SUPREME COURT OF QUEENSLAND

CITATION:	*R v Millar* [2013] QCA 28
PARTIES:	**R** **v** **MILLAR, Andrew John** (appellant/applicant)
FILE NO/S:	CA No 162 of 2012 DC No 858 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	1 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2013
JUDGES:	Chief Justice, White and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Refuse the applications to reopen the evidence.** **2. Dismiss the appeal.** **3. Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of two counts of receiving and two counts of fraud – whether the verdict is unreasonable or cannot be supported having regard to the evidence (*Criminal Code* 1899, s 668E(1)) – whether substance in appellant's complaints, including complaints about the reliability of witnesses' evidence, the trial judge's refusal of adjournment applications, the taking of special verdicts, the conduct of the appellant's legal representatives, the trial judge's refusal of an application to tender documents, and the trial judge's summing up – whether the appeal against conviction should be allowed CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty – whether there was an error in the conduct of the trial or the nature and quality of the evidence – whether the verdict is unsafe – whether there was

a miscarriage of justice – whether the appeal against conviction should be allowed

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where a witness referred to a third person under cross-examination whom the witness had not mentioned in police statement – where trial judge ruled the identity (and testimony) of the third person to be collateral evidence subject to the finality rule – where the appellant wished to have police investigate the identity of third person – whether the application to adduce new evidence should be allowed going only to credit

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where new evidence is inconsistent with evidence at trial – where the new evidence relates to property not the subject of any charge – whether the application to adduce new evidence should be allowed

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of two counts of receiving and two counts of fraud – where a sentence of three years and four months imprisonment for each count to be served concurrently was imposed – where the sentencing judge did not set a parole eligibility date – where the volume of the property the subject of the charges was small – where the applicant had an extensive criminal history for dishonesty – where the applicant had previously been convicted and sentenced for near identical offending – where offending committed whilst the applicant on parole and bail – where applicant did not cooperate in the administration of justice – need for personal deterrence – whether a claim for leniency was open to applicant – whether the application for leave to appeal against sentence should be granted

CRIMINAL LAW – where the verdict and judgment record requires correction to show the appellant's conviction pursuant to s 568(9) – where rule 62(5) of the *Criminal Practice Rules* 1999 permits the proper officer to amend the record if inaccurate – where the proper officer for the Supreme Court is the sheriff, deputy sheriff or registrar (Sch 6, *Criminal Practice Rules* 1999) whether the judgment record requires correction

Criminal Code 1899 (Qld), s 568(9), s 568(10), s 668E(1)
Criminal Practice Rules 1999 (Qld), r 62(5)

Bruce v The Queen (1987) 61 ALJR 603; [1987] HCA 40, considered

Nicholls v The Queen (2005) 219 CLR 196; [2005] HCA 1, cited
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, cited
R v Carroll [2003] QCA 239, considered

COUNSEL: The appellant/applicant appeared on his own behalf
G P Cash for the respondent

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

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of White JA. I agree with the orders proposed by her Honour, and with her Honour's reasons.

[2] **WHITE JA:** The appellant, who appeared for himself, has appealed convictions recorded against him, after a jury trial, on 6 June 2012. He also seeks leave to appeal the sentences imposed on him on that date.

[3] The jury found the appellant not guilty of counts 1 and 4 (breaking and entering premises and stealing) or counts 2 and 5 (receiving tainted property) but returned the verdict of "guilty" to the question "Do you find the accused guilty or not guilty of stealing or receiving but … unable to say which?"[1]; guilty of fraud which related to the property, the subject of counts 1 and 2 and counts 4 and 5. He was found not guilty entirely of entering premises and stealing (count 7) or receiving tainted property (count 8).

[4] In accordance with the provisions of s 568(10)(c) of the *Criminal Code*, the primary judge sentenced the appellant for receiving since it carried the lower maximum penalty of the alternative charges and sentenced him to imprisonment for three years and four months in respect of each count for which he was found guilty.

