SUPREME COURT OF QUEENSLAND

CITATION:	*R v Clapham* [2017] QCA 99
PARTIES:	**R** **v** **CLAPHAM, Peter Brett** (appellant)
FILE NO/S:	CA No 311 of 2015 DC No 1308 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 1 December 2015
DELIVERED ON:	23 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2016
JUDGES:	Fraser and Gotterson and McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty of an offence that he unlawfully produced the dangerous drug methylamphetamine – where police executed a search warrant at the property where the offence was committed – where police found items used in the production of methylamphetamine – where the evidence of police consisted of evidence about the process of production of methylamphetamine and items used in that process, fingerprints, DNA and chemical analysis and photographic evidence – where a co-offender gave evidence against the appellant – where the appellant argued that the co-offender gave inconsistent responses – where the appellant argued that innocent explanations for the presence of the appellant's DNA and fingerprints could not be excluded beyond a reasonable doubt – where the appellant submitted that the circumstantial evidence did not directly implicate him in the production of methylamphetamine – whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty – whether the verdict of guilty was unreasonable or unsafe and unsatisfactory CRIMINAL LAW – EVIDENCE – JUDICIAL

DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – NATURE OF DISCRETION – GENERALLY – where the trial judge at a pre-trial hearing ruled that the documents addressed to the appellant's address or referring to the appellant or his partner were admissible – where the evidence was admissible for the purpose of establishing a link between the appellant and the property where the offence was allegedly committed – whether the admission of that evidence prejudiced the appellant in a way that went beyond its probative value – whether trial judge erred in law by allowing the Crown to tender documents without having to prove the documents in the usual way, in circumstances where the Crown relied on the truth of the contents of documents

Criminal Code (Qld), s 668E(1)

Barca v The Queen (1975) 133 CLR 82; [1975] HCA 42, cited
BCM v The Queen (2013) 88 ALJR 101; [2013] HCA 48, considered
Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, considered
Hocking v Bell (1945) 71 CLR 430; [1945] HCA 16, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, considered
R v Hillier (2007) 228 CLR 618; [2007] HCA 13, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, considered

COUNSEL: The appellant appeared on his own behalf
C N Marco for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** After a trial in the District Court the appellant was found guilty by a jury of an offence that on or about 16 November 2011 he unlawfully produced the dangerous drug methylamphetamine. The jury found the appellant not guilty of the two remaining charges that the appellant committed the same offence at the same place on dates unknown between 1 July and 17 November 2011.

[2] The appellant has appealed against the conviction on three grounds. The first two grounds are that the jury's guilty verdict is "unreasonable" and "unsafe and unsatisfactory". The third ground is that the trial judge erred in law by allowing the Crown to tender documents without having to prove the documents in the usual way, in circumstances where the Crown relied on the truth of the contents of the documents and a miscarriage of justice was the result.

Grounds 1 and 2: is the verdict of guilty unreasonable or unsafe and unsatisfactory?

[3] Section 668E(1) of the *Criminal Code* requires the Court to allow an appeal against conviction if the Court "is of opinion that the verdict of the jury should be set aside

on the ground that it is unreasonable, or cannot be supported having regard to the evidence". In *SKA v The Queen*[1] and *BCM v The Queen*,[2] the High Court treated a ground of appeal that a jury verdict is "unsafe and unsatisfactory" as amounting to a challenge that the verdict is "unreasonable, or can not be supported having regard to the evidence". In any event, the argument advanced by the appellant did not distinguish between the two grounds and nothing appeared to suggest that the verdict was "unsafe and unsatisfactory" if it was not "unreasonable".

