SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bulloch* [2003] QCA 578
PARTIES:	**R** **v** **BULLOCH, Scott Duncan Robert John** (appellant/applicant)
FILE NO/S:	CA No 299 of 2003 DC No 2128 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Bowen
DELIVERED ON:	24 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2003
JUDGES:	McMurdo P, Davies and Williams JJA Separate reasons for judgment of each member of the Court, McMurdo P and Davies JA concurring as to the orders made, Williams JA dissenting
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - EVIDENCE - CONFESSIONS AND ADMISSIONS - GENERALLY - where appellant convicted of stealing as a servant - where audio tape tendered into evidence by prosecution - whether jury misled by the extracts of tape - whether verdict unsafe and unsatisfactory CRIMINAL LAW - APPEAL AND NEW TRIAL - MISCARRIAGE OF JUSTICE - whether verdict of guilty amounts to a miscarriage of justice CRIMINAL LAW - JUDGMENT AND PUNISHMENT - SENTENCE - where appellant sentenced to three years imprisonment - whether sentence manifestly excessive *M v The Queen* (1994) 181 CLR 487, followed *R v Ma'afu* [1991] CCA 020; CA No 269 of 1990, 28 February 1991, distinguished *R v Scott* [1997] QCA 300; CA No 164 of 1997, 21 July 1997, distinguished *TJKW v R* (2002) 76 ALJR 1579, followed

COUNSEL: The appellant/applicant appeared on his own behalf
D A Holliday for the respondent

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

[1] **McMURDO P:** The appellant was convicted of stealing as a servant a sum of money in excess of $5,000 on a date unknown between 7 May 2001 and 26 June 2001. He was sentenced to three years imprisonment. He appeals against his conviction and seeks leave to appeal against his sentence.

The appeal against conviction

[2] The appellant, who appears for himself in this appeal, contends that the trial judge erred in allowing the jury to hear only extracts of the audio tape which was tendered into evidence by the prosecutor and that the jury was misled by the extracts taken out of context. He also contends that the verdict is unsafe and unsatisfactory and against the weight of the evidence and has made some complaints about his barrister's conduct of the case. The second ground of appeal requires a review of the evidence and it is sensible to commence with this.

(a) The facts

[3] The appellant was employed by the complainant company as a security officer, sometimes delivering and picking up cash in an armoured vehicle with others. A bag called a replenishment bag containing $40,000 in cash was kept in the complainant company's armoured vehicle so that security could replenish empty automatic teller machines. The bag was locked by a zip with a metal catch covered with a numbered plastic seal which could be used once only. After the $40,000 was placed in the bag, the bag was zipped and secured with the metal catch and plastic seal and the bag could not be reopened without breaking the plastic seal. When an automatic teller machine was replenished, a security officer would break the seal, remove the money and refill the ATM. This procedure would be noted, recorded and observed by another officer. The bag would then be taken back to the complainant company and the responsible person would note the funds used and check this against the money in the bag. The amount in the bag would again be made up to $40,000, placed in the replenishment bag, the zip covered with a new numbered plastic seal, and the bag returned to the armoured vehicle. The only time a check was made on the contents of the bag was when an automatic teller machine was to be filled with cash from it. The bag would often remain in secure custody in the armoured van with the seal intact throughout an entire shift. At the end of the shift the bag was taken to the complainant company's dispatcher where the seal was checked by a security officer to ensure it was still intact; the bag was then secured in a vault until taken out on another shift. Weeks could pass without the bag being opened and its contents checked; if the seal appeared to be in tact when checked at the end of each shift, it was assumed that the $40,000 was still in the bag. The system only provided for checking the contents if the bag had been opened to replenish an ATM or if the seal did not appear to be intact.

[4] There were three security officers, a driver, a guard and a messenger in each armoured vehicle. The messenger was in charge of the driver and guard with custody of the vault key and was responsible for signing for all money handled by the crew. The guard and the messenger made the deliveries and did the pickups

from the banks and other institutions. The messenger remained locked in the armoured vehicle when the guard and the driver left for a short meal break of about eight minutes.

[5] On 26 June 2001, an employee of the complainant company taking delivery of the replenishment bag at the end of a shift noticed something odd about the plastic seal and on closer inspection saw that it had been broken, that the $40,000 had been removed and replaced with National Bank books of approximately the same size as the bundle of money and that the broken seal had been resealed with glue.

[6] The prosecution case was that on one occasion between when the money was placed in the replenishment bag and sealed on 9 May 2001 and 26 June 2001, the appellant was assigned to an armoured vehicle as a messenger and stole the $40,000 from the bag whilst left alone in the armoured vehicle during the guard and driver's meal break.

[7] About four or five messengers, including the appellant, were messengers employed by the complainant company during the relevant period and had a similar opportunity to steal the money. The number of potential suspects grew if the thief did not act alone. The appellant's work roster indicates that the only opportunity he had to take money from the bag was between 22 May 2001 and 25 May 2001 and that on 24 May 2001 he was a messenger in an armoured vehicle. Although not particularised as such, the prosecution case was effectively that the appellant committed the offence whilst a messenger on 24 May 2001.

[8] There was divergent evidence as to whether a messenger acting alone had the opportunity to steal the replenishment money. There were two types of armoured vehicles in use by the complainant company at the time; in both, the vault was at the rear and the messenger had custody of the key to open it.

