SUPREME COURT OF QUEENSLAND

CITATION:	*R v Asaad* [2017] QCA 108
PARTIES:	**R** **v** **ASAAD, Michael Boghdadi** (appellant/applicant)
FILE NO/S:	CA No 39 of 2016 CA No 141 of 2016 DC No 768 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 5 February 2016; Date of Sentence: 12 May 2016
DELIVERED ON:	30 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2016
JUDGES:	Fraser and Philippides JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction is dismissed.** **2. Application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – IDENTIFICATION EVIDENCE – WARNING ADVISABLE OR REQUIRED – where the appellant was convicted of dishonestly obtaining a financial advantage from a Commonwealth entity – where the appellant obtained a late registration birth certificate in the name of Michael Boghdadi Asaad – where the appellant used that notice of birth as an identity document in his successful application for an Australian passport in the same name – where the appellant applied for Centrelink benefits under that name using his Australian passport – where the appellant received Commonwealth benefits in the total sum of $89,161.44 – where the prosecutor invited the jury to compare the photographs on two different passports and to conclude that the photographs were of one and the same person – where the trial judge gave conventional directions about circumstantial evidence – where the appellant argued that the trial judge should have given directions or warnings about the issues involved in the comparison of the passport photographs – whether the trial judge erred in not giving the jury a strict warning about the dangers of identification

evidence in all of the circumstances

CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – where the appellant has applied for leave to appeal against sentence – where the appellant had a significant and serious criminal history – where the appellant had health conditions and a disabled son – where the appellant argued the custody would cause his family hardship – where it was more than a completely speculative possibility that the appellant would be deported as a result of the conviction – where the appellant argued that the sentence should have been ameliorated by application of the principle of totality – whether the aggregate sentence is just and appropriate – whether the sentence was manifestly excessive – whether the sentencing judge failed to reflect the appellant's age, health conditions, the health conditions of his disabled son and other relevant factors in the sentence

Crimes Act 1914 (Cth), s 19AB(1)(d)
Criminal Code (Qld), s 668B(1)
Criminal Code 1995 (Cth), s 134.2(1)
Evidence Act 1995 (Cth), s 156, s 157
Migration Act 1958 (Cth), s 501(6)(a)

Alexander v The Queen (1981) 145 CLR 395; [1981] HCA 17, considered
Alford v Magee (1952) 85 CLR 437; [1952] HCA 3, considered
Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, considered
Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, considered
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, cited
Guden v The Queen (2010) 28 VR 288; [2010] VSCA 196, considered
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, considered
R v Beattie; Ex parte Attorney-General (Qld) (2014) 244 A Crim R 177; [2014] QCA 206, considered
R v GW (2016) 258 CLR 108; (2016) 90 ALJR 407; [2016] HCA 6, considered
R v Hassarati [2005] QCA 102, considered
R v Lovel [2007] QCA 281, considered
R v UE [2016] QCA 58, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: M J Byrne QC for the appellant/applicant
B H Mumford for the respondent

SOLICITORS: Peter Shields Lawyers for the appellant/applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **FRASER JA:** The appellant was convicted in the District Court after a trial of an offence against s 134.2(1) of the *Criminal Code* (Cth) that between 25 March 2002

and 4 June 2009 he, by a deception, dishonestly obtained a financial advantage from a Commonwealth entity. The notice of appeal against conviction filed by the appellant includes seven grounds of appeal, but the appellant pursued only two grounds, namely, that the copy of the Canadian passport in the name of Rick Michaels that was admitted in evidence as an exhibit at the trial was inadmissible and that the trial judge erred in not giving the jury a strict warning about the dangers of identification evidence in all of the circumstances of this case.

[2] Before discussing those grounds I will outline the evidence in the Crown case. (The appellant did not give or call evidence).

The Crown case

[3] In 1992 the appellant successfully applied to the Hobart Court of Petty Sessions for a late registration birth certificate in the name of Michael Boghdadi Asaad, born on 24 April 1938 in New Norfolk, Tasmania. In August 1998 the appellant used that notice of birth as an identity document in his successful application for the Australian passport in the same name. The appellant subsequently applied for Centrelink benefits under that name, in support of which he produced his Australian passport. Between 25 March 2002 and 4 June 2009 the appellant received Commonwealth benefits in the total sum of $89,161.44. Those facts were not in issue at the trial.

[4] The Crown case was that the appellant was Rick Michaels, a Canadian citizen, he was not entitled to Centrelink payments because he did not meet the residential eligibility criteria, and by not disclosing his true identity and citizenship he deceived the Commonwealth and dishonestly obtained Centrelink benefits under a false identity. In summing up to the jury the trial judge stated that it was made clear by defence counsel at the trial that the only real issue was whether or not the appellant obtained the payments by a deception, namely, the alleged conduct of the appellant in intentionally creating and using a false identity to obtain the payments, thereby intentionally inducing the Commonwealth to believe that the false identity was his true identity whilst believing that his conduct in doing so was or would be deceptive.

[5] At the trial the appellant formally admitted many facts, including that:

> "1. Asaad has used the name Rick Michaels, date of birth 25 October 1944.
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> 2. On 16 December 1985, a person using a passport in the name Rick Michaels arrived in Australia on a QANTAS flight from Canada arriving in the name Rick Michaels ('Michaels').
>
> 3. The person using the passport in the name Rick Michaels arrived in Australia using a Canadian travel document and a 'V10' Australian tourist Visa, and was recorded as having been born in Egypt.
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> 4. The incoming passenger card relevant to that arrival, records the particulars of Rick Michaels as follows:
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> a) Date of birth: 25 October 1944;
> b) Born: Egypt;

c) Canadian citizen;
d) Occupation: Director;
e) Travelling on passport number: KF524773;
f) Arrived on a QANTAS flight;
g) Intended address of Sheraton Hotel Sydney, NSW; and
h) Intended stay in Australia was for 3 months.

5. On 6 February 1986, Asaad indicated to a government agency in NSW that his particulars were:

a) Name: Rick Michaels;
b) Date of birth: 25 October 1944;
c) Occupation: Director
d) Born: Canada;
e) Held a Canadian residential address;
f) He had arrived on a QANTAS flight in December 1985;

6. On 31 January 1991, a birth registration form was completed for Michael Boghdadi Asaad (Jnr), Mr Asaad's son, who had been born that day. The registration form lists the father and informant as:

a) Michael Asaad;
b) Age 55;
c) Occupation: Director;
d) Born: Heliopolis, Egypt;
e) Address: 187 Williams St Granville, NSW."

[6] An employee in the Commonwealth department responsible for the administration of social security payments gave evidence of the appellant's claims for various allowances and his supply of the late registration birth certificate and his Australian passport, and other documents, in support of that application. The witness gave evidence that if the department had been informed that the appellant was born in Egypt the appellant would not have been entitled to the payments he received unless he had been granted Australian citizenship or received a special visa (such as a spousal visa) to remain as a permanent resident in Australia. In cross-examination she agreed that the appellant's spouse was an Australian citizen and they had been married in 1986. She did not agree that this made him entitled to payment; the appellant would have had to apply for a spousal visa to be eligible. She acknowledged that the appellant was still being paid a special benefit in the name of Michael Boghdadi Asaad. She observed that he was eligible for that special benefit because the Department had been informed that the appellant had now been granted a spousal visa. She agreed that after the appellant had become residentially qualified when he obtained the spousal visa, he applied for the benefits in a form in which he wrote the same information about this place and date of birth as he had written in his original applications. (In re-examination, she gave evidence that a person who was not residentially qualified was not entitled to an age pension and that if the person was granted the appropriate visa there was a 10 year waiting period before payment of the age pension; the appellant's entitlement to the special benefit arose on 1 May 2014.) The same witness agreed that, because of time constraints, the Department had not attempted to establish if the appellant had a brother named Rick Michaels who lived in the United States or Canada.