[4] The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*.[3] The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if "it would be dangerous in all the circumstances to allow the verdict of guilty to stand".[4] The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the "starting point … is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses", but:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."[5]

[5] In *R v Baden-Clay*[6] the High Court emphasised that the jury is "the constitutional tribunal for deciding issues of fact"[7] and observed that, "the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial", "a court of criminal appeal is not to substitute trial by an appeal court for trial by jury", and "the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'."[8]

The case at trial

[6] Tracey Donaldson and her partner ("CM") leased a rural property. On 16 November 2011 police executed a search warrant at that property. Police officers gave evidence of what they found. At the base of the house there was a self-contained unit containing a lounge room, bedroom, kitchenette, and bathroom. A police officer detected a strong chemical odour immediately upon entering the unit. Subsequently

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1 (2011) 243 CLR 400 at [12], [37], and [80].
2 (2013) 303 ALR 387 at [27].
3 *BCM v The Queen* at [31], referring to *SKA v The Queen* at [11]-[14].
4 *SKA v The Queen* at [14], quoting *M v The Queen* (1994) 181 CLR 487 at 492-493.
5 *SKA v The Queen* at [13], quoting *M v The Queen* at 493-94.
6 (2016) 334 ALR 234 at [65]-[66].
7 *Hocking v Bell* (1945) 71 CLR 430 at 440.
8 *R v Baden-Clay* at [65]-[66], quoting *M v The Queen* at 494-5.

police found items apparently used in the production of methylamphetamine. It was not seriously in issue that the evidence of the police officers who attended at the scene, evidence about the process of production of methylamphetamine and items used in that process, fingerprints, DNA and chemical analysis and photographic evidence, and formal admissions made by the appellant, proved the following facts:

(a) In the unit, there was a disposable plastic glove in which a DNA profile was detected: there was a miniscule possibility that it did not originate from the appellant or someone with his DNA components. The DNA was found on the inside of the glove in the finger area. The glove was one of two gloves found together with an uninflated balloon close to a hotplate. Balloons are commonly used in the production of methylamphetamine (by being placed on top of condensers to trap gases produced in that process). (A swab taken from the other glove did not reveal enough information for analysis.)

(b) In the unit, next to the hotplate, there was an open Coke can on which DNA matching the appellant's DNA profile[9] was found.

(c) The hotplate was warm and still activated. On that hotplate, methylamphetamine, pseudoephedrine, chlorpheniramine and dextromethorphan were found. The last three substances are commonly used in the production of methylamphetamine.

(d) The appellant's fingerprints were also on a glass on the floor next to the Coke can and hotplate.

(e) In the unit, CM's fingerprint was found on a Pyrex dish containing methylamphetamine, chlorpheniramine and pseudoephedrine.

(f) In the main bedroom upstairs, CM's and Donaldson's fingerprints were found on a beaker containing methylamphetamine.

(g) DNA that matched CM's DNA profile was found in a glove in a box trailer on the property.

(h) The appellant's fingerprint was found on a butane canister in the box trailer. That kind of canister can be used in the production of methylamphetamine.

(i) Methylamphetamine, pseudoephedrine, chlorpheniramine and dextromethorphan were detected on an electric frypan in the box trailer.

(j) Methylamphetamine and pseudoephedrine (or its isomers) were found in items of glassware and other equipment in the trailer.

(k) The appellant's fingerprint was found on a full Winchester bottle of sulphuric acid in a shed on the property. Sulphuric acid can be used in the production of methylamphetamine.

(l) Chemicals and tablets that contained more than seven grams of pseudoephedrine were found in the house, shed and trailer.

(m) In a study in the upstairs part of the house, police found a black expanding folder containing documents, most of which were addressed to the

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[9] The probability that the DNA originated in someone other than and unrelated to the appellant was said to be one in 7,000,000,000,000.

appellant and the appellant's son at the appellant's residential address. The documents comprised invoices, receipts, correspondence, and other documents relating to purchases of various items (and some services) including, for example, furniture, a washing machine service, a mattress, a billiard table, a microwave, a deep fryer, a toaster, a pinball machine, a car, a motorcycle, and trade tools. The dates on the documents were mostly between early 2011 and mid-September 2011.