[5] The appellant's notice of appeal identifies as his ground of appeal the contention that the convictions are against the weight of evidence. Such a ground may be taken to be a complaint pursuant to s 668E(1) of the *Criminal Code*, that the verdict is unreasonable or cannot be supported having regard to the evidence.

[6] The appellant also raised a number of additional complaints in his written outline of submissions. Several of these he developed in some detail in his lengthy oral submissions.

[7] The appellant has filed two applications to adduce new evidence, consideration of which can be deferred until the circumstances of the offences have been considered.

[8] The defence at trial was that it was not the appellant who sold the property, the subject of the receiving counts, to the second-hand dealer. The only evidence implicating him in the theft of the property was his alleged possession of it shortly after the stealing had occurred.

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1 Section 568(9) *Criminal Code.*

Circumstances of offending

Counts 1, 2 and 3 – between 4 and 9 August 2009

[9] Giuseppe Bufalino and his daughter stored property in a garage associated with their unit in a residential complex of nine at Milton. The garages were beneath their unit, which was located on level one. Entry could be gained to the garages off the street. Their unit was in the process of being vacated and no one was living there between 5 and 8 August 2009. On Saturday, 8 August, Mr Bufalino went to the garage and noted that the saddles of the locks locking the garage door had been cut. He had last seen that door on 5 August when the lock was intact. On entry, Mr Bufalino immediately noticed that his daughter's electric keyboard was missing. Two large speakers, an amplifier and about 30 bottles of red wine were also missing. Mr Bufalino closed the garage and reported the theft to police. The theft of this property was the subject of count 1.

[10] About 10 months later, Ms Genevieve Bufalino saw a keyboard in the Record Exchange store in Adelaide Street, Brisbane on 23 June 2010 which she identified from its brand – a Roland RD-150 – and particular marks – vinyl peeled back on the sides – as hers. She did not mention it at the store but told her parents. Ms Bufalino had video footage of a concert at which she had played her keyboard. She re-played the video and was confident it showed that her keyboard had peeled back vinyl in the same places as on the keyboard in the city store. The jury had a photograph of the keyboard and the case, the subject of the charge, and viewed the video. Ms Bufalino returned to the store on 2 July 2010 and on that visit identified a soft case which had belonged to her keyboard. She reported her find to the Police Beat in the city and shortly after examining the keyboard at the police station she confirmed the identification.

[11] Police also retrieved a set of speakers from the store which were identified by Mr Bufalino as those stolen from his garage. In the face of challenge, Mr Bufalino was adamant that they were his speakers because he had used them in a business and had set them up more than a hundred times.

[12] Police removed all items of property from the Adelaide Street store which were recorded in the Second-Hand Dealers Register as having been sold by the appellant.

[13] Richard Van Hart, a licensed second hand dealer, operated the Record Exchange. He also dealt in clothing, posters, guitars and amplifiers and some other goods. Mr Hart had first come to know the appellant when he brought some CDs into the store to sell. He recalled meeting him there some 15 times over the two years prior to 3 July 2010, the date when police took possession of property allegedly deposited there by the appellant. Mr Hart gave evidence that he had initially verified the appellant's identity by reference to a driver's licence and/or an 18 plus card, and, although his evidence is not clear on this, had continued to do so. Subsequently Mr Hart said he "knew" the appellant.

[14] The Second-Hand Dealers Register recorded on 7 August 2009 "Andrew John Miller. 888 Logan Road Holland, Park West, 4121" against the entry concerning the keyboard, the Peavey speakers and a mixer. Under the name was a driver's licence reference number with an expiry date of 11 February 2010 and an 18 plus card reference with an expiry date of 21 October 2008. Mr Hart recalled that it was likely that the appellant had brought in the keyboard to the store the

previous day. Since he wanted to test before purchase he would have asked him to leave it with him. When he had done so and had decided to buy, the appellant signed the Register that he had received $100 for the keyboard and $250 for the speakers and mixer.