[7] A member of the Anglican Church clergy at St Matthew's Church, New Norfolk Parish, Tasmania gave evidence that she had the authority of the Anglican Diocese of Tasmania to access records held within the New Norfolk Parish at St Matthew's Church. The Church maintained a register which recorded baptisms by date, time of birth, the child's name, parents' names, address, and a signature of the priest who performed the baptism. After a request by the Department in 2015, the witness examined the baptism book kept by the Church and found that there was no record of a baptism in the name of Michael Boghdadi Asaad between December 1938 and April 1939, and there was no record of a baptism of any child in New Norfolk on 21 February 1939. A photocopy of the baptism record from December 1938 to April 1939 was admitted in evidence. Baptism No 834 was recorded as having been performed by W Gregson[1] on 29 February 1939 and baptism No 835 was recorded as having been performed by the same person on 22 February 1939. In cross-examination the witness agreed that she had previously stated that in the relevant period the baptism record indicated that 14 baptisms were held in St Matthew's Anglican Church and that records for other centres of the parish were not stored at St Matthew's and were most likely to be held at the Tasmanian State Archives. As she added, the baptismal record showed that there were baptisms in St Matthew's Church of children who resided in the other centres of the parish, including children who resided in Lachlan, New Norfolk (the place given as the appellant's residence in the baptism certificate faxed to the next witness).

[8] An employee of the Anglican Diocese of Tasmania gave evidence that a baptism certificate was faxed to her after numerous telephone calls to her from the appellant. The certificate is headed, "Baptism solemnised in the Parish of _____ in the Diocese of _____and County of _____ in the year 193__". The blank spaces were not completed by handwriting, as was evidently the intent of the form. It is dated 21 February 1939 and purports to be signed by W Gregson. Above the date and signature appear the words, "I Certify, that the foregoing is a true Copy of the entry of the Baptism of Michael Boghdadi Asaad in the Register of Baptisms for the said Parish of New Norfolk". The certificate records the alleged date of birth as 24 April 1938, a baptism date of 21 February 1939, the child's Christian name of Michael Boghdadi, the Christian names and surname of his parents, the abode of Lachlan, New Norfolk, and that the baptism ceremony was performed by W Gregson. The witness gave evidence that when she received the document she contacted someone who she thought would know whether the document should have had the words "Church of England" at the top, but she was not able to obtain that information or find any records. Initially she took the baptism certificate at face value. In cross-examination she agreed that she had originally verified that the baptism certificate was issued by the Anglican Diocese of Tasmania in the Parish of New Norfolk, and informed the appellant of that in a letter of 30 September 2014. She subsequently sent a letter in March 2015 retracting that verification. She retracted the verification because of absence of any reference to the baptism in the baptismal record for St Matthew's Church. She was also concerned about a long number on the certificate; an admission by the prosecutor established that this number had no bearing upon the validity of the birth certificate.

[9] An employee in the Australian Passport Office gave evidence about the records of the passport application made in August 1998 in respect of Michael Boghdadi Asaad. At the time the appellant applied for an Australian passport in August 1998,

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1 Note that the spelling of the reverend's name alternates throughout the transcript of proceedings.

a birth certification showing that he was born in Australia was satisfactory to prove that he was an Australian citizen. In the ordinary course of events the details of a copy of the birth certificate presented as part of the application would be recorded in the appropriate space on the application form. The Australian passport application, which was in evidence, records in the appropriate place on the form details of a birth certificate which match the details of the May 1992 record of birth.

[10] A Tasmanian record of birth records that Michael Boghdadi Asaad was born at the Cottage Hospital, New Norfolk on 24 April 1938 and that the birth was registered on 18 May 1992. An employee in the Registry of Births, Deaths and Marriages gave evidence that she signed the record of birth as the delegate for the Registrar of Births, Deaths and Marriages. The record was issued as a result of an order by the Court of Petty Sessions in Hobart ordering the registration of the birth. The information in the file in support of the application for registration of birth comprised the court order and a notice of birth. In cross-examination the witness agreed that, with the authority of the Registrar, she had cancelled the birth certificate without having notified the appellant. An appeal regarding the cancellation of the birth certificate had been adjourned and the applicant had made a freedom of information application relating to the registration of his birth. She agreed that in an investigation relating to the decision to cancel the birth certificate she had regard to a document suggesting there was an absence of records for New Norfolk District Hospital between November 1936 and April 1942 and that the document reflected perhaps that a fire had destroyed the records in those years.

[11] A birth certificate relating to one of the appellant's children states that the child was born on 31 January 1991 to a named mother and father (the appellant). The place of birth of the appellant is given as Heliopolis, Egypt. The birth certificate states that the appellant and the child's mother were married in the USA on 21 October 1986. The "informant" for the certificate is described as being the father, M Asaad. Those details accord with the details previously entered on a birth registration form apparently signed by the appellant as the informant on 31 January 1991. The birth certificate in evidence for another son of the appellant, borne on 19 December 1996, records that the place of birth of the father, the appellant, was New Norfolk, Tasmania; information on that birth certificate matched information on a birth registration form apparently signed by the appellant and the child's mother in February 1997. The birth certificate for the appellant's daughter born in August 1992 also gave the place of birth of the appellant as Norfolk, Tasmania; the information on that certificate matched the information on a birth registration form apparently signed by the child's mother on 14 August 1992. A witness who gave evidence about those documents, a public servant attached to the New South Wales Registry of Births, Deaths, and Marriages, agreed in cross-examination that it was theoretically possible that signatures could be put upon the birth registration form before the details of the forms were completed and that such a form could be filled out by one person before being signed by other persons.

[12] A witness who gave evidence about the Rick Michaels passport and the incoming passenger card relevant to the arrival of that person (referred to in admissions 2-4) also gave evidence that a "movement records database" held by the Department of Immigration and Border Protection recorded the arrival of Rick Michaels on 16 December 1985 (as admitted in admission 2). The movement records database

also recorded information supplied by the Canadian government that the Rick Michaels passport had been used in Canada on 15 January 1986.[2]

[13] In summing up the trial judge reminded the jury of the following submissions made by the prosecutor. The appellant's admission (admission 5) that on 6 February 1986 he indicated to a government agency in New South Wales what his particulars were corresponded with the incoming passenger card relevant arrival of Rick Michaels in Australia on 16 December 1985 using his Canadian passport (admissions 2 and 4) as to name, date of birth, occupation, and arrival on a Qantas flight, the only difference being in respect of the place of birth; and the details in the incoming passenger card corresponded with the Rick Michaels' passport and visa stamp on that passport. One of the supporting documents in the first claim for Centrelink payments in 2002 was the Australian passport issued to the appellant in 1998. The prosecutor invited the jury to compare the photographs on the 1985 Canadian passport and the 1998 Australian passport and to conclude that, although the jury might infer that those photographs were taken some 13 years apart (having regard to the dates of issue of the passports), the photographs were of one and the same person. The Crown case was that the only rational inference to be drawn was that the appellant was Rick Michaels who arrived in Australia in December 1985, so that the appellant's identity as Michael Boghdadi Asaad was false. The prosecutor submitted that the creation of the Asaad identity started in 1992 in Tasmania, with reference to the baptism certificate sent by fax. The recipient initially verified that document but later looked at the parish records and could not see any record of a baptism on the date mentioned in the baptism certificate, 21 February 1939, or any baptism in the name Michael Boghdadi Asaad. The 1992 birth certificate was the identity document supporting the application for the Australian passport in 1998. The first birth registration form for children of the appellant was the form for the child born in January 1991, which was before the appellant applied to register a birth certificate in his own name in 1992; that form identified Egypt as the appellant's birthplace. That accorded with the place of birth on the incoming passenger card for Rick Michaels upon his arrival in Australia on 16 December 1985.

Ground 1: Admissibility of the passport

[14] On the second day of the trial the prosecutor tendered and the trial judge admitted in evidence a document described as "Canadian passport in the name of Rick Michaels"[3] (the Canadian passport referred to in admission 2). The document marked as an exhibit is a copy of that passport. It does not bear a certificate that it is such a copy and the prosecutor did not adduce evidence that it was an examined copy.

[15] Sections 156 and 157 of the *Evidence Act* 1995 (Cth) provide:

> "**156 Public documents**
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> (1) A document that purports to be a copy of, or an extract from or summary of, a public document and to have been:
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> (a) sealed with the seal of a person who, or a body that, might reasonably be supposed to have the custody of the public document; or

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2 Transcript 2-54, 3-9, Exhibit 17.

3 Transcript p 2-52, 2-53.

(b) certified as such a copy, extract or summary by a person who might reasonably be supposed to have custody of the public document;

is presumed, unless the contrary is proved, to be a copy of the public document, or an extract from or summary of the public document.