(n) In the unit, there were documents, including a letter from a bank. That letter was addressed to a name other than the appellant's name. The address on the letter was the appellant's residential address.[10]

[7] Some items of property of the kind described in the documents mentioned in (m) of the preceding paragraph were found at CM's house and some were found at the appellant's house.

[8] CM was tried jointly with the appellant and Donaldson. CM gave the Crown a statement that implicated the appellant in the production of methylamphetamine at the appellant's residential property and also at CM and Donaldson's rural property. CM undertook to co-operate with the Crown by giving evidence against the appellant in accordance with that statement.

[9] CM gave the following evidence. Before the date of the alleged offence by the appellant at CM's house, CM had sold some glassware to the appellant for $1,000. After the appellant expressed an interest in buying a motorcycle from CM, CM took the motorcycle to the appellant's house. During that visit the appellant was producing methylamphetamine and he told CM that he had been doing so for years. CM described equipment he said the appellant used to produce methylamphetamine. CM visited the appellant a couple of times because they shared an interest in riding motorcycles and CM rode at the appellant's property with the appellant and his sons.

[10] CM went on a camping trip with the appellant and his sons. The trip was cut short because the appellant had to return to Brisbane to collect some boxes of pseudoephedrine, leaving CM to bring the motorcycles and camping equipment to his house. A fortnight later, the appellant asked CM if the appellant could use CM's house to finish a production the appellant had started the previous night. CM agreed. The appellant arrived at CM's house a couple of hours later. CM saw the appellant set up his glassware in the shed. CM was paid "$500 or something" and given a small amount of drugs for the glassware. The appellant took the glassware with him when he finished producing the drugs.

[11] About a week later the appellant visited CM at his house and asked if he could use the house to produce methylamphetamine in an ongoing arrangement. CM agreed subject to some rules, including that the appellant should use the shed, only the appellant and one other person were to be at the property for that purpose, there were to be no children present, and nothing was to be left at CM's house. CM refused to be involved in the production. He was paid $500 and a gram of methylamphetamine for allowing the appellant to produce the drug at CM's property. The appellant produced methylamphetamine on three or four occasions at CM's house. The appellant brought his trailer with him and unpacked it in the shed. CM saw the appellant unpacking hydrochloric acid, caustic soda, and cold and flu tablets. On one of these occasions the appellant's partner helped to transfer tablets

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10 AB 156-157, Exhibit 28A and Exhibit 28B.

from packs into a box. The appellant left his trailer parked on the side of the road near CM's house. CM identified various items subsequently found by police as being property belonging to the appellant.

[12] The appellant gave to Donaldson the documents found in the study at CM's house because the appellant was interested in starting a business and Donaldson was going to help him set up business bank accounts and other matters. The appellant brought the black expanding folio containing the documents to the house. The documents found downstairs in the unit also belonged to the appellant. The addressee on the letter found in the unit (see [6](n) of these reasons) is the appellant's son. Various other items found by the police belonged to the appellant. Those items included hydrochloric acid, the Winchester bottle of sulphuric acid, a cooker in the shed, motorcycles, camping equipment, archery equipment, a gas mask and the hotplate and Coke can found in the unit downstairs. The appellant had access to other items including the Pyrex dish. CM claimed that he possessed chemicals and the cold and flu medication found in his house for innocent purposes and he used gloves for his work.

[13] CM purchased drugs from the appellant at the appellant's house on 14 November 2011. The appellant visited CM on 15 November 2011 and asked to use the downstairs area to produce drugs. CM agreed. The appellant arrived by motorcycle and someone else brought the trailer. On 16 November CM was caught by police with drugs he had been given as payment.

