

AUSTRALIA / JUDGMENT

Yazdani v R [2016] NSWCCA 194

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Court of Criminal Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Yazdani v R [2016] NSWCCA 194

Hearing dates: 9 May 2016; 10 May 2016

Decision date: 02 September 2016

Before: Simpson JA , McCallum J and Davies J at [1]

Decision: Appeal dismissed

Catchwords: CRIMINAL LAW – supply drugs – multiple charges - large commercial quantities – commercial quantities – knowingly participate in criminal group – appeal against conviction – improperly obtained evidence of finding and seizing drugs – whether evidence should have been excluded – whether entry onto property and inspection of bag without search warrant was a deliberate circumvention of Law Enforcement (Powers and Responsibilities) Act 2002 – whether officers of Australian Crime Commission had reasonable grounds to inspect bag – whether misrepresentation to magistrate for search warrant

CRIMINAL LAW – disclosure of evidence by Crown – whether disclosure of covert listening device – whether miscarriage of justice

EVIDENCE – fresh evidence – expert evidence obtained subsequent to trial – evidence not obtained prior to trial for financial reasons – lack of satisfactory explanation of financial issues – evidence available prior to trial - whether fresh evidence as a result of impecuniosity – whether further evidence would be likely to have caused jury to have a reasonable doubt about guilt of the accused – no reasonable doubt shown on the whole of the evidence

Legislation Cited: Australian Crime Commission Act 2002 (Cth), s 25A

Crimes Act 1900 (NSW), s 93T

Crimes (Sentencing Procedure) Act 1999 (NSW), s 53A

Criminal Appeal Act 1912 (NSW), s 12

Evidence Act 1995 (NSW), s 138

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 3, 21

Surveillance Devices Act 2004 (Cth), s 16

Cases Cited: Grey v The Queen [2001] HCA 65; 184 ALR 593

House v The King [1936] HCA 40; 55 CLR 499

Khoury v R [2011] NSWCCA 118; (2011) 209 A Crim R 509

Lawless v The Queen [1979] HCA 49 (1979) 142 CLR 659

R v Abou-Chabake [2004] NSWCCA 356; (2004) 149 A Crim R 417

R v Rondo [2001] NSWCCA 540; (2001) 126 A Crim R 562

R v Spiteri [2004] NSWCCA 321; (2004) 61 NSWLR 369

Ratten v The Queen [1974] HCA 35; (1974) 131 CLR 510

Category: Principal judgment

Parties: Sahba Yazdani (Appellant)

Regina (Respondent)

Representation: Counsel:

G Brady SC (Appellant)

P Ingram SC (Respondent)

S Maharaj QC (Australian Crime Commission)

Solicitors:

Nyman Gibson Miralis (Appellant)

Office of the Director of Public Prosecutions (Respondent)

Australian Crime Commission Legal Services (Australian Crime Commission)

File Number(s): 2011/50593

Decision under appeal Court or tribunal: District Court

Date of Decision: 15 May 2015

Before: Woods DCJ

File Number(s): 2011/50593

Judgment OF THE COURT

1. On 13 October 2014 the appellant was arraigned in the District Court on an indictment that contained 16 counts. The first charge was that he knowingly participated in a criminal group, knowing that his participation contributed to the occurrence of criminal activity, namely drug smuggling. This count was brought under s 93T(1) of the Crimes Act 1900 (NSW). Eleven counts were of supplying prohibited drugs (heroin, MDMA and methylamphetamine). Eight of these offences were alleged to have involved the large commercial quantity, two the commercial quantity, and one a smaller quantity. Three counts were of dealing with the proceeds of crime. One count was of possession of apparatus used in drug manufacture.
2. The appellant entered pleas of not guilty to all counts, and a trial proceeded over the following two months. On 19 December 2014 the trial judge, Woods DCJ, directed the jury to return verdicts of not guilty on the count of possession of drug manufacturing apparatus, and on one count of dealing in the proceeds of crime. On 22 December 2014 the jury returned verdicts of guilty on all remaining counts with the exception of one count of supply not less than the commercial quantity of methylamphetamine; on this count, the jury found the appellant guilty of the statutory lesser alternative of supplying not less than the indictable quantity.
3. On 15 May 2015, pursuant to s 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) ("the Sentencing Procedure Act"), Woods DCJ imposed an aggregate sentence of imprisonment for 28 years, with a non-parole period of 21 years. In accordance with sub-s (2) (b), he specified the sentences he would have imposed in respect of the various individual counts.
4. The appellant appeals against the conviction. He does not seek leave to appeal against the sentence.

The Crown case

1. Although the trial was a lengthy one, and the evidence very detailed, for present purposes it is possible to outline the Crown case with relative brevity. Aspects of the evidence will, so far as necessary, be amplified when the individual grounds of appeal are considered.
2. The Crown case was that the appellant was a principal member of an extensive drug syndicate that distributed drugs from Sydney to Perth. For that purpose, he utilised a number of properties, mostly in the eastern suburbs of Sydney, specifically an apartment in Elizabeth Bay (where he lived), another in Darlinghurst, and another in Bondi. The syndicate employed a number of people for the purposes of distribution, including one who gave evidence anonymously, and was known as "A Witness". "A Witness" was the principal witness in the Crown case. He gave extensive evidence of his dealings with the appellant, of conversations with him, and of packaging and transporting the drugs. Other witnesses gave evidence relevant to the specific counts on the indictment.

3. The evidence disclosed that the appellant and other members of the syndicate had been under surveillance, under a joint operation of the NSW Police and the Australian Crime Commission ("the ACC"). Surveillance included camera surveillance within the Elizabeth Bay and Bondi apartments as well as of car parks of the apartment blocks in which the appellant and other syndicate members resided, and which were used for the purposes of the drug packaging and distribution.
4. The appellant and "A Witness" were arrested on 15 February 2011. "A Witness" was charged with a number of offences, to which he entered pleas of guilty. He agreed to assist prosecution authorities and was, accordingly, given a significantly reduced sentence.

The grounds of appeal

1. Four grounds of appeal were pleaded. They were pleaded as follows:

"Ground 1

The Trial Judge erred in failing to exclude evidence of the finding and seizing of 1.65 kilograms of 3,4 methylenedioxymethamphetamine (Count 6) on 22 December 2011, and in failing to exclude the video, Exhibit AV.

Ground 2

A miscarriage of justice occurred as a result of the absence of fresh evidence from the trial relevant to Exhibit BZ (Surveillance video of the Bondi Apartment).

Ground 3

There was a miscarriage of justice as a result of:

- a. The failure of the Crown to disclose that Covert Listening Devices had been installed in the Elizabeth Bay unit;
- b. The misrepresentation that Listening Device Product produced under subpoena was from the 'apartment door' surveillance device; and
- c. The positive misrepresentation by the Crown that there were no Listening Devices installed in the Elizabeth Bay unit.

Ground 4

A miscarriage of justice was occasioned as a result of the failure of the Australian Crime Commission to produce, under subpoena, transcripts of any interview with, or examination of, A Witness."

Ground 1 – improperly obtained evidence

1. Ground 1 challenges the admission of evidence of an incident that occurred on the morning of 22 December 2010, in the car park of the Elizabeth Bay apartment block in which the appellant was then living.
2. The appellant's occupation of an apartment in the building entitled him to the use of two car spaces in an underground car park, in which he parked a black Audi sedan and a silver Mercedes Benz. The car park had for some time been the subject of surveillance pursuant to a warrant issued under s 16 of the Surveillance Devices Act 2004 (Cth). Pursuant to that warrant, a number of cameras were positioned in the car park and transmitted to the offices of the ACC; images of the car park, the two car spaces allocated to the appellant's apartment, and activity in the area. The transmissions were, at times, monitored in real time, and were, in any event, recorded.
3. NSW Police had an agreement with the manager of the apartments to obtain access to the car park, and were supplied, for that purpose, with electronic access devices.
4. The video transmissions for the early hours of 22 December 2011 depicted the appellant, over a period, and on occasions in company with others, handling a black suitcase, a black backpack, and a shoulder bag. He left the suitcase and the backpack, together with a baby capsule, in a storage box in front of the Audi. The video recording of this activity was viewed by Mr Mal Nimmo, an investigator of the ACC, from about 6.00am on that day.
5. At 7.45am two ACC surveillance officers, known in the trial as ACCS003 and ACCS007, entered the car park in order to commence surveillance duties. It is a fair inference, although not clearly stated in the evidence, that they did this at the direction of Mr Nimmo or other officers overseeing the investigation.
6. On entry, ACCS003 and ACCS007 observed the items in front of the Audi. ACCS003 left the car park and spoke by telephone to Detective Sergeant Anthony Hyndes of the ACC. He then, with ACCS007 and ACCS003, returned to the car park. ACCS003 opened both the backpack and the black suitcase. In the backpack was a soft package wrapped in clear plastic, which he removed. (This, in turn, contained three resealable bags, in which were a number of pills and some powder, which later proved to be 1.71 kilograms MDMA, the subject of Count 6.) In the suitcase were a number of glassware items, including two reaction flasks. (These were the subject of Count 7, possession of drug manufacturing apparatus, of which the appellant was acquitted by direction.) All this was recorded on a video tape that was shown to the jury and given the exhibit number AV.
7. As a result of what had been seen in the bags by ACCS003, Detective Sergeant Hyndes prepared an application for a warrant to search the relevant section of the car park, and to seize items falling within the application. As was required, he swore or affirmed an affidavit in support of the application. The application and the affidavit were in evidence before the trial judge, but were not provided to this Court. It was acknowledged, on behalf of the Crown