(2) If an officer entrusted with the custody of a public document is required by a court to produce the public document, it is sufficient compliance with the requirement for the officer to produce a copy of, or extract from, the public document if it purports to be signed and certified by the officer as a true copy or extract.

(3) It is sufficient production of a copy or extract for the purposes of subsection (2) if the officer sends it by prepaid post, or causes it to be delivered, to:

(a) the proper officer of the court in which it is to be produced; or

(b) the person before whom it is to be produced.

(4) The court before which a copy or extract is produced under subsection (2) may direct the officer to produce the original public document.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

157 Public documents relating to court processes

Evidence of a public document that is a judgment, act or other process of an Australian court or a foreign court, or that is a document lodged with an Australian court or a foreign court, may be adduced by producing a document that purports to be a copy of the public document and that:

(a) is proved to be an examined copy; or

(b) purports to be sealed with the seal of that court; or

(c) purports to be signed by a judge, magistrate, registrar or other proper officer of that court.

Note: Section 5 extends the operation of this provision to proceedings in all Australian courts"

[16] The appellant accepted that if the document admitted in evidence had been proved to be an examined copy of the Rick Michaels passport referred to in admission 2 it would have been admissible, but he argued that the document was not admissible in the absence of such proof. He argued that the importance of the passport in the Crown case was such that its admission without the required proof amounted to a miscarriage of justice. The respondent argued that at the trial the prosecutor was in a position to adduce evidence that the document was an examined copy of the passport but defence counsel had not objected to the prosecutor's tender of the copy

of the passport without such evidence. That was a forensic decision by defence counsel, and in the circumstances there was no miscarriage of justice.

[17] The respondent's argument should be accepted. Before the jury was empanelled defence counsel submitted that the copy of the Rick Michaels passport was strictly admissible, but she argued that it ought to be excluded as a matter of fairness and because it did not prove what the Crown argued it proved, that the true identity of the appellant was Rick Michaels, who used the passport to come to Australia on 16 December 1985. Defence counsel argued that, whilst there was evidence that the appellant had used the identity Rick Michaels (as admitted in admissions 1 and 5), the passport did not prove that there was no other Rick Michaels or who it was that used the passport to come to Australia; she submitted that the use of the passport as evidence that the appellant was Rick Michaels was highly prejudicial because it was the very basis of the Crown case. She also submitted that the passport would be "tainted by the submission or the inference that it's essentially another false document, a false passport belonging to the man of many names".[4]

[18] The prosecutor submitted that the passport formed part of the circumstantial case proving that the appellant arrived in Australia in 1985 under the name Rick Michaels born in Egypt, and if that were accepted the appellant could not be Asaad, whose identity was not created until 1992 in response to the application for a birth certificate in Tasmania in that name. The prosecutor indicated that the Crown would invite the jury to compare the photograph in the passport with the photograph of the appellant in the Australian passport. The prosecutor informed the Court that the passport had been tendered in court proceedings in Western Australia in 1986. The prosecutor submitted that it would be unduly prejudicial to go into the details of the trial in Western Australia, which concerned fraud, but submitted that the passport was admissible under the *Evidence Act* 1995 (Cth). The prosecutor stated that the Crown could call an employee in the Western Australian Office of Director of Public Prosecutors to give evidence that the passport was tendered as an exhibit in the Western Australian proceedings. The prosecutor had available a statement from that proposed witness, which identified a copy of the Canadian passport in the name Rick Michaels kept in a file in that office and certified that certain documents were copies of the documents in the file.

[19] The trial judge declined to exercise the discretion to exclude the Rick Michaels passport from evidence, observing that it was open to the defence to make such submissions to the jury, as where considered appropriate about what inferences should or should not be drawn about the identity of Rick Michaels or whether there was another person by that name, and it would be appropriate for directions to be given regarding the use of circumstantial evidence and the drawing of inferences.

[20] When the prosecutor subsequently tendered what he described as a Canadian passport in the name of Rick Michaels, defence counsel stated that she had no objection to the tender. (The transcript records that shortly before then the prosecutor was given leave to speak with defence counsel)

[21] It is apparent that defence counsel acquiesced in the copy passport being admitted in evidence as a copy of the Canadian passport of Rick Michaels without proof that it was an examined copy of the original passport lodged with the court in Western Australia. The appellant therefore cannot point to any wrong decision by the trial

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4 Transcript 2 February 2016 at p 1-17.

judge upon a question of law but must instead contend, as he does, that the admission in evidence of the copy of the passport without additional evidence that it was an examined copy amounted to a miscarriage of justice.[5] The appellant does not argue that defence counsel acted incompetently in this respect. It is readily understandable why defence counsel might have considered it to be in the appellant's interests not to require proof that the passport had been admitted in evidence in other proceedings. Contrary to a submission made by counsel for the appellant, the admission in evidence of the Rick Michaels passport would not carry with it a prejudicial effect that it was a false passport; there was no evidence that it was other than a legitimate passport, neither the prosecutor nor defence counsel made any such submission, and upon the Crown case it was the appellant's genuine passport.

[22] In these circumstances there is no justification for departing from the general rule that there is no miscarriage of justice where defence counsel acquiesces in an irregularity in a criminal trial.[6]

Ground 2: Directions

[23] Before the trial judge summed up to the jury, defence counsel acknowledged that "the usual identification warning" was not appropriate but submitted that the trial judge should give a warning "about the process of identification that's being asked of them by the Crown with respect to the two photographs, the quality of the photographs and the surrounding circumstances", upon the ground that it was "a somewhat dangerous process that they're being asked to engage in by the Crown".[7]

[24] The trial judge considered that no such warning appropriate but that directions concerning circumstantial evidence should be given. The trial judge gave conventional directions about circumstantial evidence. In particular, the trial judge directed the jury that to bring in a verdict of guilty based entirely or substantially on circumstantial evidence it was necessary that guilt should be the only rational inference that could be drawn from the circumstances, if there was a reasonable possibility consistent with innocence it was the jury's duty to find the defendant not guilty, and that followed from the requirement that guilt must be established beyond reasonable doubt.

[25] The second ground of appeal pressed by the appellant is that the trial judge erred in not giving the jury "a strict warning about the dangers of identification in all of the circumstances of this case". As support for this ground of appeal the appellant quoted passages from *Domican v The Queen*.[8] The appellant argued that the trial judge should have given directions or warnings about the issues involved in the comparison of the passport photographs for the purpose of establishing the identification for which the Crown contended. The appellant relied upon the statement by Stephen J in *Alexander v The Queen*[9] that:

> "When identification is attempted with the aid of photographs, there are introduced peculiar difficulties, due to the various ways in which

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5 See *Criminal Code* s 668E(1).
6 *Gately v The Queen* (2007) 232 CLR 208 at [77].
7 Transcript p 3-6.
8 (1992) 173 CLR 555.
9 (1981) 145 CLR 395 at 409.

> photographic representations differ from nature: their two dimensional and static quality".

[26] The appellant argued that the trial judge's failure to give any such directions about identification evidence resulted in a miscarriage of justice because, notwithstanding the appellant's admissions that he had used the name Rick Michaels, the lynchpin of the Crown case was that the appellant arrived in Australia using the Rick Michaels passport and the comparison of the passport photos was an important piece of evidence in the Crown's circumstantial case upon that issue. The appellant argued that the failure to give such directions was a fundamental error of a kind which precluded application of the proviso is s 668E(1A) of the *Criminal Code* that "the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[27] The respondent acknowledged that the trial judge gave no specific directions or warnings in relation to the comparison of the two photographs. The respondent noted that the appellant's experienced counsel at trial submitted that this was not a case where the usual identification warning is appropriate and asked the trial judge to warn the jury about the process of identification advocated by the Crown. The respondent submitted that the identification of the photographs was only part of the very strong circumstantial case against the appellant and, if the directions on identification were inadequate, the proviso should be applied.

[28] In *Domican v The Queen*, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ observed 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."[10] Their Honours stated:

> "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." (footnotes omitted)[11]
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10 (1992) 173 CLR 555 at 561.

11 *Domican v The Queen* (1992) 173 CLR 555 at 561-562.