[9] Mr Shaun Hogan, the operations manager for the complainant company, described the complainant company's policy of dual control which was designed to ensure that no one staff member was left alone with access to cash. He explained the complainant company had five vehicles and five ATM replenishment bags in the system at one time; there were no set vehicles for set runs; the messenger had sole custody of the vehicle vault key. Some vehicles had:

> "… an interlocking system whereby the messenger may require access to the vault, the driver would have to push a button and the driver would have to put a key into the door and turn the key also and that would release the door. … From memory he would have - he would have been in vehicles that would require the driver to also push the button, and also he could just open the door with his key.
>
> I see. There wasn't any policy in place that there had to be someone else physically present when he opened the vault? -- No. The messenger's, yeah, got sole responsibility for it.
>
> What sort of system was there in relation to meal breaks or things of that nature? -- During meal breaks there must always be one person remains on the vehicle at all times. Okay? If for instance the driver and the guard were to exit the vehicle to go to the toilet, go get a drink, go get a pie, whatever they may be doing, they cannot re-enter

> the truck without the messenger's key. So if the messenger remained on board he would give the driver or the guard his key and they would exit the truck and go and do - go and have their break as such."[1]

[10] In cross-examination Mr Hogan said that some of the vehicles have an interlocking system with a driver's release button in a panel above the driver's head. He was asked:

> "So in order to unlock the truck vault there has to be the driver release button hit and key has to go in and that's all got to be done within a second or so. Is that right? -- Yeah, five or so seconds. There's a bit of – there's two releases on the door. Once one is pushed, that releases. If you put the key in, it will release.
>
> Is it less than five seconds or do you not know? -- Well, with the twin locks you can put one key in, turn it, take the key out, get the other key, put it in and turn it and the door will release.
>
> I am asking you only about the driver release system together with the key? -- Yes. There is – it's not a system where you have to – bang, do it at the same time.
>
> No? -- There is a bit of a time lag in it.
>
> But what I'm suggesting to you is it's something less than five seconds, though? -- Yeah, I don't know the exact time.
>
> So if a messenger were left by themselves in the truck they'd have to – and assuming it's one of these systems, it's a press on the button and go to the back then put your key in and then the vault will unlock. Is that correct? -- Correct.
>
> You mentioned just before that there might be two keys? -- I was referring to different doors. There's different doors within the truck. The entry door is different to the vault door is different to the cabin door.
>
> How many people in a crew have keys to the truck vault? -- One.
>
> That's just the messenger? -- Correct.
>
> You told us before that sometimes if a driver and a guard would go out for their meal break or what-have-you, the messenger would stay by themselves? – Yes.
>
> The truck has to be occupied by someone at all given times, doesn't it? -- Correct.
>
> … Now the keys are left with the messenger. The driver leaves his key as does the guard. Is that right? -- Each are issued keys,

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1 Appeal book, 18.

> whether the driver, the guard and the messenger. If the messenger is remaining in the truck while the other two go outside for their meal break or go to the toilet, the messenger is required to hand his key to the other crew. That will enable them to get back into the truck.
>
> So the messenger gives his key – does that open the side door, does it? – It's part of the keys that open the side door, yes.
>
> And that's part of [the complainant company's] standard procedure, is it? – Yes.
>
> That the messenger gives his key to either the driver or the guard if they want to be outside? – If the messenger is going to remain on the vehicle on his own, yes.
>
> That's part of – I know I've asked you this before. That's part of ----? -- The procedure.
>
> ------- the standard procedure that appears in the [complainant company's] standard operations manual, does it? -- Yes, it would."[2]

[11] In re-examination, Mr Hogan was asked which key the messenger gave to the driver or guard. He said:

> "… The key – the messenger is only issued one key, which is the vault key, as such. The locks within the vehicle are keyed similarly on the entry door as to the vault door. But there is two locking mechanisms on the entry door, Okay. As our procedures state that one person must remain with the vehicle at all times, if the messenger is to remain and the guard and the driver are to exit, the messenger is to give him – give the guard or the driver his messenger key, that then will allow them access back into the vehicle as he has to be locked in the front compartment of the truck. The guard or the driver then approach the door, they put the key – the messenger's key into the door, turn the key, the messenger will then push the button in the driver's compartment which releases the door which will allow them entry."[3]

[12] Mr Martin Vermeeren was employed as a truck driver/guard/messenger for the complainant company during the relevant period and was the messenger on the shift immediately preceding the discovery of the loss of the replenishment money. As a messenger, he was responsible for assisting the driver and the guard to load the vault at the back of the vehicle with the money bags and to lock the vault. Throughout the shift, the messenger was the only person with access to the back of the truck where the vault is. The exterior doors to the vault would stay closed throughout the shift. There is an interior door into the vault secured with a key held by the messenger on that shift. Some vehicles have a second lock where the driver has to push a button in conjunction with the messenger's key to open the interior door but not all vehicles had this system. In cross-examination, he explained the interlocking system further:

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2 Appeal book, 31-33.

3 Appeal book, 38.

> "… What's required to open up the interior door to the vault in the trucks, you have to have the key in the lock and turned and then the driver pushes the button which releases the second lock and then the door opens by itself.
>
> How soon must the driver hit the driver release button before the second lock will unlock? -- As soon as he presses the button, the second lock unlocks. The first lock is done by the key."[4]

He said that the system was that one person at all times would stay inside the vehicle:

> "… The keys to the truck stay in the engine as the engine is constantly running. The messenger's key stays in the vault with the messenger. At the time when I was working there we only had the procedure where one person had to stay in the vehicle at all times. With the trucks with the dual locks, the button for the second lock is just above the driver's wheel above the windscreen which is a fair distance away from the interior door to the vault.
>
> When you say a fair distance, how far are we talking? – Easily two metres around the centre console. We've got interior bulkhead doors."