[14] In cross-examination CM agreed that at a court appearance before the trial he asked the appellant how the appellant's knee was, he asked the appellant whether he was "going to get up and be a man?", and counsel for CM then informed the court that there was a late change of instructions by CM. CM went to his counsel's chambers and started to write a statement against the appellant. CM instructed his lawyers to tell the appellant's lawyers that if the appellant did not plead guilty, then the appellant was going to say that there were three or four amphetamine cooks, the last cook was on 15 to 16 November 2011, the appellant stayed overnight and left early in the morning, and the amphetamine found at CM's house was produced that night as part-payment for the appellant using CM's house. CM accepted that he instructed his lawyer that CM would not hand his statement over if the appellant decided to plead guilty within an hour. CM had a longstanding drug addiction and a criminal history commencing in 1997 and involving many drug offences. CM was scared of being convicted of producing methylamphetamine. The first time CM had seen the appellant since 16 November 2011 was in court that day. The charge of production and possessing things used for production was discontinued because of CM's co-operation. CM pleaded guilty to permitting the use of a place for production and possessing dangerous drugs. CM's lawyers informed him that the Crown would not seek a custodial sentence if CM pleaded guilty and gave evidence against the appellant. CM understood that if did not co-operate by giving evidence against the appellant he risked serving six months imprisonment. CM adhered to his evidence implicating the appellant in the offence of which he was convicted. He gave evidence that if his own fingerprints were found on items used to cook methylamphetamine, that might be because those items were also in use in the kitchen. For example, the Pyrex dish was a pie dish.

[15] In re-examination, CM said that he asked the appellant about his knee because he had heard that the appellant had been in a motorcycle accident. CM knew that the

penalty for the offence of which he was convicted would be less than for an offence of producing methylamphetamine. CM was sentenced to 15 months imprisonment with immediate parole. He breached parole by possessing a small quantity of cannabis.

[16] The appellant did not call or give evidence.

[17] The Crown case was that the jury should accept beyond reasonable doubt CM's evidence as to the appellant's involvement in the offences. That evidence was submitted to find support in various circumstantial facts: the appellant's connection with the house where methylamphetamine was produced, evidenced by the documents found at the house; the appellant's DNA on the Coke can next to the activated and still warm cooker upon which there were traces of methylamphetamine; the appellant's fingerprints on the glass next to the cooker; the appellant's DNA in the glove near the cooker; the appellant's fingerprint on the glass bottle in the trailer; and the appellant's fingerprint on the sulphuric acid bottle in the shed. The prosecutor submitted that in those circumstances the jury should find that the appellant was materially involved in the production of drugs.

[18] Defence counsel submitted that the jury would have a reasonable doubt about CM's evidence. He had a motive to lie. It was CM rather than the appellant who was the cook. That was supported by the evidence of the DNA and fingerprints of CM found at the scene. Innocent explanations for the presence of the appellant's DNA and fingerprints could not be excluded beyond a reasonable doubt. The DNA found in the glove might have been the result of a secondary transfer. The evidence about the appellant's DNA and fingerprints did not relate them directly to the presence of methylamphetamine. The appellant might have innocently touched the glass and the Coke can and they might have been placed near the cooker at a different time. The appellant might have used the butane gas bottle for camping and the sulphuric acid bottle for cleaning. The sulphuric acid bottle was full so it could not have been used in any production of methylamphetamine. Defence counsel emphasised the grounds upon which the credibility of CM and the reliability of his evidence were challenged.

[19] In relation to CM's evidence, the trial judge directed the jury to approach their assessment with caution and to scrutinise his evidence carefully before acting upon it, CM was likely to be a person of bad character, his evidence might be unreliable and untrustworthy, and it would be dangerous to convict the appellant on the evidence of CM unless the jury found his evidence was supported in a material way by independent evidence implicating the appellant in the offences. The trial judge also directed the jury that there was evidence coming from independent sources which was capable of supporting CM's evidence in a material way – the DNA evidence, the fingerprints, and the documents – but that it was a matter for the jury whether that evidence did implicate the appellant in the offences and whether that evidence supported CM's evidence.