in this Court, that the affidavit did not make any mention of ACCS003's preliminary investigation of the contents of the backpack and the suitcase.

8. A magistrate issued the warrant at 9.50am, and it was executed at about 10.20am at Elizabeth Bay. The backpack and the suitcase were seized, taken to ACC offices, and searched. There the pills and powder, and the glassware, were identified.
9. At the commencement of the trial objection was taken to admission of the evidence of the search and the seizure of the bags and their contents. Objection was also taken to the admission of Exhibit AV, the video tape on which the events in the car park were recorded. Both objections were based on s 138 of the Evidence Act 1995 (NSW), which provides that evidence obtained improperly or in contravention of an Australian law, or as a result of such impropriety or contravention, is not to be admitted:

"...unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained."

1. Sub-section (3) identifies (non-exhaustively) the matters a court may take into account in determining whether to admit evidence that comes within the category of evidence that has been obtained improperly or illegally, or as a result of impropriety or illegality. Those matters are:

"(a) the probative value of the evidence, and

(b) the importance of the evidence in the proceeding, and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and

(d) the gravity of the impropriety or contravention, and

(e) whether the impropriety or contravention was deliberate or reckless, and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law." (*italics in original*)

1. A voir dire was conducted, in which Detective Sergeant Hyndes, ACCS003, Mr Nimmo and ACCS007, gave oral evidence, based on written statements.
2. The argument advanced on behalf of the appellant at trial had a number of limbs. It was contended:

1. (i) that the entry of ACCS003 and ACCS007 into the car park was unlawful, as a "deliberate circumvention" of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) ("the LEPR Act");
2. (ii) that the inspection of the bags prior to the grant of the search warrant was an unlawful trespass to property;
3. (iii) that ACCS003 did not have reasonable grounds to inspect the bags;
4. (iv) that, in applying for the search warrant, Detective Sergeant Hydnes had failed to disclose a material fact (that ACCS003 had already opened the bags and investigated their contents), that this amounted to a misrepresentation, and constituted an impropriety as a direct result of which the evidence was obtained.

Accordingly, the evidence of the contents of the backpack and suitcase fell within s 138, and was inadmissible unless it was held that the desirability of admitting that evidence outweighed the undesirability of admitting evidence that had been obtained in the circumstances.

1. The trial judge delivered an ex tempore judgment. He gave a brief resume of the factual background. He characterised the circumstances in which ACCS003 had investigated the contents of the bags as:

"... they ... determined that they would have one of their number [ACCS003] have a quick look inside the bag before they did anything further."

1. The trial judge did not expressly rule on whether any illegality had occurred; having initially said that:

"Technically [the opening of the bags] was a trespass to property."

He revised that and proceeded on a stated assumption (while expressly declaring a lack of confidence in its correctness) that there had been a breach of the civil law. Nor was he confident that police would not have been entitled to search and seize the bag or bags without warrant.

1. He took a similar approach to the asserted impropriety in what was said to be a material non-disclosure in the affidavit presented to the magistrate in the application for the search warrant. He said that:

"the failure to tell the Magistrate that there had been a quick look inside the bag was a failure and it might be regarded as an impropriety",

and for the purpose of the exercise required by s 138, he proceeded on the assumption that it was an impropriety. Contrary to the submission on behalf of the appellant, however, he did not expressly conclude or find that it was. He held that (if it were an impropriety) it was one that was not grave, and indeed was minor, and more likely to have been the product of carelessness rather than deliberate decision or recklessness. He considered it likely that, even if the brief inspection had been disclosed to the magistrate, the search warrant would have been issued.

1. He briefly considered the various matters set out in s 138(3) (so far as they were applicable). Notably, he considered the probative value of the evidence obtained to be "plainly substantial". He concluded:

"I must have regard to the possibility of unfair prejudice against the accused and I do. In looking at these matters one does not ask the question of how badly the accused will be affected by the admission of such evidence, but rather whether or not he will be unfairly prejudiced."

He then concluded that the evidence would be "forensically unhelpful" to the appellant but not "unfairly prejudicial".

The appeal

1. On appeal, it was argued that the trial judge erred in six specific ways.
2. The first asserted error on which reliance was placed was said to be a failure on the part of the trial judge to consider whether ACCS003 had a reasonable suspicion that would justify entry to the car park and the search of the bag. Heavy reliance was placed upon the decision of this Court in *R v Rondo* [2001] NSWCCA 540; (2001) 126 A Crim R 562.
3. The argument advanced in this respect proceeded upon a fundamental misconception. In *Rondo*, the Court had under consideration an event in which two police officers had purportedly exercised their powers under s 357E (now repealed) of the Crimes Act, which authorised police officers to stop, search and detain any person a police officer reasonably suspected of having or conveying anything stolen or otherwise unlawfully obtained, and any vehicle in which a police officer reasonably suspected there was anything stolen or otherwise unlawfully obtained or used or intended to be used in the commission of an indictable offence. Two police officers had in fact stopped Mr Rondo when he was driving a motor vehicle and had then searched the vehicle, and then his home. One question that arose was whether the police in fact had a reasonable suspicion. The Court held that the police officer did not have the requisite reasonable suspicion. He was therefore not authorised by s 357E to stop and search the vehicle, and doing so was unlawful.
4. Section 357E has been repealed, and replaced by s 21 of the LEPR Act which provides:

"21 Power to search persons and seize and detain things without warrant

- (1) A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists:
 - (a) the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,
 - (b) the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence,

- (c) the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence,
 - (d) the person has in his or her possession or under his or her control, in contravention of the Drug Misuse and Trafficking Act 1985, a prohibited plant or a prohibited drug.
- (2) A police officer may seize and detain:
- (a) all or part of a thing that the police officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, and
 - (b) all or part of a thing that the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, and
 - (c) any dangerous article, and
 - (d) any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985,

found as a result of a search under this section."

1. Both parties focussed upon s 21. The Crown attempted to defend the admission of the evidence by reference to ss 21(1)(b) and (d). The appellant's position appeared to be that, because ACCS003 was not shown to have had a reasonable suspicion of either kind specified in ss 21(2)(a) or (b), the inspection was a contravention of s 21, and therefore unlawful.
2. Two fundamental flaws in the argument can immediately be identified. The first is that s 21(1) authorises search and detention of "a person" and anything in possession or under the control of that person, if the reasonable suspicion exists. Sub-section (2) authorises the seizure and detention of, relevantly, prohibited drugs found as a result of search under s 21.
3. There was no search or detention of any person in what ACCS003 did with respect to the bags. There can therefore arise no question of a reasonable suspicion within ss 21(2)(a) or (b) in the mind of ACCS003. Whether or not ACCS003 had such a reasonable suspicion is irrelevant.
4. Even more fundamentally, s 21 provides an authorisation to police officers. By s 3, police officers are officers of the NSW Police Force. ACCS003 was not such an officer.
5. There are good reasons why powers of police officers might be circumscribed in a way that rights available to other individuals are not. A police officer who stops, searches or detains a person, or the person's property, is seen to be exercising the particular powers entrusted to law enforcement officers. In Rondo, the police officer was purporting to exercise the powers expressly conferred by s 357E of the Crimes Act. Those powers were conferred for use when the precondition (reasonable suspicion) exists. The powers go much further than the surreptitious cursory inspection (called a "sneak and peek" by trial counsel for the appellant) of the bags by ACCS003, and involved interference with the liberty and free movement of Mr

Rondo. That the actions of the police officers in Rondo were held to be "an unlawful interference with [Mr Rondo's] freedom of movement and harassment", says nothing of the lawfulness or otherwise of what ACCS003 did in the car park.