> "A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused. The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence. If a trial judge has failed to give an adequate warning concerning identification, a new trial will ordinarily be ordered even when other evidence makes a very strong case against the accused. Of course, the other evidence in the case may be so compelling that a court of criminal appeal will conclude that the jury must have convicted on that evidence independently of the identification evidence. In such a case, the inadequacy of or lack of a warning concerning the identification evidence, although amounting to legal error, will not constitute a miscarriage of justice. But unless the Court of Criminal Appeal concludes that the jury must inevitably have convicted the accused independently of the identification evidence, the inadequacy of or lack of a warning concerning that evidence constitutes a miscarriage of justice even though the other evidence made a strong case against the accused." (footnotes omitted)[12]

[29] The identification evidence in *Domican* was given by a witness who claimed to have seen and recognised the person she previously had seen committing an offence. The identification evidence in *Alexander v The Queen* was given by a witness who claimed that she recognised a person depicted in a photograph (the alleged offender) as the person the witness had seen in circumstances connected with an offence. In *Festa v The Queen*,[13] the term "identification evidence" was used to describe evidence that people who had seen a woman near the scene of crime subsequently identified the accused as being or as resembling that woman.[14] Evidence of the kind in issue in those cases – evidence that a person recognises or (in the case of an out of court identification) recognised the accused as the person who committed or was connected with a crime – may be persuasive to a degree beyond its inherent strength. There has been a long history of miscarriages of justice arising from that kind of identification evidence. It was the "seductive" effect of such evidence that was said in *Domican* to have formed the rationale for making it mandatory for trial judges to give appropriately tailored warnings to juries.

[30] In *Festa v The Queen*,[15] witnesses gave evidence of their observations of a female person near the scene of a crime who was wearing a wig and was disguised to an extent. That evidence did not of itself permit a conclusion that the female person was the appellant, but if it was accepted and considered in conjunction with other evidence it showed that the appearance of the female was consistent with her being the appellant. Gleeson CJ observed that this evidence was "only identification evidence

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12 *Domican v The Queen* (1992) 173 CLR 555 at 565-566.

13 (2001) 208 CLR 593.

14 (2001) 208 CLR 593 at [26] (Gleeson CJ), [54]-[60] (McHugh J, who considered that evidence by a witness that the facial features of the accused were similar to those of the perpetrator does not attract a mandatory warning according to the *Domican* principles but a particular warning may be required by the particular circumstances), [153], [157], [166] (in which Kirby J disagreed with McHugh J's conclusion that "circumstantial identification evidence" given by a witness was no more presumptively prejudicial than other forms of evidence), [218]-[219] (Hayne J).

15 (2001) 208 CLR 593.

in the loosest sense of that term".[16] The evidence of the passport photographs in this case is a step further removed from "identification evidence" of the kind in issue in *Domican*, *Alexander* and *Festa*. The Australian passport identifies the person shown in the photograph in it as the appellant, an Australian citizen, and the Canadian passport identifies the person shown in the photograph in it as Rick Michaels, a Canadian citizen. That evidence was admissible as circumstantial evidence of an alleged fact (the resemblance of the appellant with and the Canadian citizen Rick Michaels) which, when take in conjunction with other circumstantial evidence, allowed the jury to infer a fact in issue (the identity of the appellant as a Canadian citizen). Importantly, the jury could consider whether the photographs suggested that the appellant resembled Rick Michaels without potential for error arising by the influence upon the jury of evidence that some other person considered that there was a resemblance.

[31] There were weaknesses in the photographic evidence - their two dimensional and static quality, the poor quality of both photographs arising from the fact that they are copies, those photographs were taken some 13 years apart, and only the head (and to some extent shoulders) is shown – but those matters were likely to be obvious to a jury. They were not factors of a kind that judicial experience shows were likely to be given insufficient weight by a jury in deciding whether there was a resemblance between photographic images.

[32] For these reasons, the jury exercise of comparing the passport photographs to decide whether the those photographs revealed a resemblance between the appellant and Rick Michaels was not evidence as to identification of the kind with which *Domican* was concerned. In relation to that exercise, the trial judge was not obliged to give the jury the mandatory directions of the kind discussed in that case.

[33] It remains necessary to consider whether the particular circumstances of this case called for a direction about the photographic evidence. In *Alford v Magee*[17] the High Court endorsed the principle that a trial judge should inform the jury of so much of the law as is required to guide the jury to a decision on the real issues in the case. The Court added that "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." One of the real issues at the trial of this case was whether the appellant was the Canadian citizen Rick Michaels. An alleged circumstantial fact relevant to that issue was the resemblance of the appellant with the Canadian citizen Rick Michaels as it appeared on a comparison of the passport photographs. The trial judge's summary of the prosecutor's submissions, however, suggests that the prosecutor submitted that the jury might conclude merely upon a comparison of the photographs – without reference to any other circumstance proved in evidence - that the appellant was Rick Michaels, a Canadian citizen: "[the prosecutor] noted that you might infer those photographs were taken some 13 years apart having regard to the date of issue of the two passports, but he submitted that you might think and urged upon you that they are one and the same person. On that basis the Crown submitted that you might think the defendant first arrived in Australia under the name Rick Michaels in December 1985."[18]

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16 (2001) 298 CLR 593 at [6].
17 (1952) 85 CLR 437 at 466 (Dixon, Williams, Webb, Fullagar and Kitto JJ).
18 Summing up p 7.

[34] The trial judge also referred to the other circumstances relied upon by the prosecutor for that conclusion, but it is possible that the jury understood the prosecutor to be submitting that the jury could find an identity between the appellant and Rick Michaels, a Canadian citizen, merely upon a comparison of the passport photographs. The photographs are certainly evidence of a resemblance between the appellant and Rick Michaels, but the weaknesses in the photographic evidence already discussed make it difficult to accept that it was of itself capable of sustaining the conclusion that the appellant was Rick Michaels. If the photographic evidence was admissible for that purpose, its weaknesses are such as to render any such conclusion unsafe.

[35] In *R v GW*,[19] the High Court referred to *Bromley v The Queen*,[20] *Crofts v The Queen*,[21] and *Longman v The Queen*[22] and held that the common law requires a trial judge to give a warning to the jury "whenever a warning is necessary in order to avoid a perceptible risk of a miscarriage of justice". The Court held that "A perceptible risk of that kind arises when there is a feature of the evidence which may adversely affect its reliability and which may not be evident to a lay jury". The risk was perceptible to the Court because judicial experience had shown that evidence of that description may be unreliable and, subject to any statutory prohibition, in such a case "the fair trial of the accused requires the judge to draw it to the jury's attention, explain how it may affect the reliability of the evidence and warn the jury of the need for caution in deciding whether to accept it and the weight to be given to it."

[36] The prosecutor's submission that the photographs taken alone might justify the jury in concluding that the appellant was Rick Michaels introduced the additional factor that the jury had only the photographs of Rick Michaels with which to compare the appellant's passport photograph. This factor was not significant for the jury's evaluation of the question whether the photographs evidenced a resemblance – as they undoubtedly did - but in the context of that resemblance it increased the risk of a wrong identification of the appellant as Rick Michaels being made merely upon a comparison of the photographs. An analogous weakness in witness identification evidence is avoided by eye witnesses being asked to identify offenders by viewing identification parades or photographs of a number of people whose appearances might all match a general description. Defence counsel did not ask the trial judge to take this factor into account and the appellant did not rely upon it in the appeal, but it is a weakness in the use of the photographs as identification evidence that may not have been obvious to the jury. In light of the prosecutor's submission, it therefore would have been appropriate for the trial judge to refer the jury to this factor and the other weaknesses in the photographic evidence and warn the jury that it would be dangerous to conclude upon a comparison of the passport photographs alone that the appellant was Rick Michaels.

[37] The record makes it seem very unlikely, however, that the jury concluded merely upon a comparison of the photographs that the appellant and Rick Michaels were one and the same person. That the jury did not reason in that way is suggested by questions the jury asked after the conclusion of the summing up about the testimony

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19 (2016) 90 ALJR 407 at [50] (French CJ, Bell, Gageler, Keane and Nettle JJ).
20 (1986) 161 CLR 315.
21 (1996) 186 CLR 427.
22 (1989) 168 CLR 79.

given by the employee of the Anglican Diocese of Tasmania (see [8] of these reasons) and the circumstances concerning admissions 1 and 5.

[38] In any event, the uncontradicted evidence in the Crown case was of such strength that, if the omission to give directions about the photographic evidence involved a wrong decision by the trial judge or a miscarriage of justice, the appeal should nevertheless be dismissed because no substantial miscarriage of justice has actually occurred.