Consideration

[20] The jury evidently accepted CM's evidence that the appellant was at CM and Donaldson's property for the purpose of producing methylamphetamine on the date stated in the charge of which the appellant was convicted. There was a strong Crown case that methylamphetamine was in fact produced on that date, in particular in the evidence that police found in the downstairs unit a strong chemical odour, an

activated, warm hotplate, paraphernalia used in the production of methylamphetamine, and traces of that drug and precursor chemicals on that hotplate and the Pyrex dish. The discovery in the unit of what the jury could find was the appellant's DNA and the appellant's fingerprints on various items close to the hotplate (including in particular the DNA found in the glove) supported the evidence of CM implicating the appellant in the production of the methylamphetamine.

[21] Much of the appellant's outline of submissions comprised statements by the appellant of his version of events. As was explained to the appellant during the hearing, the Court is obliged to act upon the transcript of the evidence at the trial rather than statements made by the appellant in argument.

[22] The appellant submitted that the circumstantial evidence did not directly implicate him in the production of methylamphetamine using the hotplate in the unit. That is so. It is also true that if each of the facts and circumstances described in [6] of these reasons is considered separately, each might possibly be explained in a way which is consistent with the innocence of the appellant. In a circumstantial case, however, the proper approach is to consider the circumstances in combination and together with all other evidence.[11]

[23] The appellant argued that the evidence that testing of samples from the wall above the stove proved negative for the presence of chemicals that would be produced in any production of methylamphetamine in this area falsified the police evidence of the chemical smell. The jury was not obliged to adopt that reasoning, which was not verified by any expert evidence.

[24] The appellant argued that the evidence of his fingerprint on the bottle of sulphuric acid in the shed was not significant because that bottle was full and therefore could not have been used in the production of methylamphetamine. The prosecutor and defence counsel made competing submissions about the question whether the effect of the evidence was that the bottle of sulphuric acid had not been opened. However that issue might be resolved, it remained a relevant circumstance that the appellant's fingerprint was found on a bottle containing a substance of a kind that could be used in the production of methylamphetamine; but if that were disregarded it would not falsify the conclusion that the guilty verdict was reasonably open on the evidence.

[25] The appellant argued that the documents in the black folder found upstairs were not incriminating because the appellant did not deny having been at the property in the past and he had innocent reasons for being there, including riding motorcycles. If so, it does not follow that this evidence was not relevant. The evidence that many documents relating to the appellant's purchases and other expenditure were found at the property was a circumstance connecting the appellant with that property where the offence was alleged to have occurred. The defence case at trial about the documents found in the downstairs unit was that CM had put them there in an attempt to implicate the appellant more closely with the household.[12] That was put to CM in cross-examination and denied by him. It was open to the jury to accept his denial, which was not inconsistent with any evidence.

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11 *R v Hillier* (2007) 228 CLR 618 at [46]-[49].

12 Transcript of addresses, 27 November 2015 at p 31.

[26] The appellant referred to the evidence that fingerprints of CM, and not the appellant, were found upon the Pyrex dish containing trace elements of methylamphetamine, and the evidence that CM and Donaldson's fingerprints were found on the beaker containing methylamphetamine. The beaker was found in the main bedroom of the dwelling. CM gave evidence that the Pyrex dish was a pie dish and probably came from upstairs but it was being used by the appellant, who had access to it. If the jury accepted that evidence and the evidence of the disposable gloves in the downstairs unit, in one of which DNA matching the appellant's DNA was found, the jury was not bound to conclude that the absence of the appellant's fingerprints on the beaker and the Pyrex dish proved that the appellant had not handled that dish. The jury could attribute little weight to the absence of the appellant's fingerprints. In any case, the fact that the appellant's fingerprints were not on the beaker and the Pyrex dish and that CM's fingerprints were on that beaker and dish did not detract from the weight of the evidence implicating the appellant in the production offence.