He explained that the driver and guard sit in the front compartment; the messenger sits in the middle compartment with a doorway between those two compartments. When he worked for the complainant company, up until September 2001, the messenger was not allowed to give the messenger's key to anybody else; the messenger was sometimes left alone in the truck during the lunch break. He explained that to get into the truck two keys were needed but the truck could be opened from the inside with the handle to exit the exterior door.

[13] After the money was discovered, many staff, including Mr Vermeeren, joked for several weeks afterwards about how they had spent the money, although the banter and jokes about stealing the money did not include detailed accounts of how the offence had been perpetrated. He was friendly with the appellant and assisted him by paying for about $4,000 to repair the appellant's Jaguar motor vehicle on his credit card. The appellant repaid him in small amounts; by the time he finished working at the complainant company in September 2001 the appellant had repaid about $500.

[14] Security officer Mr Nicholas Paul who was employed by the complainant company for four and a half years, including during the relevant period, said that the messenger was not allowed to be in the back of the truck in the vault area alone; there had to be someone with him. He was asked how a messenger could enter the vault:

> "… Well, it is very hard in some of the trucks because they are electronic. You need a driver to push the buttons and all the doors have to be shut. Some of the older trucks we have have got the different key.

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[4] Appeal book, 48.

> In those older trucks did that necessitate the driver doing anything in addition to the messenger? -- No, no.
>
> Using a key? -- The messenger could just put the key in and open the door."[5]

[15] In cross-examination, he agreed that there always had to be somebody in the truck and if the driver and guard went on a lunch break leaving the messenger, the messenger would sit in the middle compartment of the vehicle but the messenger is not allowed to stay in the truck by himself if he has the keys to the vault. Normally he gives the keys to the guard or the driver if they step out.

[16] The evidence as to whether the appellant had an opportunity to commit the offence was not clear and unequivocal. Mr Hogan's evidence suggests that the appellant was probably a messenger in an interlocking vehicle requiring both a key to be turned in the vault and the release button near the driver's seat to be pushed before the vault could be opened. Mr Hogan and Mr Paul both said that the standard procedure was that the messenger was not left alone in the vehicle with the key to the vault; that is also the procedure recorded in the complainant company's manual. On the other hand, Mr Vermeeren's evidence was that the messenger always kept possession of the vault key when locked in the vehicle alone. If the jury accepted Mr Vermeeren's evidence and rejected that of Mr Hogan and Mr Paul, there was evidence of an opportunity for the appellant to have committed the offence, even in the interlocking vehicle, although he would have had to turn the key in the vault and move two metres through another door to push the release button near the driver's seat within about five seconds in order to open the vault.

[17] The critical evidence in the case against the appellant was that of fellow security officer, Colin Tunney. He said that on 23 May 2001, when he was rostered to work in an armoured vehicle with the appellant and another security officer, Mr Boston, the appellant asked him, in the absence of Mr Boston, whether he had ever thought of a way of stealing the cash; he had a perfect way which did not put the blame on any person. The appellant said that the person checking the seals did not do so carefully before putting them in the vault; the appellant could open the bag without detection, replace the money in the bag with bank books of about the same size as the money and superglue the seal back in place. Mr Tunney said the appellant told him he would do this when he was the messenger and the driver and guard went for a meal; he had timed people and estimated he would have enough time to make the switch. The appellant told Tunney that he would take two personal carry bags to work that day; after the switch, he would put the bag with the stolen cash on the handlebars of his pushbike and leave the other in his possession just in case there was a random bag inspection at the end of the shift. The appellant said he had an investment adviser who could invest the money for him. The appellant then had two week's leave commencing the following weekend.

[18] Mr Tunney said he did not take the conversation seriously until he learned that $40,000 had gone missing on 26 June 2001. He then spoke to police who provided him with a digital recorder taped inside his work bag. He was rostered to work with the appellant on 20 July. Whilst he was in the vehicle he recorded their conversation. That recording is very poor quality with a great deal of background

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5 Appeal book, 62.

noise; it is extremely difficult to understand the conversation. A transcript has been prepared and I have checked the relevant portions of the transcript against the tape. It records an exchange between Mr Tunney and the appellant in which they discuss the missing money. The pertinent conversation commences with the appellant speaking of the thief in the third person and he discusses with Tunney who may have been responsible and how the theft was carried out. The conversation is interspersed with much laughter and is generally jocular rather than conspiratorial in tone. I was able to make out the following:

> "Appellant: Yeah. So they risked it for 40,000. As I look at it [indistinct] one night's work, 40 grand loose cash. Get some groceries, pay the rent, a few presents.
>
> Tunney: Wheels.
>
> Appellant: Wheels. Tyres, sports exhaust systems, fuck's sake. Bit ballsy doing that, isn't it?
>
> Tunney: Yeah.
>
> Appellant: Unless you pay for them cash [indistinct]
>
> Tunney: Yep.
>
> Appellant: That's the beauty of it. Quite impressed myself actually. [indistinct]
>
> Tunney: Heart didn't skip a beat?
>
> Appellant: Oh, I think it would have. I think when they were handing that container in, they must have been, fucking heart must have been goin' … like that. Must have been. Yeah, and as soon as he opened that container [indistinct] fucking [indistinct].
>
> Tunney: Yeah.
>
> Appellant: [indistinct] fuck. Reckon the people that are pissed off are pissed off because they never did it."

[19] They then discussed the investigation and Tunney said that police were questioning people at private residences. The conversation continued:

> "Appellant: I think it was the day or two days after there, maybe even the same day, the day after, you were outside in the – in the vault area and, ah, the turret area standing between the three doors and I just caught your eye through there and you fucking caught mine and I fucking saw this look, this fucking --- (laughter).
>
> Tunney: See you'd only just come back from fucking two weeks off?
>
> Appellant: Yeah.
>
> Tunney: [indistinct] I was planning on doing two or three …

Appellant: Yeah.