6. However, it should be recorded that emphasis was placed upon a passage of evidence given by ACCS003 in cross-examination on the voir dire. When asked why he had opened the bags, he said "to see what was in them"; when asked whether he had any belief about what might have been in them, he replied:

"No, not really, not at that stage, no."

1. It is true that ACCS003 gave that evidence. However, it cannot be seen in isolation from the whole of the evidence. This was part of an ongoing joint investigation. ACCS003 had earlier been involved in surveillance in the investigation. There is no doubt that he was aware of the nature of the investigation, and it is a reasonable inference that he was aware that he was detailed to attend the car park early on 22 December and that that was because of some development in the investigation. Even if it were necessary for the Crown to establish that ACCS003 had a reasonable suspicion that there was present in the bags a drug or some other unlawfully obtained item, the evidence established that he did.
2. Section 21 of the LEPR Act is entirely irrelevant.
3. The question remains, however, whether it was unlawful for ACCS003 to open either of the bags for the purpose of identifying their contents. Given the misconception about s 21, no argument was addressed to this question. However, Woods DCJ was prepared, without reaching a final conclusion, to proceed on the assumption that the opening of the bag and the inspection of their contents, constituted a civil trespass to property. The reasonable suspicion as to the contents of the bags is a consideration relevant to the balancing process required by s 138 of the Evidence Act.
4. The second asserted error concerned the entry of ACCS003 and ACCS007 into the car park. The error contended for was a failure by the trial judge to consider whether the ACC officers trespassed when they entered the car park. That entry, it was contended, constituted a trespass, and that was so notwithstanding the evidence that the manager of the building had expressly authorised the entry. Senior counsel who appeared for the appellant on appeal acknowledged that, in the light of that evidence, the surveillance officers were entitled to enter the car park. However, his argument was that they were not entitled or authorised to enter for the purpose of searching the appellant's bags.
5. It is a reasonable inference that the purpose of the entry of the two surveillance officers was to ascertain what they could about the content of the bags, before further steps were taken towards the issue of a search warrant. We would not, however, conclude that that purpose rendered the otherwise authorised entry to the car park unlawful or unauthorised. The complaint made on appeal is that the trial judge failed to consider whether the ACC officers trespassed by entering the car park for a purpose in excess of the authority that had been

given to them. It was submitted that failure to consider that question was an error of a "House v King" [House v The King [1936] HCA 40; 55 CLR 499] variety.

6. The first answer to this submission is that the asserted illegalities or improprieties were not, at trial, dissected as they have been on appeal. Although it was put to the trial judge that the licence given to the ACC officers did not extend to examination of property left in a private car parking space, that was run together with complaint about alleged trespass on the part of the car park that was specifically allocated to the appellant. The obligation of a trial judge confronted with evidentiary objections is to deal with such objections, and such arguments, as are put to him or her. Here, the argument was primarily directed to what was said to be the illegal search of the bags. No attempt was made (as is now made) to label the entry to the car park (as distinct from what was done in the car park) as illegal or improper. It was not an error for the trial judge not to address an argument that was not put to him.
7. In any event, the argument must fail. The entry into the car park (regardless of what was in the minds of the officers) was lawful and authorised.
8. The third asserted error is said to be failure to consider whether ACCS003 and ACCS007 committed a trespass by entering into the car space allocated to the appellant's exclusive use. This argument, too, has been, on appeal, dissected in a way it was not at trial. As mentioned above, the argument was directed to the examination of the bags. That the trial judge dealt with, finding it initially a technical trespass to property, but, immediately after, retreating from that position. No error is established in this respect.
9. The fourth asserted error is said to be failure properly to assess that the evidence in question arose as a consequence of an impropriety in the conduct of ACCS003 in looking into the bags. We do not accept that there was any such failure. The consideration of whether the examination of the bags was "technically a trespass", and the later consideration that the officers might have been entitled to act as they did without warrant, and the observation that, in order to regularise the position, they sought and obtained a warrant, makes it clear that the appropriate consideration was given to what the ACC officers did.
10. The fifth asserted error is failure to consider the combined effect of the improprieties, in undertaking the balancing act required by s 138. Again, reliance was placed upon the decision in Rondo, this time in a way that has relevance. In Rondo, the Chief Justice emphasised that it was "the cumulative effects of the defects in the investigative process" that led him to the conclusion that the appeal should be allowed.
11. The present argument, too, depended upon assertion of an accumulation of illegalities or improprieties – the asserted illegal entry into the car park, the asserted illegal entry to the appellant's car space, the asserted illegal search of the bags, the video taping of the illegal search of the bags, and what was said to be misleading (by omission) information provided to the magistrate in the application for the search warrant.

12. The argument is considerably weakened, however, when the conclusion we have reached about the asserted individual illegalities or improprieties is taken into account. It is artificial to break up what the ACC officers did into component parts. The entry into the car park, and the very brief inspection of the bags ought to be treated (as it was at trial) as a whole. As the trial judge found, such improprieties as there were (if any) were minor and inadvertent.
13. It is to be noted that it was not claimed that the trial judge failed properly to consider what was asserted to be an impropriety in the application for the search warrant. Clearly, his Honour did give full attention to that question.
14. The submissions culminated in the following:

"A proper assessment of the combined effect shows a deliberate course of conduct, culminating in misleading the magistrate about their actions and the reasons for the application for the search warrant."

1. Examination of the reasons given by the trial judge establish clearly that he was fully alive to all of the arguments advanced to him, and dealt with them. It is true that, in his final evaluation, he did not use the language of s 138. However, it is quite clear that he weighed the possible prejudice to the appellant by the admission of the evidence. Most significantly, he recognised, in a way that was not and could not be contested, that the probative value of the evidence obtained was very substantial. To the extent that any of the conduct of the surveillance officers was illegal – something he found it unnecessary to determine – or improper, he assessed the impropriety as minor.
2. There is no error in the approach of the primary judge in relation to the admission of the evidence. We reject this ground of the appeal.

Ground 2: Fresh evidence relevant to Bondi apartment

Background facts

1. Counts 11 to 16 were particularly connected to the Bondi apartment between 12 and 17 February 2011. By the time the acts constituting those counts were carried out "A Witness" and the appellant had moved from the Elizabeth Bay apartment to an apartment in Vaucluse.
2. On 12 February, a person who was described as busboy, Scott Miller, arrived from Perth. Busboys were members or associates of the syndicate who travelled between Sydney and Perth carrying money and drugs. He came to the Bondi apartment and delivered a couple of hundred thousand dollars in cash to the appellant.
3. The appellant then instructed "A Witness" to drive to Burwood and visit "Mikkey" to pick up a bag of methamphetamine. "A Witness" took the bag back to Bondi and took out a sample, which the appellant instructed him to try. At a different time between 12-13 February, "A Witness" returned to Mikkey's with a bag of cash from the Appellant.