[27] The appellant argued that CM's inconsistent responses when he was asked whether he knew someone called "Muz" or "Muzza" at trial[13] was proof that CM's evidence was not reliable.[14] CM stated that he did "know someone called Muzza". Shortly earlier it was suggested to CM that he had said he "had been cooking a bit with a fellow by the name of Muz or Muzza", to which he responded "I have no idea who Muz or Muzza is, because no such conversation ever took place." Viewed as a whole, this passage of evidence suggests CM's original answer might be reconcilable with his subsequent answer. Even if the jury found an irreconcilable inconsistency, this concerned a peripheral issue and did not require the jury to reject the whole of CM's evidence.

[28] In light of the substantial support in the circumstantial case for CM's evidence implicating the appellant in the offence of which he was convicted and the significance of the jury's advantage in seeing and hearing the evidence unfold at trial, particularly the evidence of CM, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted.

Ground 3: the trial judge erred in law by allowing the Crown to tender documents without having to prove the documents in the usual way, in circumstances where the Crown relied on the truth of the contents of documents and a miscarriage of justice was a result

[29] At a pre-trial hearing, the trial judge ruled that the documents addressed to the appellant's address or referring to the appellant or his partner were admissible for the purpose relied upon the by Crown of establishing a link between the appellant and CM's and Donaldson's property, where the offence was allegedly committed.[15] The appellant submitted in his outline of submissions that the documents in the black folder could be unfairly prejudicial to him but the outline did not identify in what way that might occur. In circumstances in which the Crown relied upon the documents found in the house for the stated purpose and where the documents either bore the appellant's own residential address or the name of the appellant or his partner, those documents were admissible for that purpose. The admission in

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13 Transcript 26 November 2015 at pg 4-66.
14 Transcript 26 October 2016 at pg 1-4.
15 Transcript 10 February 2015 at 1-27 to 1-28.

evidence of those documents did not prejudice the appellant in a way that went beyond their probative value as a circumstance linking the appellant with the place where the drug was produced.

[30] In oral submissions the respondent drew to the court's attention that in at least two of the documents there were references to articles purchased by the appellant, such as archery equipment and a pinball machine. CM gave evidence to the effect that the appellant was in possession of a pinball machine and archery equipment found in the downstairs unit. Again the Crown relied upon these documents and the presence of that equipment only to link the appellant to the property at which the offence was alleged to have occurred. Other evidence, including the DNA and fingerprint evidence, placed the appellant at CM's house. So much could not seriously have been in issue. The evidence was admissible and in any event not prejudicial.

Other matters

[31] I will discuss other arguments by the appellant that were not within any ground of appeal.

[32] The appellant argued that the trial judge erred by not directing the jury that, "if there is more than 1 inference to the evidence presented, then the jury must choose the inference that most favours the appellant." The trial judge gave conventional directions[16] about a circumstantial case, including that "you may only draw reasonable inferences and your inferences must be based on facts you find proved by the evidence", "To bring in a verdict of guilty based on or substantially [on] circumstantial evidence, it is necessary that guilt should not … only be a rational inference, but also it should be the only rational inference … that could be drawn from the circumstances", and "If there is any reasonable possibility consistent with innocence it is your duty to find the defendant not guilty". Those directions conveyed what the appellant appeared to submit should have been conveyed. The trial judge was not required to add a direction in the terms mentioned by the appellant.

[33] The appellant argued that the directions given by the trial judge about delay in bringing in a verdict or the giving of a majority verdict unfairly pressured the jury. This submission cannot be accepted. The trial judge gave directions upon those topics in conventional terms,[17] and defence counsel did not seek any further or different direction.[18] The jury retired to consider its verdict shortly after 10.00 am on day 5 of the trial. The jury was sent home shortly after 5.00 pm with their consideration of the verdict to resume at 9.00 am on the following day. On that day, the trial judge gave some re-directions to the jury in response to a jury note. Shortly after 11.30 am, the jury sent a note indicating that they had reached a majority decision but not a unanimous verdict and seeking guidance from the trial judge. The prosecutor and defence counsel submitted that it was appropriate for the trial judge to give the jury a direction in the form approved in *Black v The Queen*.[19] Neither counsel sought any re-direction. At about 3.00 pm the jury sent a note indicating that they were unable to reach a unanimous verdict, that position had not changed since the afternoon of the day before, and the jury could not foresee a change to it.