Tunney: Oh, well. Can't be greedy.

Appellant: That's right. (laughter)

Tunney: Quality of life changed. Has it? (laughter)

Appellant: Yes. Probably long term more than short term though.

Tunney: Yeah."

They then discussed the appellant's new car, wheels and exhaust and how he got a discount for cash. The following exchange then occurred:

"Tunney: The old cash comes in handy.

Appellant: Oh, it does.

Tunney: Fucking big balls.

Appellant: Very big. (laughter) But I can tell you they also shrank as well.

Tunney: They shrink for two weeks, did they?

Appellant: Oh, fuck's sake. Even trying to get back in fucking vehicle.

Tunney: Yeah.

Appellant: The colour, the blue thing, sitting in a truck, the trauma. And that's what they've been waiting on too, watching, watching for somebody fuck up. Panic. Do what the other guy did, fucking run.

Tunney: Mmm.

Appellant: But the night that I went back in, and sat on the table, it normally goes … duh … duh … duh … and – and this night --------

Tunney: Yeah?

Appellant: ---------- the night I went back in, I go …
(laughter)
I was just ready for the old matrix shit happens.

Tunney: Who was that? Peter?

Appellant: Nick.

Tunney: Oh the Poukakis.

Appellant: Yeah. Picked it up and went and he's half blind.

Tunney: Yeah. [indistinct] Threw it over his shoulder.

Appellant: [indictinct]

Appellant: The old random bag search in the bag it was.
Tunney: Did you do the two bag thing like you said?

Appellant: No, I just did one. [indistinct]

Tunney: [indistinct].

Appellant: Yeah.

Tunney: (laughter) lunch box [indistinct].

Appellant: The risk was high.

Tunney: [indistinct] Still is.

Appellant: Still is. Any time they could drop in.

Tunney: [indistinct]

Appellant: Yeah.

Tunney: How careful were you while you were putting (placing?) the paper in [indistinct].

Appellant: Oh, not stupid, no [indistinct]. was wearing gloves first and gloves [indistinct].

Tunney: What about when you picked them up out of the branches?

Appellant: No, that was all after I picked it up [indistinct] gloves. It was all wiped down with alcohol [indistinct].

Tunney: Mmm.

Appellant: I think the other thing too is [indistinct] that resin that was used [indistinct]. Spill in the truck it's a dodgy one.

Tunney: Yeah [indistinct]

Appellant: Well, the superglue like give you [indistinct] fucking smell.

Tunney: Yeah.

Appellant: [indistinct] like that straight alcohol.

Tunney: Oh, Okay. You would have had the old deodorant out.

Appellant: Yeah.

Tunney: …

Appellant: Yeah, the aftershave I had on that night was fairly heavy.

Tunney: … just to stop the perspiring.

Appellant: Oh.

Tunney: And then you go and fuck up with that coin.

Appellant: That's deliberate.

Tunney: (laughter)

Appellant: [indistinct] I needed them to terminate me.

Tunney: So what are you waiting for?

Appellant: Um, all I have to do is one fuck up and I'm out.

Tunney: Yeah.

Appellant: And that's probably something I [indistinct]

Tunney: Someone said that you, ah – you've had a couple of finals …

Appellant: No, just the one.

Tunney: That's what I thought.

Appellant: Yeah, just the one. All for the same thing.

Tunney: Yeah.

Appellant: But that final one was a [indistinct] Sean said to me, 'You're on fucking thin ice and the ice is has actually got a big crack and a hole in it and you're just walking around [indistinct]. So look if you fart in the smoko room and I find out, you'll be fucking gone.'

Tunney: Got a redundancy package.

Appellant: Yep. Got another job lined up [indistinct] I reckon [indistinct] at least another three to six months. [indistinct]

Tunney: Yeah.

Appellant: [Indistinct]. Stop too soon. And, there's been a few comments, you know, how the fucks he got cash for that? But it's a bit too blasé [indistinct] fucking the minute you do that [indistinct], would you? That's too blasé. You need the fucking cash. But I also made a decision Col, I'll do the time. I don't like it and I'm not happy about it but I'll do it. I'll do the time.
(pause)

Tunney: Yeah. Off load it to your mate?

Appellant: Yeah. It's all gone. All gone.

Tunney: How much is left?

Appellant: [Indistinct]

Tunney: [Indistinct]

Appellant: I just want it all there for the future.

Tunney: Yeah.

Appellant: [Indistinct]

Tunney: In some shares or [indistinct]?

Appellant: I don't actually know where it is, I just know that [Indistinct].

Tunney: [Indistinct] or something.

Appellant: Mmm. He's in investments and portfolios and stuff.

Tunney: Yeah. [indistinct]

Appellant: Oh, it's big business.

Tunney: Mmm.

Appellant: I couldn't believe it when he brought his computer up to me and he showed me what he did. He, um, chose not to buy a house, he chose to rent.

Tunney: Mmm.

Appellant: By renting he saved on mortgage principal repayments, insurances and maintenance.

Tunney: Yep.

> Appellant: He saved between eight and $10,000 every year. Invested that in the short-term stock marked and he's made, over a five year period, 47,000. That's not bad. Not bad for five years."

[20] They then discussed how other money had disappeared from the company and nobody had been caught. The appellant added:

> "Still ride my bike, rent's overdue, still [indistinct] got 10,000 in school fees due that's not been paid. … Oh, I would but [indistinct]. You've got the justify it. So I'll wait for my settlement comes in."