[39] The following uncontroversial facts supplied strong support for the Crown case. In circumstances in which on 16 December 1985, a person using a Canadian passport in the name Rick Michaels arrived in Australia on a Qantas flight from Canada and the incoming passenger card relevant to that arrival recorded particulars of Rick Michaels, including that he was a director, a Canadian citizen, and born in Egypt on 25 October 1944:

(a) Less than two months later, the appellant's indication to a Government agency in New South Wales revealed that his particulars matched those of Rick Michaels as to name, date of birth, occupation, month of arrival, and that he arrived by a Qantas flight, and he also identified his birthplace as Canada and indicated that he held a Canadian residential address.

(b) More than 12 months before the appellant applied to the Hobart Court of Petty Sessions for a late registration birth certificate recording that he had been born in Tasmania, a birth registration form for his son born on 31 January 1991 signed by the appellant identified the father as Michael Asaad and gave his birthplace as Egypt.

(c) The birth certificate upon which the appellant relied in support of his application for an Australian passport was not issued until May 1992, after the appellant applied on 24 April 1992 for a late registration birth certificate recording that he had been born on 24 April 1938.

(d) Although the register of baptisms maintained at the St Matthew's Church, New Norfolk Parish, Tasmania recorded baptisms in that church of children who resided in Lachlan, New Norfolk, the register did not include any record of a baptism in the name of Michael Boghdadi Asaad on 21 February 1939 (the date of baptism stated in the partly completed baptism certificate faxed to the employee of the Anglican Diocese of Tasmania after numerous telephone calls to her from the appellant).

(e) Attributing full weight to the factors affecting the reliability of any conclusion based upon the comparison of the photographs in the passports, that evidence revealed a consistency of appearance between the appellant and Rick Michaels.

[40] In relation to (b), defence counsel submitted to the jury that it was unlikely that a person submitted by the Crown to be a sophisticated fraudster would make such a slip, and it might more readily be explicable by someone else having filled in the form and the appellant having simply signed it. Even if this circumstance were taken alone, I would not accept the submission. When considered in the context that the birth of the son of the appellant occurred more than a year before the

appellant applied for a late registration birth certificate, the fact that the birth registration form identified the appellant's place of birth as Egypt supplies powerful support for the Crown case.

[41] The strength of the Crown case derived from the combination of those circumstances was not weakened by other arguments by defence counsel at the trial. The circumstance that the authorities had not made efforts to establish whether the appellant had a brother named Rick Michaels, and whether he existed in the United States, Canada or elsewhere, was not evidence that the appellant did have such a brother. The circumstance that the Rick Michaels passport had been used in Canada after the arrival of someone using that passport in Australia was not evidence that the appellant had not used that passport to travel to Australia. Defence counsel invited the jury to consider whether the person called Rick Michaels who arrived in Australia using his own passport would set about such an elaborate scheme to create another identity; that does not answer the Crown case that the circumstantial evidence established that the appellant had embarked upon such a scheme. A submission by defence counsel that the appellant could have received Centrelink payments on a spousal visa did not take into account the evidence of a waiting period in relation to a claim for an age pension based upon a spousal visa and the fact that the appellant had not applied for a spousal visa before receiving benefits. A submission by defence counsel that the appellant was still being paid benefits in the name of Michael Asaad did not take into account the evidence that the appellant became entitled to benefits after he had applied for and been granted a spousal visa. A submission by defence counsel that a record of the appellant's baptism might have been held at the Tasmania State Archive did raise a relevant issue for the jury in light of the concession by the witness that she had previously stated that records for centres for the parish other than the Church itself were not stored at the Church but were most likely to be held at the State Archive; but the jury could take into account that the baptismal register kept at the Church included baptisms of children who resided at the place given as the appellant's residence in the faxed baptism certificate.

[42] Defence counsel submitted to the jury that it was central to the consideration of the Crown case that the appellant acted dishonestly that he received payments between March 2002 and June 2009, when he could safely act upon the birth certificate and the baptism certificate. That argument has no weight when the late registration birth certificate was issued in reliance upon a baptism certificate supplied by the appellant that was inconsistent with the appellant's true identity. Defence counsel also submitted to the jury that evidence of an absence of records held by New Norfolk Hospital relating to patients from November 1936 to April 1942 was a legitimate and documented reason for the absence of a birth certificate for the appellant. As the trial judge observed in summing up to the jury, that absence of records from the hospital does not explain the absence of a birth certificate; it only explains the absence of birth records in the hospital.

[43] Upon a review of the record of the trial, the evidence proved beyond reasonable doubt that the appellant obtained payments from the Commonwealth by the deception of intentionally creating and using the false identity Michael Boghdadi Asaad; he intentionally induced the Commonwealth to believe that this false identity was his true identity, whilst believing that his conduct in doing so was deceptive; and the appellant thereby dishonestly obtained a financial advantage from the

Commonwealth. The "natural limitations",[23] that apply where an appellate court proceeds wholly on the record are not significant for those conclusions. The relevant evidence in the Crown case was not contradicted by other evidence and was inherently credible. Because the evidence adduced by the Crown proved that the appellant was guilty of the offence charged against him beyond reasonable doubt no substantial miscarriage of justice actually occurred, notwithstanding the suggested irregularity in the trial.

[44] The appellant argued that the proviso should not be applied even if the evidence proved the appellant's guilt beyond reasonable doubt because the trial judge's failure to give directions about the "identification evidence" was a "fundamental error". That submission should not be accepted. The relevant evidence was not "identification evidence" of the kind which attracted obligatory directions in accordance with *Domican*. It was no more than an omission to give a direction about the reliability of evidence of one of many matters relied upon in a circumstantial case.

Application for leave to appeal against sentence

[45] The appellant was sentenced to imprisonment for three years and six months. It was declared that a period of pre-sentence custody of 192 days was imprisonment already served under the sentence. The sentencing judge fixed a non-parole period of 13 months and ordered the appellant to make reparation of $89,161.44 for the Commonwealth. The appellant has applied for leave to appeal against sentence on four grounds:

> "1. The learned trial Judge did not adequately reflect the issue of general totality in my sentence; and/or
>
> 2. The learned trial Judge did not adequately reflect my age, health conditions, and health conditions of my disabled son in arriving at a just sentence in regards to both general mitigation and in relation to how my time in custody is more onerous compared to an ordinary prisoner; and/or
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> 3. The learned trial Judge erred in what weight could be afforded to my previous (significant) cooperation with the authorities. That is to say the Judge erred in rejecting the contention that there is an inherent and on going risk to those that assist authorities in any future imprisonment they might have imposed on them; and/or
>
> 4. That in all the circumstances the sentence was manifestly excessive."

[46] In order to consider these grounds it is necessary to refer to the sentencing judge's sentencing remarks.

[47] The sentencing judge recorded that the offence was committed over a period of some years and involved the creation of a false identity and the use of that identity to fraudulently apply for and receive just under $90,000 in various benefits from Centrelink. The appellant's deceptive conduct was elaborated, sophisticated and

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23 Cf *Weiss v The Queen* (2005) 224 CLR 300 at [41].

determined. His offending was distinguishable from the conduct of others in committing the same offence by failing to update Centrelink about changed circumstances or by lying about some aspect of their personal circumstances. The appellant had not repaid any of the amounts he had received. He was approaching 72 years of age. He had a significant and serious criminal history. It included quite dated convictions for serious drug offences in 1993 and an offence of dishonesty in 1994. More relevantly and recently:

(a) In May 2004 the appellant was convicted in the District Court of fraud offences for which he was sentenced to 12 months imprisonment. He served six months of that sentence. (The convictions were for fraud with a circumstance of aggravation (between 12 and 15 June 2001) and attempted fraud (between 13 and 23 June 2001), for which the appellant was sentenced to 12 months imprisonment, wholly suspended for three years; the whole of the suspended sentence was subsequently activated on 2 June 2010.

(b) In May 2005 the appellant was convicted of an offence of preparing to leave Australia as an undischarged bankrupt and carrying on business as an undischarged bankrupt. (Those offences were committed between 20 March 2004 and 25 March 2005; he was sentenced to three months imprisonment to be released forthwith upon giving security by recognizance, on condition that he be of good behaviour for three years, and 50 hours community service was imposed.)

