the charge does not lack balance as is claimed in ground 3, so that it is not surprising that no exception along the lines contended for was taken at the trial by the applicant's counsel.

Ground 4 – Error in consciousness of guilt direction

21. It was argued for the applicant under ground 4 that his Honour erred in his direction relating to the Crown case that the applicant's premature flight demonstrated consciousness of guilt. More particularly, it was said that the judge did not tell the jury that, in order to convict the applicant on that basis, they had to be satisfied that he departed prematurely because of his consciousness of guilt of the crime and for no other reason and that, if they were in doubt as to his reason for leaving, they could not infer consciousness of guilt on his part. It was also claimed for the applicant that the judge wrongly told the jury that if they concluded that he decamped because of his realisation of guilt and wished to avoid apprehension, they "were more or less deciding the case against him" and that flight was strong evidence of, or was tantamount to, the applicant's guilt. The applicant contended that a careful *Edwards*[11] direction should have been given by his Honour. It was also said that, in the circumstances of the charge, the judge's comments concerning the applicant's departure from his hotel were left as directions of law.

22. In my view, however, a fair reading of the whole of the relevant part of his Honour's charge makes it apparent that the deficiencies contended for have not been made out such as to vitiate the verdict. That the applicant's experienced trial counsel took no objection to his Honour's charge on that basis is some indication, I think, that he perceived no error or injustice in his Honour's charge as is alleged. His Honour made it plain to the jury, I think, that in order for them properly to conclude that the applicant's premature departure from the hotel demonstrated consciousness of guilt on his part they had to exclude or reject his alternative explanation for his departure.

23. At the outset of his charge on this issue, and then again later, his Honour told the jury that his directions on this matter were directions of law which, as the judge had earlier explained to the jury, were binding on them. When his Honour told the jury that if they accepted the Crown case that the applicant decamped in a prompt fashion because he knew that he had raped the complainant and wanted to avoid detection they would be "more or less deciding the case against him", the judge meant no more, as he went on to say, that such a conclusion would "amount to

very strong evidence of guilt". And so it would, in my view. Importantly, his Honour also told the jury that, because such a course was virtually tantamount to guilt, they would have to be satisfied of it beyond reasonable doubt. His Honour also emphasised that the jury should be aware that there could have been other reasons for the applicant leaving his hotel prematurely, as he claimed was the case. The judge proceeded to point out those "other reasons". His Honour concluded this aspect of the charge as follows:

> "As I have said, for you to use this to convict you have to be able to exclude those other possibilities beyond reasonable doubt. And you have to accept beyond reasonable doubt that he left because he knew he had raped her and he wanted to avoid the consequences."

24. In the circumstances, although his Honour did not in terms follow the form of the *Edwards* direction, what he said in that regard, viewed in the context of the charge as a whole, was sufficient to make the jury aware of the essential matters of which they had to be satisfied before they could properly convict the applicant on the basis of his consciousness of guilt.

25. In the circumstances, there is no need to consider ground 5. I would dismiss the application.

VINCENT JA:
26. I agree, and I do so for the reasons given by the learned presiding judge.

REDLICH JA:
27. I also agree.

CHERNOV JA:
28. The order of the Court is that the application is dismissed.

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[1] The applicant had previously been convicted of the same offences in the County Court at Geelong on 11 September 2003, but this conviction was quashed by this Court and a new trial ordered on 6 April 2005 – *R v Yusuf* [2005] VSCA 69; (2005) 11 VR 492; (2005) 153 A Crim R 173 ("*Yusuf No.1*").
[2] The relevant photograph in Exhibit A shows that a petrol station could be made out through the window in question.
[3] *Crisafio v R* [2003] WASCA 104; (2003) 27 WAR 169; (2003) 141 A Crim R 98 at 112 per Murray J with whom Malcolm CJ and Parker J agreed; *Liberato v R* [1985] HCA 66; (1985) 159 CLR 507 at 515; 61 ALR 623; 59 ALJR 792 per Brennan J and 520-521 per Deane J; *Middleton v R* [2000] WASCA 200; (2000) 114 A Crim R 141 at 144-145 per Miller J with whom Kennedy ACJ and Wallwork J agreed; and *R v Niass* (2005) NSWCCA 120 at [28] per Hunt AJA with whom Grove and Hall JJ agreed.
[4] At 112.
[5] Here, the source of the different versions of the relevant events was confined to the evidence of the complainant and the applicant's record of interview.
[6] See, for example, *R v Wright* [1999] VSCA 145; [1999] 3 VR 355 at 356; (1999) 30 MVR 412 per Phillips CJ and Charles JA and at 360-361 per Callaway JA.
[7] [2001] VSCA 95; (2001) 124 A Crim R 312 at 314-315.
[8] At 314-315.
[9] [2006] VSCA 72 at [52]; (2006) 14 VR 11; (2006) 161 A Crim R 149.
[10] *R v Dao* [2005] VSCA 196; (2005) 156 A Crim R 459 at 463-464 per Buchanan, Vincent, JJ A and Byrne, AJA.
[11] *Edwards v R* [1993] HCA 63; (1993) 178 CLR 193; (1993) 117 ALR 600; (1993) 68 A Crim R 349; (1993) 68 ALJR 40.

APPEARANCES: For the Crown: Mr CW Beale, counsel. Mr S Carisbrooke, Acting Solicitor for Office of Public Prosecutions. The applicant Yusuf appeared in person.