[21] They then discussed unrelated matters, returning to discuss matters connected to the offence and other offences committed against the complainant company but not in any way that implicated the appellant. The following conversation may have some relevance:

> Appellant: So have you heard anything, and tell me if anyone's said [indistinct] fucking [indistinct].
>
> Tunney: [Indistinct]
>
> Appellant: [Indistinct]
>
> Tunney: Yeah, [indistinct] …
>
> Appellant: … Yeah, well I heard too that there was someone [indistinct].
>
> Tunney: Yeah, I heard that. Yeah, that's [indistinct] yeah, well I believe that's only a rumour.
>
> Appellant: Oh. [Indistinct]
>
> Tunney: [Indistinct] I didn't want to shaft [indistinct]
>
> Appellant: Shafted with what?
>
> Tunney: [Indistinct]
>
> Appellant: [Indistinct] Yeah.
>
> Tunney: But nothing ever come up [indistinct].
>
> Appellant: They couldn't prove it. See the way I look at [indistinct] fucking [indistinct] straight away and straight into that. Even just [indistinct] on 'em straight away. 'Cause that's when you're [indistinct] 'cause as time goes on, whoever's did it they get used to the idea [indistinct]. I guess too, the other one too that comes to mind is this one, [indistinct] if they do say [indistinct] we think that it was you because you were the person who handled the bag on this day and we [indistinct] scientific and forensics say that they believe the bag [indistinct] superglue and it was four weeks old and you were the person around about that time that handled it. Well after

> [indistinct] say that [indistinct] I can see your point but handed that bag back in and the seal was [indistinct]. Who's to say the guy and the fucking supervisor didn't do it that night.
>
> Tunney: Mmm.
>
> Appellant: Who's to say the guy in the [indistinct] didn't do it? [Indistinct]."

The telephone rang. A little later after some indistinct conversation, the appellant said:

> "Yeah. The only person that knows for sure.
>
> Tunney: … So you didn't tell anyone else about [indistinct] 'cause, ah, he sort of was quite adamant. He says, 'I have my suspicions.' [Indistinct] she said, 'I didn't think anyone was smart enough to do it or was gutsy enough,' or had big enough balls or something. So Arthur was up her. 'What are you saying? We're all dumb and we've go no balls.' … As he does.
>
> Appellant: Just she mentioned anybody?
>
> Tunney: No, she wouldn't. She wouldn't disclose names. But she – she … she had the [indistinct] way about through the bloody [indistinct].
>
> Appellant: Oh, yeah.
>
> Tunney: [indistinct] talking about, she [indistinct] happen.
>
> Appellant: [Indistinct] you and me [indistinct]. That's why [indistinct] never discussed [indistinct]. Well I guess it would be – if she'd discussed it with [indistinct]. Hang on a sec. You fucking discussed [indistinct] you fucking let it [indistinct] who knows. As soon as you talk to yourself [indistinct] could be classed as an accessory.
>
> Tunney: Yeah [Indistinct]
>
> Appellant: That's why [indistinct] talking [indistinct] person [indistinct] you could ignore the person you did it with. A lot of people [indistinct] a guy gets stupid [indistinct] casino. See a lot of people [indistinct] a lot of people [indistinct] if you [indistinct] casino [indistinct] 10 grand and change that in chips, they'll have you on camera. 'Watch this guy. Who's this guy?' You might see somebody just throwing money, throwing money away at the tables [indistinct] 'Who's this guy? He's just fucking lost 5 grand.' "

The conversation continued about casinos and other matters. The appellant then added:

> "[Indistinct]. I tell you though, in hindsight, you know [indistinct] you know why? Fucking [indistinct]. Chips away at you every day

> [indistinct]. The threat and the feeling of someone fucking [indistinct] know what I mean?
>
> Tunney: Yeah.
>
> Appellant: [Indistinct] and that wouldn't matter, just fucking 20 million [indistinct] I think the more – the more the fucking [indistinct] you know what I mean? It's just [indistinct].
>
> Tunney: Yeah.
>
> Appellant: I look at my grand-daughter and I think [indistinct] ---
>
> Tunney: The second [indistinct] not working [indistinct].
>
> Appellant: That's right. That's right. And I look at my grand-daughter and I think if you fucking go to gaol I'll never see her again. [indistinct]"

[22] The appellant received warnings from his employer about his standard of work on 19 January 2001, 20 April 2001 and a final letter of warning on 25 May 2001.

[23] Tunney gave evidence about the recorded conversation, much of which was indistinct. He said that the appellant boasted of stealing the money wearing first aid gloves;[6] he said he wiped the bank books used to replace the money with alcohol;[7] he said he sprayed alcohol and deodorant to try and disperse the smell of the glue fumes. He gave the money to an investment advisor, telling him it was part of his divorce settlement. He would not pay off bills and still rode his bike so as not to attract attention. Guilt was chipping away at him. He said he was prepared to do the time in gaol but he was concerned about it.

[24] In cross-examination, Mr Tunney admitted that when the appellant initially spoke on 23 May of committing the theft, he questioned him as to how he might get away with it. Mr Tunney was questioned at some length by the appellant's barrister, who suggested that the conversations in which the appellant admitted stealing the money were only made in jest.

[25] Some fingerprints were found on the bank books placed in the bag to replace the stolen money. These prints did not belong to the appellant and three other employees of the complainant company were also cleared. It does not seem that the fingerprints of all employees, including Mr Tunney, were eliminated.

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

(b) Was the guilty verdict unsafe?

[27] His Honour told the jury that before acting on the tape recorded conversation they would have to be satisfied that any alleged confession or statement was in fact made, that it was truthful and accurate and to consider what those statements, if made by the appellant, prove and what weight they should be given.