4. That afternoon "A Witness" said that he and the appellant drove to "Cheech's" house in Five Dock to collect a further bag of methamphetamine. The appellant instructed "A Witness" to take the bag back to Bondi via taxi. The Appellant denied this.
5. On 13 February "A Witness" said that the appellant instructed him to visit "Billionaire" to collect a further bag of methamphetamine. The appellant denied this. After this, "A Witness" said that he and the appellant went to the Bondi safe house and mixed the load. During the evening "J" and "R" turned up at the Bondi apartment and delivered another bag of methamphetamine. In total "A Witness" said there was around 10 kilograms of methamphetamine. He also said that the appellant took a more active role in cutting and mixing the drugs while "A Witness" vacuum sealed the kilogram bags of cut methamphetamine. The appellant denied being at the Bondi flat during that day mixing drugs. He admitted being there that night but said he was not packaging prohibited drugs.
6. On 14 February at approximately 1:50pm "A Witness" went to Bunnings Warehouse in Rose Bay and purchased two safes and some bubble wrap.
7. That afternoon "A Witness" became ill and ultimately went to St Vincent's Hospital. He left the black Audi sedan with the two safes outside the front of the Darlinghurst Medical Centre. That night the appellant and his girlfriend Yasmin picked up the black Audi from outside the Darlinghurst Medical Centre.
8. On 14 February in the afternoon or early evening a surveillance camera was installed inside the Bondi apartment. It was in operation from about 10.00pm on 14 February until midday on 15 February. The surveillance device and the recording equipment was monitored by the ACC investigator, Mr Nimmo and another ACC officer, Martin Kiernan. They prepared and filled in a log which was MFI 123 at the trial. Page 4 of the log was Exhibit 96. The whole log was annexed to an affidavit of Mr Nimmo read at the hearing of the appeal.
9. Exhibit BZ was the surveillance video. It showed that at 12:30am on 15 February the appellant and Yasmin entering the apartment. The appellant was carrying a large bag. Whilst he was in the apartment there were various noises consistent with packaging including the sounds of taping, zipping of bags and closing of safes. The footage also depicted the appellant wearing gloves.
10. At 3:00am the appellant left the Bondi apartment.
11. At 4:54am on 15 February "Aloha" Blackberry sent a message to RP which said:

Brother I just getting to bed due to having to do Flip's work bro please don't repeat this but he was so shocking today he looked like a vegetable/retard please can you organise a courier to come to Bondi any time after 9 to grab load if not I will be up then anyway.

The Crown case was that Aloha was the appellant. "Flip" was a reference to "A Witness".

1. Mr Kiernan took over from Mr Nimmo at 5.00am. An entry on page 4 of the log at 0800 made by him reads:

Someone in apartment. Not yet seen. Sounded like bottles clinking together.

1. The next entry is at 11.00 am when the log notes, and the surveillance footage shows, the appellant returning to the apartment and then wheeling the orange or red suitcase out of the apartment. At 11:30am a courier arrived at the apartment. The courier saw a man come out of the building with two cases and helped the courier put them in the truck. The truck was followed and police pulled it over at The Rocks. They opened the zippers of both bags and in the red/orange bag found a small bundle of money amounting to \$7,270.00 (count 14).
2. Subsequently police arrived with bolt cutters to cut the locks on the suitcases. Inside the suitcases were two safes. What was found inside the safes was 9.80725 kilograms of methamphetamine (count 11).
3. On 15 February at 4.02pm police searched the Vaucluse apartment. They found a plastic bag with what appeared to be a white substance (count 12). This was later determined to be 7.1g of methamphetamine. The jury returned a not guilty verdict on this count. The police also found \$861,300 in cash (count 16). \$773,765 of that amount was located in a black suitcase in the bedroom of the appellant. The suitcase had on it a flight tag "YAZDANI QF128 08 Feb Sydney".
4. On the same day at 4.15pm the police searched the Bondi house. They found a black bag containing \$8,100 in cash on the dining room table (count 15). The jury were directed to return a not guilty verdict on that count. Police also located 377g of methamphetamine in the house (count 13). The jury returned a verdict of not guilty to supply of the commercial quantity but guilty of supply of an indictable quantity.

Appellant's case at trial

1. The appellant's case was that the apartment at Bondi was rented by "A Witness" and he, the appellant, denied any involvement in the hiring of the apartment or the mixing of prohibited drugs. He denied attending the Bondi flat on 12 February to mix prohibited drugs. He admitted to being at the apartment on the night of 14/15 February but he was not there packing a load of prohibited drugs. The appellant saw "A Witness" in hospital and "A Witness" told him that he wanted to go home. (It is not clear what "home" meant but the appellant's response "I think it's a good idea" suggests it did not mean "A Witness" going back to Vaucluse with the appellant because at that time the appellant wanted "A Witness" out of Vaucluse – he was said by the appellant to have trashed the Vaucluse apartment while the appellant had recently been overseas.) "A Witness" told the appellant that he had a suitcase at Bondi that he needed to get to RP, and he also needed to clean the apartment as he had a lady friend over before he went away for holiday.

2. The appellant went to the Bondi apartment in the early morning of 15 February. He cleaned up some "dirty stuff" on the floor which was why he used gloves. He found suitcases inside the cupboard which were closed, a small amount of drugs and a bit of money. He took the drugs and some of the money and put the rest in a third safe. The appellant asserted that three safes were purchased from Bunnings and said that the third safe must have gone missing between 3:00am and 11:00am.
3. The appellant said that "A Witness" asked him to pack up his personal belongings which was mainly money that "A Witness" left in the Bondi apartment. The appellant said that he sealed the money with a plastic vacuum sealer, wrapped it in brown tape and put it in the third safe. The appellant used a vacuum sealer as "A Witness" told him to.
4. The appellant said that when he returned from Bondi early in the morning he gave the "Aloha" phone back to "A Witness" and went to bed. The appellant said that "A Witness", who regularly pretended to be the appellant, must have sent the message to RP at 4:54am ([62] above) although earlier in his cross-examination the appellant said that he may have sent the message.
5. The appellant only woke up when "A Witness" told him he was still too sick and asked if he could go and give the suitcases to the courier. "A Witness" gave the appellant a Blackberry so he could contact RP about the courier. "A Witness" told the appellant only to use that specific Blackberry. The appellant believed that "A Witness" had been speaking to the police which was why, the appellant said, "A Witness" wanted the appellant to use that specific Blackberry.
6. The appellant had no knowledge of the ten kilograms of methamphetamine inside the suitcases. The appellant believed what was in the suitcases was money. The cash in the bedroom at Vacluse (count 16) was not the appellant's.
7. In relation to these counts the appellant believed that the Crown and the police were omitting evidence that would prove his innocence. That was particularly so in relation to the video surveillance footage which was exhibit BZ.
8. Counsel for the appellant initially objected to the admissibility of the video footage for two reasons:
 - (1) There was no evidence that the camera was installed pursuant to a warrant; and
 - (2) Pursuant to ss 135 and 137 of the Evidence Act 1995 (NSW) the quality of the evidence would make it unfairly prejudicial if admissible.
1. Some three days later the Crown produced a Commonwealth warrant which answered the first ground of objection. However, counsel for the appellant maintained her objection on the basis of unfair prejudice for two reasons:
 - (a) The quality of the footage was so poor; and

- (b) Misinterpretation of sound as opposed to any kind of visual confirmation of what actually happened in the unit. This related to identifying sounds and whether there was more than one person in the apartment.
1. Counsel for the appellant's submissions concerning the quality of the footage included that there was a permanent humming noise throughout the video and there were instances where the tape jumped and dropped out; although the Crown submitted that a person seen walking through the video at about 10:00pm (when there was no visible surveillance outside the unit) was the appellant there was no way of saying it definitely was the appellant and not somebody else. There was no way to identify how many people were in the flat at any one time.
 2. Counsel for the appellant ultimately conceded that the footage could go to the jury but went on to say, "it's what to be made of the footage that in my submission an unfair prejudice can arise". The trial judge said, in allowing the footage to be shown to the jury, that he would not permit the Crown to allow the police to give their interpretation of what the noises were.
 3. The appellant's complaint at the trial was that the footage on the tapes that became exhibit BZ had been edited and that the portions edited out would show clearly that someone had been in the unit at Bondi between 3:00am when the appellant left and 11:00am when he returned the next day. He said that this was clear because he packed money into a third safe and yet when he returned at 11:00am the third safe had gone. His allegations in relation to the editing of the video footage occurred during his cross-examination and re-examination.
 4. The appellant was shown Exhibit BA being 20 photographs of the items that the police took out of the two suitcases seized from the courier. The following appears (T 2398):

Q. You can see from some of those photographs alone that there is a lot of brown masking tape wrapped in those?

A. Yes.

Q. It is funny, is it?

A. What's funny is throughout this whole brief of evidence, anything that proves my innocence has been omitted.

Q. Such as?

A. The third safe.

Q. The what?

A. The third safe.

Q. What third safe?

A. The one that was referred to in cross-examination of Detective Walker and Ferris. I packed a third safe in there.

Q. You packed a third safe?

A. Which had money in it. I taped up money. But it's not in there, is it?

Q. Well, we do have DVD recordings of what was taken out of Mr Xidis' truck?

A. That's right.

Q. And the recordings of when those two bags were opened so if there is a third safe, we would see it, wouldn't we?

A. And it was continuous, right, with no breakages in it but?

Q. Are you saying that there was a third safe in those two bags?

A. So, well, it must have gone missing between 3am when I left there and 11 o'clock before I got there and --

Q. What did you put into that safe?

A. Money.

Q. Why did you put money into the safe?

A. Because "A Witness" told me to. He said, "My money is there", he wanted it and that was the third safe that was opened and I never had keys to any of these safes so I couldn't see inside the other two and this footage we are looking at, you have chosen a part of the 18 hours of footage which you want to show the jury but in Detective Kiernan's logs, it shows clearly that someone is in the unit and it has been edited.