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16 See *Barca v The Queen* (1975) 133 CLR 82 at 104.
17 Affidavit of Stannard filed 12 October 2016 at p 41 (Transcript 1 December 2015).
18 Affidavit of Stannard filed 12 October 2016 at p 42 (Transcript 1 December 2015).
19 (1993) 179 CLR 44.

Both counsel submitted that the trial judge should enquire whether the note concerned all counts or only some counts. The trial judge made that enquiry and the spokesperson indicated that the jury had reached a unanimous verdict only on one count. The trial judge then directed the jury that, the jury having deliberated for more than eight hours the circumstances had arisen in which, if the jury could not all agree on a verdict, the verdict of 11 might be taken as a verdict of the jury on each of the remaining counts. The trial judge gave further directions upon that topic and asked the jury to retire again to resume their deliberations, observing that the jury might find that they were able to deliver a unanimous verdict or, if not, they might be able to delivery majority verdicts. The trial judge recorded that he had formed the view that the jury was not likely to reach a unanimous verdict on the counts on which they could not agree. Neither counsel sought any re-direction. About 10 minutes later the jury sent a note indicating that there were majority verdicts on two of the counts and a unanimous verdict on one count.

[34] There was no issue at the trial about the appropriateness of the trial judge giving directions in conformity with *Black* and in relation to majority verdicts or about the particular directions the trial judge gave. The appellant did not develop his contention that the trial judge's directions upon those topics amounted to unfairly pressuring the jury. I accept the submission for the respondent that there was no miscarriage of justice arising in relation to those directions.

[35] The appellant argued that defence counsel "did not give adequate instruction or direction to the admissions made on behalf of the appellant". The respondent's outline of submissions stated that the respondent required further particularity of this submission to enable the respondent to understand and address it. In oral argument the appellant referred to what he said was an admission that he had a conviction for production of a dangerous drug 12 years earlier. He submitted that this admission was told to the jury, he was not able to identify this in the record, but he thought it was mentioned by the prosecutor in his address to the jury. The respondent submitted that there was no such admission before the jury. There is no reference to such an admission in the record of the trial, including the submissions made by the prosecutor and defence counsel, a transcript of which was supplied to the court by the respondent.

[36] The appellant also argued that he was prejudiced by a submission made by the prosecutor at the trial that compared the appellant to a fictional character in a television program who produced methylamphetamine on a daily basis in massive amounts. The prosecutor referred to that television program and drew analogies between CM and a character in the program (a drug addict who fled the scene) and between the appellant and another character (an established drug producer). The prosecutor submitted to the jury that, "although you might think that's a reasonable analogy or you might think its rubbish your verdict here must be based on evidence".[20] The prosecutor then moved on to a detailed analysis of the evidence and arguments about that evidence. The reference to the analogies with fictional characters occurred towards the beginning of the address, which in transcript form occupies about 19 pages. At the beginning of the trial judge's summing up to the jury, the trial judge exhorted the jury to determine upon the evidence whether the appellant was guilty or not guilty of the charges. Many of the conventional directions given by the trial judge effectively repeated that exhortation. In those circumstances, there is no real prospect that the jury might have determined their verdict otherwise

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20 Transcript 27 November 2015 at p 3.

than upon the evidence. The appellant was not prejudiced by the prosecutor's analogies with fictional characters. This argument also should not be accepted.

Proposed order

[37] I would dismiss the appeal.

[38] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[39] **McMURDO JA:** I agree with Fraser JA.