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6 Other evidence established that surgical gloves were in the vehicle's first aid kit.

7 The complainant company's security officers carried alcohol to clean card readers.

[28] The learned primary judge gave a detailed summation of the defence case in his directions to the jury. Understandably, the defence case did not concentrate on whether or not the prosecution proved which truck the appellant was in on the night he was said to have stolen the money, but on the crux of the case, this is, whether the prosecution could prove beyond reasonable doubt that the appellant was not just joking in his conversation with Tunney. His Honour explained that the defence case emphasised that after the prosecution claimed the appellant committed this offence, the bag was returned and checked 27 times, including on occasions by Mr Middleton who, on the prosecution case, was someone who was very particular about the seals; the mode of execution of the theft was common knowledge amongst the complainant company's employees by the time Mr Tunney had his conversation with the appellant on 20 July; Mr Tunney was interested in the appellant's jocular plan in May to steal the money and for that reason may be an unreliable and self-interested witness; the overall impression of the taped conversation between the appellant and Tunney on 20 July was of two men joking, perhaps inappropriately, over the loss of $40,000 from the company during which the appellant observed that the offence was not worth it because whoever took the money would end up in jail; another matter demonstrating Mr Tunney's unreliability was that he had added in evidence that the appellant said on 23 May that he would take two bags to commit the offence, yet that detail was not recorded in any of the three statements he gave to police or in his evidence at committal in February 2002.

[29] The prosecution case established that the appellant may have had the opportunity as messenger to commit the offence, even though, as Williams JA points out in his reasons, the guard and driver who worked the shift with the appellant on 24 May 2001 did not give evidence about it. The fingerprint evidence added nothing one way or another. There was a peculiar aspect to Mr Tunney's evidence; had the appellant told him on 23 May that he could commit an offence in the very way this offence was shortly afterwards committed, it seems odd that Mr Tunney did not directly raise this with the appellant in their conversation. The jury were not by any means, however, compelled to reject Mr Tunney's evidence on this or any other basis; it was supported by the tape recorded conversation. In the absence of any evidence providing an innocent explanation of the conversation, it is difficult to understand why the appellant would have made admissions about the offence unless he was responsible and involved. It seems implausible he would have joked about such details. If the jury accepted Mr Tunney's evidence and found that his conversation with the appellant was an admission that the appellant planned and committed the offence, as they were entitled, then the case against the appellant was convincing. After reviewing the evidence, I am not persuaded the verdict of guilty amounts to a miscarriage of justice; it was open on the evidence: *M v The Queen*.[8]

(c) The appellant's complaints about his barrister

[30] The appellant has made unsworn complaints of a general nature about his barrister which, when examined, seem to amount to nothing more than a claim that his defence was inadequate because he was found guilty after this trial when, on his previous trial (with the same defence counsel), the jury could not reach a verdict. The appellant has not demonstrated that any miscarriage of justice has occurred as a result of his counsel's conduct of the case within the principles discussed in *TJKW v R*.[9]

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8 (1994) 181 CLR 487, 494-5.

9 (2002) 76 ALJR 1579, [13]-[17], [107]-[112].

[31] These contentions, never formulated into a ground of appeal, are unsubstantiated.

(d) The playing of the tape recording

[32] Mr Tunney's electronically recorded conversation with the appellant took place over their eight hour shift. The appellant contends that at his first trial, when the jury was unable to reach a verdict, the full eight hours of tapes were played and he contends that the failure to pay the eight hours of tape in this trial is one reason why the jury has wrongly convicted him.

[33] That contention is wrong. The prosecution tendered one audio tape which recorded two hours of conversation including the relevant portions relied on by the prosecution. The tape was tendered without objection through the witness Tunney; there was no application by any party to tender or play the eight hours of tape recording, either at this trial or at the appellant's earlier trial. After the portions of the tape relied on by the prosecution were played in this trial, the prosecutor indicated that there was nothing else on the tape relied upon as incriminating. The appellant's counsel, after considering his position over the morning adjournment, informed the court that there was nothing further on the tape he required to be played to the jury. The appellant's barrister cross-examined Mr Tunney about the relevant conversation. The appellant's counsel, presumably on instructions after discussing the matter with the appellant, chose not to have the full two hours of tape played to the jury. The appellant cannot now fairly complain about that tactical decision. In any case, it is difficult to see how playing the eight hours of tape could have assisted the appellant's case; the portion of the tendered recording demonstrated the jocular nature of much of the conversation.

[34] It follows that the appeal against conviction should be dismissed.

The application for leave to appeal against sentence

[35] The applicant's submission on sentence was simply that if this Court could not acquit him, it should at least reduce his sentence. He has not put forward any argument to demonstrate that the sentence is excessive.

[36] The applicant was a mature man, 42 years old at sentence and 40 at the time of the offence. He showed no remorse and did not have the mitigating factor of an early plea of guilty or cooperation with the criminal justice system. The offence was carefully planned and was a shocking breach of trust committed by a security officer upon his employer. An offence like this is not easy to prove and a salutary deterrent sentence is required for this offender and others who might be so tempted. The sentence imposed of three years imprisonment was appropriate and cannot be said to be manifestly excessive: cf *R v Ma'afu*;[10] *R v Scott*;[11] *R v Rees*;[12] *R v Phipps*[13] and *R v Peters*.[14]

[37] The application for leave to appeal against sentence should be refused. I would make the following orders:

1. Appeal against conviction dismissed.

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10 [1991] CCA 020; CA No 269 of 1990, 28 February 1991.
11 [1997] QCA 300; CA No 164 of 1997, 21 July 1997.
12 [2002] QCA 469; CA No 205 of 2002, 4 November 2002.
13 CA No 780 of 1990, 6 June 1990.
14 [1989] CCA 096; CA No 67 of 1989, 16 May 1989.