Q. And what do those logs show, according to you?

A. Well, the log says there is someone in the unit.

Q. And wasn't that person you?

A. No, at 8am. It wasn't me. I was in bed sleeping at Vaucluse and the systematic editing from - at between 8 and 9 o'clock, we can show the jury that too, if you want.

The further evidence

1. The appellant now seeks to rely on fresh evidence in relation to exhibit BZ. The basis of the application was said to be a funding issue at the trial. An affidavit from the appellant's solicitor disclosed that at the trial Legal Aid allocated an amount for the assessment of the authenticity and integrity of the listening device and surveillance material. The grant was only sufficient to cover the cost of the examination of one of the exhibits. An examination was conducted of exhibit AY which was footage taken of the courier's truck being stopped at

The Rocks. Accordingly, there was not sufficient funding to examine exhibit BZ. The affidavit went on to say that upon commencing the appeal the appellant instructed the solicitor to brief an expert to review exhibit BZ to determine whether the footage had been edited. A forensics analysis expert, Gordon McMeikan, was briefed. He prepared a report dated 19 October 2015.

2. The report identified a number of problems with the recording. The Crown in turn engaged Michael Bilic who was a technical capabilities specialist with the Australian Federal Police to examine the footage. A further report in reply was then obtained from Mr McMeikan. Mr McMeikan and Mr Bilic gave concurrent evidence at the hearing of the appeal.
3. This issue in relation to the footage narrowed to the matter of gaps in the recording totalling one hour, 31 minutes and ten seconds over a total claimed recording period of six hours, 37 minutes and 40 seconds. The majority of the lost time of one hour, 31 minutes and ten seconds was made up of small periods of time. However, there was a large gap of 14 minutes and 35 seconds on 15 February 2011 from 0932.06 hours to 0946.41 hours.
4. Mr McMeikan's conclusions were these:
 - (a) The most probable cause of the lost or missing video frames is the automatic pausing of the Sony DV Direct recorder when sufficient signal loss occurs. Possible scenarios that could cause or contribute to the signal losses and audio gaps and anomalies are:
 1. The use of faulty or failing battery power supplies or adaptors in any portion of the collection, processing, forwarding and recording path;
 2. The process of forwarding the sd video feed from the Bondi unit via an undisclosed probable rf means for recording at the covert Listening Post where the link was unstable or subject to interference;
 3. The use and/or unfit-for-purpose equipment or the incorrect configuration and use of equipment.
 - (b) A less probable scenario, but one that cannot be discounted, is that additional undisclosed and undocumented processing was performed on the video prior to being recorded onto disc by the Sony DV Direct recorders i.e. video was not recorded in real time.
 - (c) A thorough review of the SD recording with various filters and noise reduction settings could not identify the occurrence of any speech or the presence of any person in the Bondi unit for the period 07:45 to 09:30am on 5 February 2011 according to the time stamp overlays present on the recording.

[Elsewhere in Mr McMeikan's conclusions he limits that time period to 09:00am.]

- (d) The possibility of unauthorised, undocumented or undisclosed additional processing or editing having taken place, or being able to have taken place cannot be discounted due to:

- (1) The large amount of missing audio and video,
 - (2) Unreliable and undocumented date-time stamp overlays,
 - (3) Unexplained audio gaps and anomalies,
 - (4) Claimed duplicate Master 2 disc that was produced on a Rimage Image Server with different files and disc meta data, and
 - (5) Undisclosed "highlight" recordings.
 - (6) No MD 5 or SHA-1 checksums.
1. In his report of 29 April 2016 Mr Bilic agreed with Mr McMeikan's conclusion that the lost video frames were probably caused by the Sony DV Direct recorder automatically pausing due to the loss of signal. He also agreed with Mr McMeikan that in relation to the loss of 14 minute 35 second gap a manual process was the reason for that loss of product. He said that the monitor on duty should be able to explain what led to this occurring. In his oral evidence Mr Bilic said that he believed the most likely cause for the signal dropping out was a radio frequency propagation issue.
 2. The concurrent evidence of the two experts was largely in accord. The evidence was that, if signal strength became poor whether by interference or otherwise, the recording device might pause until the signal improved. If the signal remained poor for a period of two minutes the recorder would switch off and would need to be manually restarted. There were three possible explanations for the gaps in the recording. They were poor signal strength, the recorder had been manually stopped as a result of human intervention, and that the recording had been edited after the event.
 3. As to later editing, Mr Bilic said that once finalisation of the disk occurs, that is, when the DVD is removed from the recording apparatus, the disk becomes "read only" so that it cannot be rewritten. Although it is possible to re-set the time date stamp after the recording is completed this would involve a re-editing of the whole disk which would be very difficult and would have to be a well-planned process. Mr McMeikan did not demur to that evidence.
 4. In relation to the loss of 14 minutes 35 seconds, the signal strength immediately before that time appeared to be good but was poor after the recording was re-started. With an analogue signal, immediate dropout and complete loss of signal can occur.
 5. There were some differences between the experts. Mr McMeikan thought the proportion of lost time relative to the whole recording was high but Mr Bilic said it was what he would expect from covert recordings. A number of factors might be responsible including the devices not being installed in ideal conditions, antennas often have to be hidden from sight to avoid detection, and the radio link quality being compromised. Although Mr McMeikan initially expressed surprise that the monitors were not logging the dropout times, especially the 14 minute period, he accepted that if the monitor configuration was such that the person was viewing the input to the recorder rather than downstream of the recorder the person

would not know that the recorder had stopped.

6. On the second day of the appeal, and after the conclusion of the evidence sought now to be led, Senior Counsel for the Crown said that further enquiries had been made, and it had been ascertained that the set-up of the recording equipment was such that the monitor was viewing what the surveillance device was transmitting prior to that information being recorded. The effect of that was that those monitoring the equipment would not have known if and when the recording stopped for any reason including a poor signal. Mr Brady SC for the Appellant accepted that position without the need for further evidence about it being called.
7. Both Mr Kiernan and the other observer Mr Nimmo denied any attempts to alter, amend or edit the recordings. Mr Kiernan denied that he switched off the recording at any time. He was not able to recall a gap of 14 minutes 35 seconds when the screen went blank.

Submissions

1. The appellant submitted that, bearing in mind the contest about what occurred at the Bondi apartment and the issues with regard to the quality of the recording and the gaps that had been identified, the further evidence with other evidence at the trial was likely to have led the jury to have a reasonable doubt about his guilt. The appellant submitted that the further evidence would have significantly supported his initial objection to the evidence. There was unfair prejudice in being unable to test the problems with the recording.
2. The appellant submitted that the video may have been used by the jury as support for "A Witness's" evidence, and that doubt about the video may well have affected the jury's assessment of "A Witness's" reliability and honesty.
3. Subsequent to the further information about the set-up of the recording coming to light ([90] above) Mr Brady SC acknowledged that the basis for Ground 2 of the appeal was somewhat weakened. He submitted, nevertheless, that the evidence was equivocal about whether there had been a manual stop and start. There was nothing in the log, and Mr Kiernan did not give evidence of any manual start nor that he realised the recorder had stopped. The appellant submitted that there were significant difficulties with the material where there were issues about who went to the property and whether there was continuity between him being there early in the morning and then being there later at 11.00am. All of this further evidence would have corroborated and supported what the appellant said when he gave evidence about the material being edited.

Determination

1. In *R v Abou-Chabake* [2004] NSWCCA 356; (2004) 149 A Crim R 417 Kirby J (Mason P and Levine J agreeing) said at [63]:

[63] The authorities in respect of fresh evidence have recently been collected and analysed by Giles JA in *R v Bikic* [2002] NSWCCA 227, and Heydon JA in *R v M* [2002] NSWCCA 66 at paras 61–64; see also *R v Sleiman* [2003] NSWCCA 231 paras 101–105. The test was stated by Barwick CJ in *Ratten v R* (1974) 131 CLR 510 at 518–520 (McTiernan, Stephen and Jacob JJ agreeing). It was reaffirmed in *Lawless v R* (1979) 142 CLR 659 by Mason J at 674–5 (Barwick CJ and Aiken J agreeing). The principles may be summarised as follows:

First, a distinction is made between "new evidence" and "fresh evidence". Fresh evidence is evidence not available to the accused at the time of the trial, actually or constructively. Evidence is constructively available if it could have been discovered, or available at the trial by the exercise of due diligence.