(c) On 29 May 2009 the appellant was sentenced in the District Court of New South Wales in Sydney for fraudulently omitting to account for money. This offence involved the appellant in taking $53,000 from another person on the basis that the appellant would buy shares on behalf of the other person, but the appellant then fraudulently used that money for his own purposes. The appellant was sentenced to 18 months imprisonment with a non-parole period of nine months.

(d) On 2 June 2010 the appellant was sentenced in the District Court for obtaining goods or services as an undischarged bankrupt (between 11 December 2003 and 1 October 2004). He was sentenced to 18 months imprisonment to be released upon giving security after nine months. A reparation order totalling $32,432.05 was made and the whole of the suspended sentence imposed on 19 May 2004 was activated, with parole release ordered after nine months. That sentence was varied on appeal such that the appellant was to be released after serving six months, with a similar reduction in respect of the activated suspended sentence.

[48] The sentencing judge found: that the appellant's criminal history and the circumstances of the subject offence revealed an ingrained dishonesty and willingness to deceive and disregard the law; this offence could not be said to be out of character or an aberration; and the appellant's criminal history was an important distinguishing factor between his case and other cases referred to at the sentence hearing. The sentencing judge referred to the established principle that the deterrence of offenders and other people who would seek to commit similar crimes was important. The sentencing judge balanced that consideration against the appellant's personal circumstance and other relevant matters: the appellant was 71 years old; he suffered

from medical conditions including a heart condition, diabetes, and a hernia; those conditions could be managed in custody but were nonetheless to be taken into account. The sentencing judge referred also to the effect of the sentence on the appellant's family, and particularly upon a son of the appellant who suffered severely from autism. The sentencing judge accepted that was a relevant consideration but noted that the probable effect of a sentence on a family must be shown to be exceptional before it could influence a sentence.

[49] The sentencing judge also referred to the circumstance that the appellant was currently on a spousal visa and that the Commonwealth minister must cancel such a visa if satisfied that the person holding it does not pass the character test because of s 501(6)(a) of the *Migration Act* 1958 (Cth), which would happen if the person has a substantial criminal record (meaning that the person had been sentenced to imprisonment of 12 months or more). The sentencing judge accepted that it was more than a completely speculative possibility that the appellant would be deported as a result of the conviction. The sentencing judge also found that, although there was no express evidence that deportation would be a hardship for the appellant, so much should be inferred from evidence to the effect that the appellant had lived in Australia for a long time and he had a wife and family, including a disabled son for whom the appellant cared.

[50] The sentencing judge considered that the most comparable sentencing decisions (in terms of the nature of the fraudulent conduct, the amount of money involved, and the degree of planning, contrivance and pre-meditation) cited at the sentencing hearing were *R v Hassarati*[24] and *R v Lovel*,[25] in which head sentences of three and a half years imprisonment were imposed.

[51] Section 19AB(1)(d) of the *Crimes Act* (Cth) requires the sentencing court to fix a single non-parole period where a sentence of imprisonment is more than three years. In this respect the sentencing judge remarked that the appellant did not have in his favour some of the beneficial mitigating circumstances that were present in comparable decisions cited at the sentence hearing such as *Hassarati*, in which the offender had no prior convictions. The appellant also did not have the benefit of a plea of guilty. The sentencing judge accepted, however, that it was appropriate for the sentence to be ameliorated to some extent to take into account the appellant's health conditions, the impact of custody upon the appellant's family and particularly the appellant's son and the risk the appellant faced of deportation. The sentencing judge did not regard it as appropriate for the pre-sentence custody to be ameliorated to much less than about half of the period of the head sentence.

Ground 1: Totality

[52] The appellant argued that the sentence should have been ameliorated by application of the principle of "totality" discussed in the following passage in *Mill v The Queen*:[26]

> "In our opinion, the proper approach which his Honour should have taken was to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced

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24 [2005] QCA 102.
25 [2007] QCA 281.
26 (1988) 166 CLR 59 at 66-67.

> at one time. It is most unlikely that the applicant would have been sentenced to eight years on the first count, eight years with six years of it concurrent on the second count, and eight years cumulative on the third count, making an aggregate head sentence of eighteen years … On the other hand, the notional exercise which we have just described tends towards a conclusion that a sentencing court dealing with all three offences at the same time would have dealt with the third offence in a similar manner to that adopted when dealing with the second, namely, by imposing a sentence of eight years with five or six years of it concurrent with the earlier sentences. … But, of course, it is not possible for a second sentencing court to impose a concurrent sentence of the kind we have contemplated in the absence of statutory provisions enabling the backdating of the new sentence"

[53] The appellant submitted that the decision in *R v Beattie; Ex parte Attorney-General (Qld)*,[27] that the totality principle was not applicable was explicable by the fact that there was no "overlap" of the subject offending with the other offending for which that offender had been sentenced. The appellant distinguished that situation from the present case, in which the appellant was sentenced to imprisonment for similar offences of dishonesty in 2009 (in New South Wales) and 2010 (in Queensland), which offending overlapped the subject offending and resulted in total of head sentences of 36 months and of non-parole periods of 15 months.

[54] The decision in *Beattie* does not assist the appellant. In that case, Philip McMurdo J (now McMurdo JA) observed:

> "[18] In *Mill v The Queen* [(1988) 166 CLR 59], the High Court approved of this description of the totality principle in Thomas, *Principles of Sentencing*, 2nd ed (1979) at pp 56-57:
>
> > 'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['']; 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'.'
>
> [19] The ambit of the totality principle has been extended in at least two ways. The first, which is illustrated by *Mill v The Queen*,

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27 [2014] QCA 206.

> is where an offender commits a number of offences within a short space of time but in more than one State. Upon being sentenced to a term of imprisonment in one State, the offender cannot be sentenced in the other State until he is released from custody under the first sentence. In such a case, it is necessary for the second sentencing judge to consider in aggregate the sentences and if necessary to moderate the sentence then to be imposed. The principle has also been extended in the sentencing of an offender who is then serving an existing sentence. In such a case, 'the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable'.
>
> [20] The present case presented none of the circumstances in which the totality principle, in its original or extended senses, has been applied. The four offences which were committed in 1996 occurred years prior to the offending for which the respondent was sentenced in 2007. Each of the seven offences here was committed years prior to the offending for which he was sentenced in 2010. And the respondent was not in custody when the subject sentences were imposed."[28]

[55] Similarly, the circumstances of this case do not attract the totality principle in any of the three senses discussed in *Beattie*. There were some, but comparatively little, overlap in the offending; less than six months of the New South Wales offending for which the appellant was sentenced on 29 May 2009 overlapped the period exceeding seven years of the subject offending and less than four months of the offending for which the appellant was sentenced on 2 June 2010 overlapped the period of the subject offending; the appellant was sentenced for that other offending some six or seven years before he was sentenced for the subject offending; and the appellant had completed the custodial components of his sentences for that other offending at least five or six years before he was sentenced for the subject offence.

[56] Because the period of the subject offence extended for many years beyond the period of the earlier offending and the appellant fell to be sentenced for the subject offence many years after he was sentenced for that earlier offending, it would be artificial and complex to adopt the approach advocated by the appellant of requiring the sentencing judge to have asked what would be likely to have been the head sentence imposed if the appellant had been sentenced for all three matters if the appellant had been sentenced for all of them at one time. Upon that hypothetical approach, however, I would accept the submission for the respondent that, in circumstances in which the appellant's criminal history reveals that he committed distinctly different types of fraudulent offending during only partly overlapping periods of time, it could not be assumed that the sentence for the subject offence would have attracted any significant moderation on account of the sentences for the other offending.

Ground 2: Inadequate reflection of mitigating circumstances

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28 I have omitted footnotes.

[57] Ground 2 of the appeal against sentence contends that the sentencing judge failed "adequately" to reflect the appellant's age and health conditions and the health conditions of his disabled son in the sentence, both in relation to "general mitigation" and how his time in custody was more onerous when compared to an ordinary prisoner. The appellant did not seek to support this ground by argument, either in the appellant's outline of submissions or at the hearing. The ground assumes that the sentencing judge did take those matters into account. The weight to be given to them was a matter for the sentencing judge to determine. No basis appears for a contention that inadequate weight was given to those matters.