2. Application for leave to appeal against sentence refused.

[38] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of the President and of Justice Williams. The facts relevant to this appeal are fully set out in their Honours judgments and I am content to rely on those statements of facts in expressing these reasons.

[39] The only substantial ground of appeal against conviction was that the verdict was unsafe and unsatisfactory. It depended on the jury's acceptance of the evidence of Tunney supported as it was to some extent by a tape recording of conversations between the appellant and Tunney on 20 July which was, in parts, unintelligible.

[40] As Justice Williams has pointed out there were a number of weaknesses in the Crown case as he has explained. However, on one view of the evidence, the appellant could have stolen the money in the way in which the jury were asked to infer he did from the evidence of Tunney and the tape recording. The critical question is whether it was unreasonable of the jury to accept the evidence of Tunney supported as it was in a number of respects by the tape recording.

[41] Tunney had two relevant conversations with the appellant. The first of these was on 23 May 2001, the day before the robbery, and the second was, as I have mentioned, on 20 July. There are, it seems to me, two significant aspects of the earlier of these conversations. In this, according to Tunney, the appellant told him that he had a perfect way of stealing the money and elaborated on the method which he would use.

[42] The first significant aspect of this conversation is that certainly in one respect and possibly in others the robbery which was perpetrated was perpetrated in the same manner as that in which the appellant described in this conversation. The money in the bag was in fact replaced with bank books of about the same size and super glue or something similar seems to have been used to reseal the bag.

[43] The second significant aspect of this conversation emerges after comparing it with part of the tape recorded conversation. In this conversation, according to Tunney, the appellant told him that he would take two personal carry bags to work that day and, after the robbery he would put the one containing the money in the carry bag on his push bike and the other keep in case of a random search. In the recorded conversation on 20 July the following exchange occurred:

"Tunney: Did you do the two bag thing like you said?
Appellant: No, I just did one. [indistinct]
Tunney: [indistinct]
Appellant: Yeah.
Tunney: [laughter] Lunch box [indistinct].
Appellant: The risk was high.
Tunney: [indistinct] still is.
Appellant: Still is. Any time they could drop in.
Tunney: [indistinct]
Appellant: Yeah."

[44] The recorded conversation, it seems to me, is a reference back to the earlier conversation to which I have just referred. And if that is so, it is plainly a description by the appellant of how he perpetrated the robbery, in one respect differently from the way in which he had described his perfect crime on 23 May.

[45] As has already been mentioned in the other reasons for judgment, the recorded conversation of 20 July extended over eight hours and, by agreement, only two hours of the tape recording, deemed relevant to the offence, were before the jury. Tunney also gave evidence about this conversation and his evidence remained uncontradicted.

[46] In the conversation, according to Tunney, the appellant told him that he stole the money using first aid gloves and that he had used alcohol to wipe the bank books and deodorant to conceal the smell of the glue and the alcohol. In the tape recording the appellant alternates from time to time between the third and first persons in describing the robbery. But in some quite long passages he is plainly speaking in the first person. The following is an example:

"Tunney: The old cash comes in handy.
Appellant: Oh, it does.
Tunney: Fucking big balls.
Appellant: Very big [laughter]. But I can tell you they also shrank as well.
Tunney: They shrink for two weeks, did they?
[The appellant had gone on leave for two weeks after the robbery]
Appellant: Oh, fucks sake. Even trying to get back in fucking vehicle.
Tunney: Yeah.
Appellant: The colour, the blue thing, sitting in a truck, the trauma. And that's what they've been waiting on too, watching, waiting for somebody to fuck up. Panic. Do what the other guy did, fucking run.
Tunney: Mmmm.
Appellant: But the night that I went back in, and sat on the table, it normally goes … duh … duh … duh … and - and this night -
Tunney: Yeah?
Appellant: The night I went back in, I go ..
[laughter]
I was just ready for the old matrix shit happens.
Tunney: Who was that? Peter?
Appellant: Nick.
Tunney: Oh the Poukakis.
Appellant: Yeah. Picked it up and went and he's half blind.
Tunney: Yeah. [indistinct] threw it over his shoulder.
Appellant: [indistinct] the old random bag search in the bag it was."

A little later the following exchange occurred:

"Tunney: How careful were you while you were putting (placing?) the paper in [indistinct].
Appellant: Oh, not stupid, no [indistinct]. Was wearing gloves first and gloves [indistinct].
Tunney: What about when you picked them up out of the branches?
Appellant: No, that was all after I picked it up [indistinct] gloves. It was all wiped down with alcohol [indistinct]."

[47] And a little later:

"Tunney: Oh, okay. You would have had the old deodorant out.
Appellant: Yeah.
Tunney: Yeah.
Appellant: Yeah, the after shave I had on that night was fairly heavy."

[48] It is true that part of this conversation occurred in a jocular fashion. But the jury were nevertheless entitled, in my view, to accept it as showing that the appellant had deliberately committed the crime in the way in which he described it. It also appeared that the appellant had committed some earlier work infringements and that, after the commission of this offence, he committed another. He explained this to Tunney as being because:

"I needed them to terminate me."

[49] And finally there is the recorded statement by the appellant to the following effect:

"But I also made a decision Col, I'll do the time. I don't like it and I'm not happy about it but I'll do it. I'll do the time."

[50] If the jury were entitled to accept the evidence of Tunney supported as it seemed to be by at least part of the recorded conversation, as I think they were, then the verdict was not unreasonable. And it must be recalled that the appellant's apparently confessional evidence was uncontradicted. For those reasons, in my opinion, the appeal against conviction must be dismissed.