Second, great latitude must be extended to an accused in determining what evidence, by reasonable diligence, could have been available at his trial (*Ratten v R* (above) per Barwick CJ at 512 [scil 517]).

Third, the Court is ultimately concerned with whether there has been a miscarriage of justice. The rationale for setting aside a conviction on the basis of new evidence or fresh evidence is that the absence of that evidence from the trial was, in effect, a miscarriage of justice. That evidence must be examined in the context of the evidence given at the trial (*Mickelberg v R* (1989) 167 CLR 259, per Toohey and Gaudron JJ at 301).

Fourth, the issue of whether there has been a miscarriage is to be approached on a number of levels, depending upon the order sought (whether a verdict of acquittal or a new trial), and the capacity of the new or fresh evidence to sustain the order sought.

Fifth, where a verdict of acquittal is sought and the new evidence is of such cogency that innocence is shown to the Court's satisfaction, or the Court entertains a reasonable doubt as to guilt, the guilty verdict will be quashed and the appellant discharged. In such circumstances, it does not matter whether the evidence is fresh or simply new (*Ratten v R* (above) Barwick CJ at 518/519; cf Gibbs CJ in *Gallagher v R* (1986) 160 CLR 392 at 398/399).

Sixth, where the evidence does not have that quality, or where a new trial is sought, a number of issues arise. The verdict will be quashed and a new trial ordered only where the following questions are answered affirmatively:

Is the evidence fresh?

If it is, is it "credible" or at least capable of belief (*Gallagher v R* (above) per Gibbs CJ at 395), or "plausible" (*Mickelberg v R* (above) per Toohey and Gaudron JJ at 301)?

If it is, would that evidence, in the context of the evidence given at the trial, have been likely to have caused the jury to have entertained a reasonable doubt about the guilt of the accused (Gallagher v R (above) per Brennan J at 410) or, if there is a practical difference, is there a significant possibility that the jury, acting reasonably, would have acquitted the accused (Gallagher v R (above) per Mason and Deane JJ at 402)? See Mickelberg v R (above) per Toohey & Gaudron JJ at 301–302.

Seventh, the concept of a miscarriage of justice is not an abstract investigation of truth (cf an Inquiry under s 474D Crimes Act 1900). It is an investigation in the context of the adversarial nature of a criminal trial. Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused to such decisions, even though it is conceivable that other decisions or something else may have worked rather better (Ratten v R (above) at 517).

1. It must first be determined if the evidence is fresh. In *Ratten v The Queen* [1974] HCA 35; (1974) 131 CLR 510 Barwick CJ said (at 517):

It will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of his trial, or of which, bearing in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial. Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence. But he must bear the consequences of his own decision as to the calling and treatment of evidence at the trial.

1. In *Lawless v The Queen* [1979] HCA 49; (1979) 142 CLR 659 Mason J said (at 675):

[F]resh evidence properly so called ... is evidence of which the accused was unaware at the time of his trial and it is evidence which he could not have discovered with reasonable diligence.

That definition was applied by Simpson J (Davies J and Grove AJ agreeing) in *Khoury v R* [2011] NSWCCA 118; (2011) 209 A Crim R 509 at [107]. Her Honour went on to say that, "new" evidence is evidence that does not qualify as "fresh", either because it was available, but not used, at first instance, or because, in the exercise of reasonable diligence it could have been obtained.

1. There is no doubt that the further evidence now sought to be led was available at the time of the trial. The only question is whether by reason of a limit on funding of the defence of the trial it could be said that the evidence was evidence "bearing in mind his circumstances as an accused ... he could have been able to produce at the trial" (Ratten at 517).
2. There seem to us some difficulties in determining that financial considerations provide a sufficient basis for saying that evidence was unavailable to an accused. However, we do not think that it is necessary to determine the point of principle in the present case because the explanation provided about the matter is wholly inadequate. Precisely what was sought of

Legal Aid was not identified nor the response received. There was no explanation why, when this appeared to be the significant matter complained about by the appellant, the funding allocated was applied to an examination of another exhibit. Further, the circumstances in which the funding became available at the hearing of the appeal to obtain the evidence were not elucidated.

3. Notwithstanding the unsatisfactory state of the evidence and bearing in mind Barwick CJ's statement that "... it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence", we are prepared to assume for present purposes that the evidence was fresh.
4. The second requirement, that the evidence be credible, is satisfied in the present case. There was no challenge to the expertise of either expert witness.
5. The third requirement is one that the evidence taken together with the evidence given at the trial would be likely to have caused the jury to have entertained a reasonable doubt about the guilt of the accused. It was never made clear whether the further evidence should result in an acquittal or simply the ordering of a new trial. However, for the reasons which follow, the evidence is such that the distinction is immaterial.
6. The appellant's assertions during cross-examination and re-examination at the trial that the recording had been subsequently edited was the basis upon which the further evidence was obtained. There can be no doubt that the appellant's assertions alleged wrongdoing on the part of Mr Kiernan or Mr Nimmo or other unnamed persons. Both Mr Nimmo and Mr Kiernan swore affidavits denying that they altered, amended or edited the recordings. Mr Nimmo was not cross-examined on his affidavit, Mr Kiernan gave evidence before this Court. Whilst he was asked if he turned the machine off manually at any time (which he denied) he was never challenged on his statement in his affidavit that he did not edit the tape in any way. We accept his evidence that he did not turn the recorder off at any stage.
7. That evidence, when taken with the evidence of the electronic experts which indicates that the surveillance was being viewed prior to its passing through the recorder puts an end, as Mr Brady accepted, to any suggestion that the gaps in the recording were brought about by subsequent editing. Further, Mr Kiernan's evidence of not remembering a gap of 14 minutes 35 seconds was supported by the evidence that he was viewing the input to the recorder. His evidence that he did not switch off the recorder should be accepted.
8. Moreover, the evidence of the electronic experts was that the most likely explanation for the gaps in the recording was a poor signal which caused the recorder to pause and, in one case, switch off after two minutes.
9. The essence of the appellant's complaints was that the recording had been edited at times when it would otherwise have shown that a person other than him was present at the premises. That was said to be the explanation for the disappearance of the third safe which he claims to have used as the repository for "A Witness's" money and for the drugs being in

the safes in the suitcases which he denied packing. The appellant pointed also to the entry on the log at 8.00am which referred to someone being in the apartment. Mr McMeikan's evidence at [84(c)] above tends strongly against the correctness of that entry, based as it was on Mr Kiernan's conclusion at the time without the testing done by Mr McMeikan.

10. However, the appellant's own evidence was inconsistent with the reasonable doubt it was said the jury would have if the further evidence was before them.
11. During cross-examination the appellant was shown a portion of exhibit BZ starting at 00:43:06 to 00:46:31. The following then appears (T 2404):

Q. I played enough of that I think and I want to ask you these questions?

A. Sure.

Q. Could you hear the sound of someone using a roll of masking tape?

A. Yes.

Q. And you did that?

A. Yes, I did.

Q. And we've all heard that particular recording before what's been played and we've heard it, but would you agree that you were using a lot of masking tape throughout the few hours that you were there?

A. I can't comment on that. I told you what I used the masking tape for and I don't know how perfectly clear that footage is, and as I've said before and I say it again bits of that evidence is constantly omitted from the surveillance at 8 in the morning after I've left there the footage is constantly edited. It's not, you know, bad footage, bad connection. It is the editing is rife and that's what I did there, third safe was gone, contents are gone so I'm stuck with this.

Q. What in total do you say is missing from the edited DVD, a third safe is?

A. In the logs of the Detective that was sitting behind that monitor.

Q. Regardless of what the logs say, you were there?

A. No, no. I'm saying when I was not there after I have left at 8 (sic) in the morning

someone is in that unit and there's no more third safe. It couldn't have been taken any time other than 3 in the morning when I left till I got there and I'm sure you've seen the footage.