[15] The information in respect of the property the subject of the charges was not, in every case, located under the correct heading in the Register, for example, proof of identity was written under the name and address column although there was a separate column for proof of identification. The appellant sought to make much of this somewhat "sloppy" record keeping.

Counts 4, 5 and 6 – between 11 - 12 June 2010

[16] On 11 June 2010 Christopher Park lived in a unit at Norman Park with a garage in which he stored some of his possessions including two guitars – a solid body electric bass Musicman copy OLP, and a semi-acoustic Monterey bass guitar – a guitar stand and case, and a mountain bicycle and helmet. Mr Park went out about 5.00 pm that day and on his later return noticed those items were missing from his garage. He reported the theft to police. Those items of property were the subject of count 4. He was contacted by police on 4 July 2010 and identified as his two guitars which police had seized from Mr Hart's store on 3 July 2010.

[17] There was a particular identifier on one of the guitars - a Cash Converters' sticker on the Monterey guitar. Mr Park had purchased a Monterey guitar from that business and recalled the sticker still being on the instrument. The guitar stand, mountain bike and helmet were not amongst the property recovered.

[18] Mr Hart said he had purchased two guitars from the appellant on 12 June 2010, the day after the theft from Mr Park's garage. He identified the entry in the Second-Hand Dealers Register relating to this transaction as being in his own hand. The appellant's name, address, licence and 18 plus card particulars appear adjacent to the description of the goods. A signature, about which Mr Hart had some hesitation, appears after the words "These 2 Base (sic) Guitars Are Mine To Sell".[2] However, Mr Hart confidently said that the signature appearing after the description of the guitars was the appellant's. Mr Hart paid $215 for the two guitars. He gave some detailed evidence about one of the guitars, no doubt to support his recollection of the transaction, which was plainly erroneous and of which the appellant made much in this court. It will be more convenient to consider that evidence when discussing the appellant's appeal submissions.

Counts 7 and 8: 2 – 3 July 2010

[19] Ms Kieren Brennan last saw her Trek 7.0 silver hybrid bicyle, helmet and bike accessories and surf board in the garage of the unit where she lived at Camp Hill on 1 July 2010. On Saturday, 3 July, when she returned home later in the evening from work she discovered that property was missing from her garage. Ms Brennan identified her bicycle and the other equipment which she had purchased for it at the police station in Adelaide Street. It was property which had been recovered by police from Mr Hart's store. Although there was nothing unique about her bicycle or the saddle bag, which contained a tyre fixing kit and some tyre levers, nonetheless she said that she was able to identify her bike from some scratches on the bell and on the top of the handle bar which were placed there after she had "up-

[2] In Register quoted words are capitalised.

end[ed] it on concrete". While Ms Brennan accepted in cross-examination that she had not mentioned the unique scratches on the bicycle to police, nor could they be seen from the photographs, nonetheless it was not suggested to her that those unique marks were not on the bicycle that was recovered, nor that the bicycle was not hers.

[20] Mr Hart said that he had bought "a few" bicycles from the appellant. He was somewhat unclear about this transaction but recalled that there was no entry about it in the Second-Hand Dealers Register because he had sold his old Hyundai Excel automobile to the appellant for $750. As he remembered, the appellant had given him about $700 in cash and owed him $50. Mr Hart said he believed that the bike was given to him in lieu of the outstanding $50.

[21] The appellant was not convicted of any offence concerning this bicycle.

Summary of Prosecution Case

[22] It was the prosecution case that, having offered the items for sale so close to their theft, the appellant must have been responsible for stealing them or receiving them knowing that they had been stolen. The fraud consisted of the appellant dishonestly receiving payment from Mr Hart for property which he knew was not his to sell.

Contentions on appeal

[23] It is appropriate to consider the stated ground of appeal in the notice of appeal that the verdict is unreasonable and cannot be supported by the evidence after specific complaints have been addressed.