Ground 3: Co-operation with the authorities

[58] The appellant did not seek to support ground 3 by argument, either in the appellant's written outline or at the hearing. There was no suggestion at the sentence hearing that the appellant had afforded any co-operation with the authorities in relation to the subject sentence. It was submitted that the sentencing judge should take into account assistance the appellant was said to have provided to law enforcement agencies in relation to a previous sentence. The sentencing judge declined to do so both because her Honour thought it would be wrong as a matter of principle and because there was no evidence before the sentencing judge about the suggested assistance or what risks the appellant may or may not face as a result of it. There is no basis for thinking that her Honour erred in so deciding.

Ground 4: Manifest excess

[59] The appellant argued that the sentence was manifestly excessive. The appellant's main argument was that in *Hassarati* and *Lovel*, in which the same head sentence was imposed as here, neither of the offenders had the specific factor of probable deportation following imprisonment. The appellant referred to the adoption in *R v UE*[29] of the sentencing principle endorsed in *Guden v The Queen*,[30] that the prospect of an offender's deportation is "a factor which may bear on the impact which a sentence of imprisonment will have on the offender, both during the currency of the incarceration and upon his/her release". The appellant argued that the sentencing judge gave insufficient weight to that "serious 'punishing consequence'"[31] in this case.

[60] As the sentencing judge observed, there was no express evidence that deportation in fact would be a hardship for the appellant, but the sentencing judge inferred as much from the evidence about the long time the appellant had lived in Australia, that he had a wife and family, and that his family included a disabled son for whom the appellant cared. There is no basis for thinking that the sentencing judge attributed so little weight to that factor as to suggest any error of principle.

[61] The appellant did not argue, and I would not accept, that the sentencing judge erred in considering that, in terms of the objective character of the appellant's offence, *Hassarati* and *Lovel* were comparable sentencing decisions. In both of those cases the offender pleaded guilty. In *Hassarati* the offender had no previous convictions and in *Lovel* the offender's history revealed a single stealing offence, in respect of which no conviction had been recorded. Furthermore, the offender in *Lovel* relied upon a mitigating circumstance that he had substantially succeeded in breaking his

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29 [2016] QCA 58 at [13].
30 (2010) 28 VR 288 at [25], citing *Khem v The Queen* [2008] VSCA 136 at [31].
31 (2010) 28 VR 288 at [27].

gambling habit, which he had sought to finance by his offending, and in *Lovel* the offender had incurred a long time financial burden in taking out a loan which enabled her to make full reparation before sentence. Even giving the fullest credit to the different mitigating circumstances upon which the appellant relied, the sentence in this case derives substantial support from the sentence in *Lovel* of three and a half years imprisonment with release on recognizance after nine months on a three year good behaviour bond and the sentence in *Hassarati* of three and a half years imprisonment with a non-parole period of 15 months (in respect of each of five counts).

[62] Courts have repeatedly emphasised the importance of general deterrence in sentences for determined and sophisticated frauds against the Commonwealth of this character. The sentencing judge appropriately took into account each of the mitigating factors upon which the appellant now relies and there is no ground for a conclusion that the sentence imposed is excessive.

Proposed orders

[63] I would dismiss the appeal and refuse the application for leave to appeal against sentence.

[64] **PHILIPPIDES JA:** I agree with Fraser JA that the appeal should be dismissed. As the appellant accepted, the Crown case, in simple terms, was that the appellant was a person named Rick Michaels who created a false identity in the name of Michael Asaad, which was then used to deceptively obtain Centrelink payments.

[65] The two grounds of appeals pursued were:

(a) the inadmissibility of a copy of a Canadian passport issued in 1985 in the name of Rick Michaels; and

(b) the absence of directions regarding a process of identification by means of a comparison between the photograph in the Canadian passport issued in 1985 and the photograph in an Australian passport issued in 1998 in the name of Michael Asaad.

[66] I agree with what Fraser JA has written as to why the first ground of appeal must fail.

[67] As to the second ground of appeal, as stated, one of the issues at trial was whether the appellant was the Canadian citizen Rick Michaels. There was no dispute that the appellant was the person in the photograph in the 1998 Australian passport issued in the name Asaad. In contending that Rick Michaels, a Canadian citizen, was the true identity of the appellant, the Crown asked the jury to compare the photograph in the Asaad Australian passport with the photograph in the earlier Michaels Canadian passport and to draw the inference that the photographs depicted the same person, being Rick Michaels.

[68] At the start of the trial, the appellant's counsel referred to the danger in comparing the photograph in the Michaels passport with the photograph on the Asaad passport. After addresses by counsel and before the summing up, the following exchange occurred between the trial judge and the appellant's counsel:[32]

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32 AB at 150 (emphasis added).

> "COUNSEL: Your Honour raised with us yesterday afternoon the issue of whether we had any contributions, effectively, to what should come into the summing up. Whilst I don't submit that the usual – it's not a case where the usual identification warning is appropriate but that your Honour would, in summing up, take steps to warn the jury about the process of identification that's being asked of them by the Crown with respect to the two photographs, the quality of the photographs and the surrounding circumstances. That it's a somewhat dangerous process that they're being asked to engage in by the Crown.
>
> HER HONOUR: Well, I would certainly propose to make reference to your submission about that. As to whether it's a dangerous process, I mean, isn't this just something that juries are asked to do, to look at evidence and consider what they might make of it? The Crown has said they might make something, you've said it's – I looked at that identification direction in the bench book and I just didn't think in any way, shape or form it was applicable.
>
> COUNSEL: No.
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> HER HONOUR: And I'm mentioning that – I know you've already acknowledged that.
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> COUNSEL: I accept that.
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> HER HONOUR: But that led me to think it wasn't really necessary or appropriate to - for me to be saying "it would be dangerous for you to undertake that task". I think it's just a task they can undertake as the jury.
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> COUNSEL: They can undertake it but it needs, in my submission, to be highlighted that it's – they're being asked to look at photocopies, poor quality copies, not even originals and done in the absence of any other investigations, Although, your Honour might be satisfied with my submissions about that if your Honour [indistinct]
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> HER HONOUR: Yes. I'm not going – I will make express reference to your submissions but I'm not going to say anything coming from – independently from me about that, if you like.
>
> COUNSEL: Yes, your Honour."

[69] In accordance with her indication to counsel, the trial judge in her summing up reminded the jury of arguments made by the appellant's counsel as to the weaknesses in the Crown contention in the following terms:[33]

> "Regarding the two photographs on the passports, the Canadian passport and the Australian passport, [counsel] reminded you of the standard which is applicable, beyond reasonable doubt, and said you should exercise great caution in undertaking the comparison invited by the Crown. She made the point that what you have been shown as part of the exhibits are only photocopies, you might think poor

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33 AB at 164.

> photocopies, and you don't have before you the originals. She submitted that, in the context of the various Commonwealth government departments with involvement in this matter, the best the Crown can come up with is to ask you to look at the photocopies and infer that they show the same person."

[70] The appellant's counsel did not seek any redirection. Nevertheless, it is now submitted before this Court and, notwithstanding the concession made at the trial, that an identification direction fashioned along the lines set out in the *Criminal Directions Benchbook* was required. I agree for the reasons given by Fraser JA that no *Domican* direction[34] was required. However, I join with Jackson J in disagreeing with Fraser JA's conclusion at [36] that any direction was required to be given as to the weakness in the use of the photographs for the purposes of comparison and identification of the appellant as Rick Michaels.

[71] The trial judge's duty to instruct the jury as to the law applicable to the case requires an identification of the real issues in the case.[35] I endorse the remarks of Jackson J regarding the need to consider carefully whether a direction contended for is necessary to avoid a miscarriage of justice. In addition to the passage referred to by Jackson J from Brennan J's judgment in *Carr v The Queen*,[36] the following passage of that judgment is pertinent:[37]

> "Trial judges give warnings to juries in many situations to guard against perceptible risks of justice miscarrying. The warnings may relate to the jury's contact with the public, the need to disregard information obtained outside the courtroom, the dismissal of prejudice or a variety of other matters occurring in the course of a trial. A warning may be needed to ensure that the jury attributes the appropriate significance and weight to the evidence. That is a central aspect of the jury's function. In the majority of cases the assessment of the evidence can be left to the jury's experience unaided by judicial warnings but there are some occasions when a warning is needed."