Q. But you say that there was a third safe that you'd taped up money and put inside the third safe and then by the time you got back to the Bondi flat the next day around about 11 o'clock in the morning the third safe was gone?

A. Yes. In the logs of Detective Kiernan it says that there's someone in the unit.

...

Q. But nothing else was missing from the unit the next morning, is that right, just the third safe with the money?

A. I didn't really take notice of anything else. I really didn't take notice of anything else.

Q. Didn't you pack the two suitcases with something or not?

A. The safes were already inside the suitcases that were open.

Q. The suitcases were open?

A. Yes, they were open but inside the cupboard, there was an open safe there and the money, I taped up the money put it in there and then closed it.

Q. Closed the safe?

A. Yeah, closed the safe, yeah. There was no keys for it. I just looked (sic) it and that was it and I went home and I told ["A Witness"] that.

Q. And then when you went back the next day at 11 o'clock?

A. Then the messages even shows I thought ["A Witness"] was going to go back because I thought it would be all right by then and in the morning at the Vacluse house he said, he asked me to go back and I went back.

Q. And when you went back what was inside the flat and what do you say was missing?

A. Well, I didn't notice anything missing at that stage. I just thought I didn't think much of it. I sat down and smoked some more drugs and spoke to a couple of friends, just general chit chat, nothing to do with drugs, apart from I sent a message to a friend of mine who used to be an addict asking him about the problem he was having with drugs and all that and that was it. And the guy arrived, took the suitcases and I didn't think much of it. I was - actually after I came back into that unit, I was a little bit depressed. I was quite upset with myself just for using drugs and all that stuff and I tried so hard to come off it I was just worrying about all those type of issues really.

Q. So where did the third safe come into it?

A. What do you mean?

Q. You say it was there when you went to the Bondi flat on the night of the 14th going into 15 February?

A. It was already there.

Q. And then it was there you say when you left the Bondi flat?

A. Yes.

Q. I think it's around about 3.30 or something in the morning?

A. 2.49, 3 o'clock or something like that, yeah.

Q. And then when you went back to the Bondi flat at 11 o'clock the next day, was the third safe there or not?

A. When I left there I'd padlocked the safes and I didn't look in it. I didn't need to look in it.

Q. You padlocked the safes?

A. Yes.

Q. Which safes?

A. I mean the suitcases sorry.

Q. But you're telling us about a third safe that you'd put money into?

A. And then I put it inside the suitcase.

Q. You put that inside the suitcase?

A. Yes.

Q. And then when you left the Bondi flat on the night, very early hours of the 15th, as far as you're concerned the third safe was inside one of the suitcases?

A. Yes.

Q. And when you went back at around about 11 o'clock on 15 February the two suitcases were there padlocked as you'd left them?

A. Yes.

Q. And you've seen the DVD of the police seizure of the two suitcases?

A. Yes.

Q. And the opening of those two suitcases but we only see two safes, don't we?

A. Yes, you do.

Q. Do you know what happened to that third safe?

A. Do you want to have a look at the footage?

Q. Do you know what happened to the third safe?

A. Obviously can't make a comment as to what happened to it, but there is no other explanation that it's gone missing from 3am to 11 o'clock. I know it sounds a little bit out there, but look at the footage.

Q. There was no third safe put into these suitcases?

A. There was no third safe. It was in the brief of evidence in the forensics.

Q. Where?

A. When you cross-examined Detective Walker and Detective Ferris on that. He wrote it in his words for the forensic labs and there was three safes purchased from Rose Bay Bunnings.
(emphasis added)

1. The second last answer should not be understood as an agreement with the Crown Prosecutor's question – the appellant was asserting that the third safe was in the brief of evidence. However, what this evidence shows is that the appellant, if believed, put the third safe in a suitcase and padlocked the suitcases. The next morning the padlocked suitcases were there as he had left them. The courier then collected the suitcases. The appellant agreed that the DVD of the seizure showed only two safes, and he could not explain where the third safe might have been.
2. That evidence foreclosed any suggestion that what was found in the suitcases was put there after the appellant left the premises at 3.00am and before he arrived back at about 11.00am. Although the appellant asserted that someone else came to the premises he never identified who it might have been or who had the means of access. Certainly, on the appellant's own evidence it could not have been "A Witness" who was at Vaucluse and was too sick to go to Bondi; that was the appellant's explanation for going to Bondi that morning.
3. It then remained for the jury to determine, first, if it believed the appellant that he did not pack anything but money into a third safe and, secondly, whether the Crown had proved its case that the appellant packed the safes and suitcases with the drugs. The further evidence could not have given rise to a reasonable doubt about those matters.
4. We reject Ground 2.

Ground 3 – listening device at Elizabeth Bay unit

1. By Ground 3 the appellant asserts miscarriage of justice as a result of non-disclosure by the Crown of relevant material in its possession, and misrepresentation concerning the same material. The material in question was evidence of listening devices that had, on 18 November 2010, been installed in the Elizabeth Bay apartment occupied by the appellant. Conversations in that apartment between "A Witness" and the appellant had been the subject of a large part of "A Witness's" evidence. It is necessary to set out the background facts. We will do this, so far as possible, chronologically.
2. On 18 November 2010 a video surveillance device was placed at the front door of the Elizabeth Bay apartment. At the same time, two listening devices were placed inside the apartment, one in the living room and one in the bedroom. The listening devices transmitted to the video device.

3. In preparation for the trial, the appellant's legal representatives issued a subpoena, seeking "all visual and audio recordings relating to" the Elizabeth Bay apartment. On 26 September 2012 the ACC produced a computer disk that contained a number of files. One of these was labelled "apartment door". That file contained, not only the video footage from the surveillance camera at the door of the Elizabeth Bay apartment, but also audio recordings from the listening devices inside the apartment. There was nothing on the labelling to indicate that the sound recording was not from a listening device placed with the video camera at the apartment door. The appellant's legal representatives made some examination of the disk. They, in common with the Crown's representatives, proceeded on the assumption that the sound had been recorded from the door of the apartment.
4. The trial commenced on 13 October 2014. On 28 October counsel then appearing for the appellant, in cross-examining "A Witness", asked if he was aware whether there were any listening devices in the apartment. The Crown prosecutor objected, saying:

"My friend knows there were not."

(It is not in issue that, at that time, the Crown prosecutor believed that to be the case.)

1. The trial proceeded. The appellant gave evidence and was cross-examined. At the conclusion of his evidence, on 12 December, the Crown prosecutor sought leave to call evidence in reply. The evidence he identified as the subject of the application was evidence from the listening devices that "in summary show [the appellant] speaking to "A Witness" in a way that shows the alleged hierarchy between them". He stated that the evidence he anticipated was that the listening device was placed in the lounge room of the apartment on 25 October 2010. (It was accepted that that date was incorrect.)
2. This drew a sharp response from defence counsel, who referred to the earlier exchange in which the Crown prosecutor had said there was no listening device in the apartment.
3. A voir dire was then conducted. Detective Sean Ferris gave evidence. He confirmed that the listening devices had been placed in the apartment on 18 November 2010.
4. Counsel for the appellant then sought discharge of the jury, on the ground that the Crown had failed to comply with its undoubted obligation to disclose to the defence all relevant material in its possession. She argued that her cross-examination of "A Witness" was, as a result, "flawed". The import of the complaint was that, had she been aware of the placement of the listening devices in the apartment, she would have cross-examined "A Witness" with a greater degree of precision, seeking to pin him down to exact locations in the apartment where he claimed conversations with the appellant took place, with a view to using the recordings to challenge his evidence and damage his credibility.
5. The trial judge refused the application to discharge the jury.

6. For the purpose of dealing with the application, he listened to part of the recordings. He gave reasons for his decision. He considered it "obvious" that noises were discernible from the inside of the apartment, and that the appellant's own voice (which the trial judge recognised, the appellant having given evidence) was apparent on a number of the recordings. He also noted that the appellant had given evidence of himself having listened to the recordings, or some of them. He considered that, the defence having had access to the recordings since September 2012, it had been open to it to conduct a more detailed investigation of the material. He noted an argument on behalf of the appellant that:

"... [the material] was not made available in a form or in a manner which realistically brought to the attention of the defence the true nature of the material."

He accepted that the witnesses from the ACC did not identify for the benefit either of the Crown or the defence during the trial the fact that there were listening devices placed in the apartment. Essentially, the trial judge considered that the Crown had adequately disclosed to the defence the material in its possession.