[51] There was nothing in the appeal against sentence. I agree for the reasons given by the President that it also should be dismissed.

[52] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of the President and I will not repeat matters of fact stated therein. Those reasons indicate in broad terms the circumstances in which the appellant was charged with and convicted of the offence of stealing as a servant. There are, in addition to what is set out in the reasons for judgment of the President, some matters of evidence which, in my view, are of critical importance in determining whether or not the conviction must be regarded as unsafe and unsatisfactory.

[53] As the President points out in her reasons, although the charge was not particularised as such, the prosecution case was essentially that the appellant committed the offence whilst a messenger on 24 May 2001. The indictment alleged that the offence occurred on a date unknown between 7 May and 26 June 2001. The evidence established that the replenishment bag in question was filled with money and sealed on 9 May 2001. The seal was not observed to be broken until 26 June 2001, the date on which it was ascertained that $40,000 had been stolen from the bag. Each armoured vehicle was crewed by three persons, and it was clear that on the prosecution case the appellant had to be the messenger on the occasion the money was stolen. The rosters admitted into evidence as an exhibit, and the evidence from Hogan, the operations manager for the complainant company, established that the appellant was only the messenger during the relevant period on 22 and 24 May 2001. The roster for 22 May, and the evidence of Hogan, establishes that on 22 May the appellant was the messenger, the driver was one Davis and the guard one Paradies. Again the roster and the evidence of Hogan establishes that on 24 May the appellant was the messenger, the driver Leesa Margaret Surtees, and the guard one Simpson.

[54] Of those four persons with whom the appellant worked on 22 and 24 May only Surtees was called to give evidence. Remarkably she was only asked questions about the shift she worked on 25-26 June; not one single question was asked of her about the shift she worked with the appellant on 24 May when, on the Crown case the theft occurred.

[55] Indeed it is significant, in my view, that virtually all the prosecution evidence called from employees of the complainant company related to general procedure, the filling of the replenishment bag on 9 May, and the finding that the money was missing on 26 June. Because of the evidence given as to general procedure the prosecution case became that the appellant had the opportunity to commit the crime on 24 May when he was left alone in the armoured vehicle whilst his co-employees, Surtees and Simpson, left the vehicle, probably for a meal break. But there is simply no evidence that at any time on 24 May the appellant was left alone in the vehicle. One would have thought that counsel for the prosecution would have asked Surtees something about her movements on 24 May to establish opportunity, if, as became the case, that was the day on which it was alleged the offence was committed. No explanation was given by the prosecution for the failure to call Simpson.

[56] That is not the only major weakness in the prosecution case. There is no evidence as to the type of vehicle Surtees, Simpson and the appellant used on 24 May. At the time there were two types of armoured vehicle in use and it is clear on the evidence that the offence could more readily have been committed in one rather than the other if all proper procedures were followed.

[57] Further, there is an element of conjecture as to the date on which the money was stolen. If it was stolen on or about 24 May then one has to face the fact that the broken and repaired seal was not noticed for about a month, although the bag was checked almost daily during that period.

[58] There are, in my view, other more minor matters which raise a concern about the verdict. Why would the appellant tell his co-worker Tunney on 23 May of his plan to steal the money? One would ordinarily expect that someone devising such a plan would not divulge it, thereby heightening the chances of discovery. If the appellant told Tunney of his plan on 23 May, why did not Tunney say something to the appellant immediately after all employees were made aware of the theft on 26 June? Tunney's evidence, without support from the taped conversation, would hardly be credible.

[59] So far as the taped conversation is concerned it is largely unintelligible. There is a lot of static, a lot of background noise, and only snippets of the conversations are decipherable. The first part of the conversation clearly appears to be discussing the theft on the assumption that someone other than the appellant committed it. Quite a number of the witnesses admitted to the fact that there was such regular discussion amongst employees of the complainant company at that time.

[60] It is of concern that later one can decipher reference to gloves, alcohol, super glue and deodorant; the juxtaposition of the use of those words is certainly suspicious. What does concern me is that in the transcript of the tape which was given to the jury as an aid, the appellant is recorded as saying: "Oh, I'm not stupid. I was wearing gloves first and gloves [indistinct]." Whereas as the President has recorded

(and I agree with her having listened to the tape) that one can only specifically decipher "Oh, not stupid, no [indistinct] was wearing gloves first and gloves [indistinct]." In other words the critical word "I" is not clear on listening to the tape and the jury could well have been influenced more by what was in the transcript than by what they could hear on the tape.

[61] The case is certainly a troubling one. There is much suspicion about the role played by the appellant because of statements he made recorded on the tape. If the conviction were to stand it could only be supported by admissions made in the taped conversation. There is absolutely no evidence positively establishing opportunity for him to commit the offence on 24 May, the date on which the prosecution rely. Surtees was called by the prosecution and not asked a question at all about events on that date. That omission is made more glaring when one notes the emphasis that was placed by the prosecution on calling employees with respect to the finding of the broken seal on 26 June.

[62] Having read all of the evidence, and having in particular listened to the tape, I have come to the conclusion that the evidence was not capable of sustaining a verdict of guilty; I cannot find a clear admission of guilty in the taped conversation. The verdict of the jury must be regarded as unsafe and unsatisfactory. I would therefore allow the appeal and quash the conviction. Given that this was a re-trial after a jury disagreement, and given the failure of the prosecution to produce any evidence as to specific opportunity on 24 May I am of the view that there should be no re-trial.

[63] The orders I would therefore make are:

1. Allow the appeal.
2. Quash the conviction.
3. No re-trial ordered.