[72] The passages quoted above and by Jackson J were considered in this Court by Keane JA in *R v TN*,[38] who made the following three points:

> "The first is that in most cases a warning is not a necessary aid to the jury's performance of its function of assessing the evidence. The second point is that the basis for the giving of a warning is the 'special knowledge, experience or awareness' of the judge (actual or inherited). The third point, a point also made in the reasons of Brennan J in *Bromley v The Queen*[39] is that the giving of the warning is a matter of necessity to avoid a miscarriage of justice. If the warning is not necessary to avoid a miscarriage of justice it need not be given."

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34 See *Domican v The Queen* (1992) 173 CLR 555.

35 See *Fingleton v The Queen* (2005) 227 CLR 166 at 196-177 [77]-[80]; *R v Baker* [2014] QCA 5 at [9], [86]-[89].

36 (1988) 165 CLR 314.

37 (1988) 165 CLR 314 at 324-325.

38 (2005) 153 A Crim R 129 at 144 [69] with whom the other members of the Court agreed.

39 (1986) 161 CLR 316 at 324-325.

[73] This was not a case such as described in *R v Alexander*,[40] to which the appellant's counsel referred. The comparison the jury were required to undertake here was between two photographs taken in similar circumstances; that is, for passport purposes showing the head and shoulders of the person depicted from the same frontal perspective. The quality of the photographs and the time difference as to when they were taken were matters to be considered by the jury as part of the process of drawing inferences about which her Honour gave the usual direction. Beyond that direction, there was no aspect of the inference that the Crown sought the jury to draw by comparing the two passport photographs that required specific direction.

[74] As Brennan J also stated in *Carr*:[41]

> "A failure to warn when a warning is necessary is a blemish in the conduct of the trial. But it is difficult for an appellant to establish that it was necessary for the trial judge to give a warning (unless the evidence is in a category which always evokes a warning) for the conduct and atmosphere of the trial are relevant to the need for a warning and those circumstances can seldom be appreciated adequately by an appellate court. In the ordinary case, a judge will sufficiently perform his task by reminding the jury of the competing submissions by counsel for the prosecution and counsel for the defence as to the proper significance and weight to be attributed to the evidence in question."

[75] This was a case where the trial judge was entirely correct in the approach taken of mentioning the weakness in the use of the photographs, which would have been obvious to any lay person, as part of her summing up of the defence case, rather than making it the subject of a specific direction to the jury. This case had no analogy to the concerns that arise in relation to visual identification or which may arise where a comparison is sought to be made between visual and photographic identification. There was no perceptible risk that, without a direction as to those obvious weaknesses which had the authority of judges' office behind it, the jury might attribute a degree of significance or weight to the evidence which they might otherwise not have done.

[76] The trial judge's approach was unimpeachable. The argument raised in ground 2 has no merit.

[77] **JACKSON J:** I agree in the orders proposed by the other members of the court and with one exception I agree with the reasons of Fraser JA.

[78] The exception is that I do not agree with His Honour's view that the trial judge ought to have directed the jury as to the risk of a wrong identification of the appellant as Rick Michaels being made upon a comparison of the passport photographs, and I do not agree that the prosecutor's submission that the photographs taken alone might justify the jury in concluding that the appellant was Rick Michaels made such a direction necessary, even if otherwise it was not.

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40 (1981) 145 CLR 395.

41 (1988) 165 CLR 314 at 326-327.

[79] Fraser JA reasons that an analogous weakness in witness identification is avoided by eye witnesses being asked to identify a person from photographs of a number of people whose appearance might all match a general description. I am not persuaded that the analogy is a good one. The problem of identifying a person seen fleetingly by a witness from a photograph shown to the witness is not the problem of identification in this case. The problem in this case was identifying the man shown on the Canadian passport bearing the name Rick Michaels as the appellant.

[80] The jury would have been able to compare the appellant's appearance in the dock with the photograph of Rick Michaels on the Canadian passport. But that photograph was taken before the date of issue of the passport on 25 November 1985. The trial took place starting 2 February 2016, over 30 years later.

[81] The photograph of the appellant on his Australian passport was taken before 27 August 1998 when the Australian passport issued. That was approximately 12 years after the time when the Canadian passport photograph was taken.

[82] The reason for comparison of the photographs was to compare the appellant's appearance in his 1998 passport photograph with Rick Michael's appearance in his 1985 passport photograph, so as to identify them as the same man. There was no question that the appellant was the man depicted in his 1998 passport photograph.

[83] Courts and criminal juries deal with cognate problems every day. It is now a commonplace for CCTV video recordings and photographic "still" images taken from such recordings to be tendered to prove that a defendant is the person who committed an offence. The comparison is one to be made by the jury. The recorded image may be of low quality, or taken from a distance, or in poor light, or from a bad angle, or be obscured or unclear for a variety of reasons. Generally speaking, courts have rejected attempts to call a witness to give opinion evidence as to the identity of the person depicted in the image with the defendant as irrelevant[42] or as a matter that is not within a specialist expertise.[43]

[84] What were the reasons that required the trial judge in the present case to give a particular warning to the jury as to the risk of comparing one passport photograph with another passport photograph so as to assist in identifying the appellant as the person in the first passport photograph?

[85] Trial judges required to prepare a summing up face a forest of required warnings and directions which only ever seems to thicken as a result of the rigorous application by appellate courts of the "requirement of the common law … to warn the jury whenever a warning is reasonably necessary in order to avoid a perceptible risk of a miscarriage of justice … [that] arises when there is a feature of the evidence which may adversely affect its reliability and which may not be evident to a lay jury."[44]

[86] The risk of photo-identification of a defendant by a jury could require a warning of this kind. In 1981 Stephen J said:

> "When identification is attempted with the aid of photographs, there are introduced peculiar difficulties, due to the various ways in which

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42 *Smith v The Queen* (2001) 206 CLR 650.
43 *Honeysett v The Queen* (2014) 253 CLR 122.
44 *R v GW* (2016) 328 ALR 583, 597 [50].

> photographic representations differ from nature: their two dimensional and static quality, the fact that they are often in black and white and the clear and well lit picture of the subject which they usually provide."[45]

[87] But the comparison there spoken of is between the image of a person depicted in a photograph and having seen the person in real life. Importantly, Stephen J was not referring to any difficulty that may arise when comparing one passport photograph with another passport photograph, in circumstances where it is not in dispute that one of the photographs depicts the person of interest.

[88] Not only that, it would be a mistake to think that community awareness of any such difficulty is the same now as it was at the time of those remarks. In 1981, Stephen J could not have contemplated a world where nearly all personal smartphones have built in cameras and a face to face video-conferencing is a built in capability of nearly all personal smartphones and computers, let alone the facial recognition software built into the programs that organise the photographic images on the same smartphones and computers, so as to enable collections of groups of photos of particular persons. These things are not a matter of expertise, but as common in the community as the number of personal smartphones and computers.

[89] The purpose of a required warning is to ensure that a defendant receives a fair trial. A fair trial[46] is not necessarily a perfect trial. The busy environment of a trial and the brief period available to a trial judge to collect his or her notes and give an often lengthy oral summing up on all the required matters reinforce that it is important for appellate courts to show restraint before finding error in failing to direct a jury as to a risk that is largely a matter of common sense.

[90] The guiding statement of principle as to when a warning is required, as I take it, appears from a statement of Brennan J, who had extensive experience of appearing in and a deep understanding of criminal trials:

> "A warning is needed when there is a factor legitimately capable of affecting the assessment of evidence of which the judge has special knowledge, experience or awareness and there is a perceptible risk that, unless a warning about that factor is given, the jury will attribute to an important piece of evidence a significance or weight which they might not attribute to it if the warning were given."[47]

[91] And in this court, having referred to that passage, Keane JA said:

> "…the question which must be addressed is whether there was some feature of the evidence which gave rise to a perceptible risk of miscarriage of justice if the assessment of the evidence was left to the jury's experience unaided by judicial warnings."[48]

[92] In this instance, I see no factor of which a judge has special knowledge, experience or awareness. In my view, the assessment was rightly left to the jury's experience unaided by judicial warnings.

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45 *Alexander v The Queen* (1981) 145 CLR 395, 409.
46 *R v Glennon* (1992) 173 CLR 592.
47 *Carr v The Queen* (1988) 165 CLR 314, 325.
48 *R v Hayes* [2008] QCA 371, [89].