1. Following rejection of the application for discharge, two officers of the ACC gave evidence before the jury. The purpose of this evidence was to confirm, in the presence of the jury, that the listening devices had been placed inside the apartment, and that the Crown had available to it the product of those recordings. This gave defence counsel the opportunity (which she seized) to address the jury on the basis that, had any incriminating material been revealed on the tapes, it would have been part of the Crown case. Since it was not, the inference was that nothing of an incriminating nature was said.

The argument on appeal

1. The appellant's argument on appeal was essentially the same as had been made at trial. It was that cross-examination of "A Witness" would have taken a different course had counsel been aware of the location of the listening devices, and that the non-disclosure (and what was said to be "positively misleading") by the Crown prosecutor on 28 October, caused a miscarriage of justice. Reliance was placed upon *Grey v The Queen* [2001] HCA 65; 184 ALR 593; and *R v Spiteri* [2004] NSWCCA 321; 61 NSWLR 369.
2. During the course of argument on appeal, Senior Counsel for the appellant acceded to the proposition that his complaint was that:

"The appellant's legal representatives were misled in that they did not pay close attention to what was on the recording because they were led to believe that it was only something to do with the apartment door."

Determination

1. It is undoubtedly the case, confirmed in Grey, that the Crown has a duty to disclose all relevant material in its possession. This it did, in response to the subpoena. As noted by the trial judge, the disk provided clearly revealed that conversations within the apartment could be heard. There was no failure on the part of the Crown to make proper disclosure. It was not the Crown's duty to draw attention to the precise location of the listening devices that recorded the sounds within the apartment. I accept that labelling the file "apartment door" might have given the impression that the listening devices were placed with the video camera. But that is of no moment when examination of the disk clearly shows that conversations within the apartment were recorded. The location of the listening devices is of little, if any, relevance.
2. Moreover, counsel for the appellant obtained a significant forensic advantage from the evidence given by the ACC officers after the discharge application was rejected. She made the point that what happened in the apartment had been recorded, and that the Crown obtained no useful evidence from the recordings.
3. There was no miscarriage of justice. We reject this ground of appeal.

Ground 4 – subpoena to ACC

1. This ground is:

A miscarriage of justice was occasioned as a result of the failure of the Australian Crime Commission to produce, under subpoena, transcripts of any interview with, or examination of, A Witness."

1. At the time the ground was drafted, the appellant did not know for certain whether any such transcript existed; it has since transpired that there does exist a transcript of an interview of "A Witness" by the ACC. That transcript was not produced to the appellant under subpoena; the ACC maintains that it did not fall within the terms of the subpoena, as narrowed in discussions with the appellant's solicitor.
2. The appellant did not contend that the failure to produce any transcript constituted a miscarriage of justice on its own. Ground 4 was relied upon as a matter compounding the alleged miscarriage of justice arising from the contentions put in support of ground 3, the burden of each ground being that the appellant was, through a combination of misrepresentation and non-disclosure, improperly hampered in his attack on the credibility of "A Witness", a key witness in the Crown case. Accordingly, it probably follows from the rejection of ground 3 that ground 4 fails but it is preferable to address the substance of the ground.
3. The appellant's legal representatives wished to obtain transcripts of the examination by the ACC of any person who had given an account of the matters the subject of the investigation into the appellant, "A Witness" and the alleged criminal syndicate. Those activities were the

subject of a particular ACC operation named "Borah-Hydrus". A subpoena was issued to the ACC in August 2014 which was arguably broad enough to catch any such transcript. One of the reasons for seeking that material was to obtain any prior inconsistent statements made by "A Witness".

4. For obvious reasons, the activities of the ACC are protected by extensive secrecy provisions. The ACC responded to the subpoena by saying that it could neither confirm nor deny whether any relevant examination material existed, as "any such material is invariably subject to statutory non-publication directions".
5. In subsequent negotiations relating to the scope of the subpoena, a solicitor for the ACC indicated that there was nothing to produce in relation to "A Witness" as he had not been examined by the ACC (if those were the precise words used, that was wrong). The appellant's solicitor was told that there may be documents falling within the scope of the subpoena in relation to another person (not "A Witness"). Having regard to the statutory prohibition on producing such material, the solicitor was invited to make an application under s 25A(12) of the Australian Crime Commission Act 2002 (Cth). That section permits the court, if it considers that it may be desirable in the interests of justice to have examination material made available to an accused person, to give the examiner a certificate to that effect, in which case the examiner must make the material available to the accused person. In the case of the examination of the person who was not "A Witness", that occurred.
6. When "A Witness" was cross-examined in the trial, he said (in answer to a direct question) that he had been examined by the ACC in 2012. The date was wrong; he had in fact been examined in relation to a different operation (not Borah-Hydrus) in 2013. In further correspondence during the trial, the ACC confirmed that "A Witness" was not examined by it "in 2012".
7. The ACC evidently took the view at some point (it is not clear when) that the transcript of the 2013 examination did not fall within the terms of the initial subpoena because it was not "in relation to the investigation of" the appellant, "A Witness" and the criminal syndicate; it was conducted under the auspices of another operation. Evidence given at the appeal suggested that the initial search for relevant documents in response to the subpoena would have been confined to a search under the name of the relevant operation. However, the evidence of the solicitor for the appellant suggests that a broader assertion was made to him (before he agreed to narrow the terms of the subpoena) that "A Witness" had not been examined by the ACC at all.
8. Shortly before the hearing of the appeal, the ACC served an affidavit revealing (for the first time) the fact of the 2013 examination and providing a redacted copy of the transcript of that examination.
9. Had the existence of the transcript been disclosed before or during the trial, an application could have been made to the trial judge under s 25A(12) of the Australian Crime Commission Act (as occurred in respect of the examination of the person who was not "A Witness"). The

evidence before this Court does not reveal the precise reason that did not occur. It appears to have been due to a combination of events; the fact that the subpoena sought documents "in relation to the investigation of" the appellant; the view evidently taken by the ACC that the investigation ended upon his arrest; the representation during negotiations relating to the subpoena that "A Witness" was not examined by the ACC (whereas he was, but not in relation to the investigation of the appellant) and the fact that, when "A Witness" gave evidence, he said that he had been examined by the ACC but was mistaken as to when that occurred, saying 2012 instead of 2013.

10. At the hearing of the appeal, the ACC expressed a concern that the fact of the examination was disclosed in evidence at the trial, contrary to the secrecy provisions to which I have referred. In fairness to "A Witness", he was asked a direct question and may well have understood he was obliged, in that forum, to answer it. In any event, it would be unfortunate if the reason for a negative response to a request for further production after that evidence was given was that the request referred to the wrong date. The un-redacted parts of the transcript of the 2013 interview related to the matters the subject of the trial; as a matter of fairness, the error (if it was perceived) should have been corrected and the redacted transcript produced at that time.
11. However, that did not occur. At the hearing of the appeal Mr Brady SC, who appears for the appellant, called for a copy of the complete (unredacted) transcript. There being doubt as to the whether s 25A(12) of the Australian Crime Commission Act may be invoked at the hearing of an appeal (the section appears to refer to "the court" before which the accused person stands charged), the call was made under s 12(1)(a) of the Criminal Appeal Act 1912 (NSW). That section allows the court to order the production of any document, exhibit or other thing connected with the proceedings if it thinks it necessary or expedient in the interests of justice.
12. For the purpose of enabling the Court to rule on the call, the ACC produced the un-redacted transcript to the Court on a confidential basis. To assist the Court in the assessment of that material, Mr Brady identified the issue to which the call was directed. He stated that the case for the appellant at trial was that, contrary to his assertion, "A Witness" was heavily involved in drug dealing with drug dealers in Western Australian before he came to Sydney and that, in effect, it was "A Witness", not the appellant, who was behind that operation. "A Witness" had rejected that proposition, saying he was just the "busboy" and that it was not until he landed in Sydney and met the appellant that his drug dealing started.
13. Having examined the un-redacted material, the Court was unanimously satisfied that the call should be refused. The un-redacted parts of the transcript are wholly unrelated to the matters specified by Mr Brady.

14. It follows that ground 4 must be rejected. However, for the reasons already explained, we wish to state that it is unfortunate this issue was not addressed at trial after "A Witness" gave evidence, contrary to what had evidently been represented to the appellant's solicitor, that he had indeed been examined by the ACC.

Conclusion

1. The following order is made:

Appeal dismissed.

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