First application to adduce further evidence – "The Sarina Russo girl"

[24] Mr Hart was challenged in cross-examination about the reliability of the entries in his Second-Hand Dealers Register. He conceded that on the occasion of the purchase of the electric keyboard and amplifiers he directed "the girl" to put in their serial numbers just after the appellant had left the store as the appellant had said he was in a hurry. He agreed that he did not mention this third person in his police statement. He was asked about her identity and explained that he took on many unemployed people to give them an opportunity for work experience from that organisation.

[25] The appellant wishes to investigate any possible evidence about this person (or any other person who might have made entries in the Register) and seeks:

> "[A]n order for police to confirm the nonexistence of "the sarina russo girl" given the production of correspondence from Sarina russo group to the applicant."

[26] The appellant contends that since the first time this evidence was raised was in cross-examination it was unable to be investigated prior to the trial. Although his counsel did seek an adjournment in the course of the trial for this purpose which was refused as going only to Mr Hart's credit.[3] The appellant has exhibited correspondence from the Sarina Russo Group which he contends would justify an order of this kind. The appellant sought information whether a person supplied by that organisation was working for Mr Hart on 7 August 2009 or thereabouts. In response the lawyer for that organisation said the recruitment arm had no files

[3] Discussed further below at [31] – [32].

indicating personnel had been provided to Mr Hart's business. However, the writer explained that their employment services company did provide employment opportunities to job seekers on unemployment benefits but the company was unable "to confirm or deny any placement to the above business without a name of the particular jobseeker" and, even if provided with a name, was bound by the *Social Security Act* "which may preclude such a disclosure without further application to the Department of Education Employment and Workplace Relations".

[27] The appellant contends that information about the person mentioned was important since either Mr Hart was concocting this evidence or there may have been a person who was coerced into putting false information into the ledger. The appellant regarded this as an important issue on his appeal and a clear indication that the convictions were unsafe. He contended that Mr Hart was making his evidence up on this issue and that it was not collateral but central to the prosecution case.

[28] The prosecution case was that by the time of the impugned transactions Mr Hart was quite familiar with the appellant, had done regular business with him and recognised him. It was thus unnecessary to rely on any particular entries in the Register inserted by any third person be it a part-time employee, a work experience casual or his wife.[4]

[29] There is no reasonable line of enquiry about third persons who may have written some details into the Register, such as serial numbers, which could affect the outcome. While the so called "finality rule" has been the subject of criticism[5] this proposed evidence about who was working for Mr Hart at the time, who inserted the serial numbers into the Second-Hand Dealers Register and/or made other entries, goes only to Mr Hart's credit at best. It was not put to Mr Hart that the serial numbers or other information were incorrectly transcribed into the Register by any other person who worked in the business although there is a suggestion of fabrication of all of the documentary evidence against the appellant in the written submissions. There is no rational basis for such assertions and the application to have police investigate this matter further must be refused.

[30] Mr Hart was challenged that he did not always see the appellant's documentary identification when he entered into a sales transaction with him. He explained that on two or three occasions the applicant had said he was in a great hurry, for example, that the appellant would say he was at risk of getting a parking ticket. Mr Hart said he would enter the identification details on only a very few occasions after the appellant had left. Mr Hart emphasised that he knew the appellant – "he couldn't possibly be anybody else".[6]

Refusal of applications for adjournment

[31] (i) The appellant sought an adjournment on the second day of the trial after Mr Hart had made reference to "the Sarina Russo girl". The basis for that application was to subpoena the records of that entity so as to explore the identity of such a person and, in effect, challenge the record kept by Mr Hart that it was the appellant who sold him the items the subject of the counts on the indictment. The primary judge ruled that these issues went only to Mr Hart's credit and should be excluded under the collateral evidence rule.[7] Accordingly, the primary judge found, there was no point

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4 Referred to by the appellant from the committal proceedings.

5 *Palmer v The Queen* (1998) 193 CLR 1 per McHugh J at 23.

6 AR 173.

7 AR 208.

in delaying the trial to enable that evidence to be gathered. His Honour refused the application for adjournment. Although the collateral evidence rule is, in essence, a rule of convenience, it will give way when the dictates of justice so require.[8] But, as concluded above, this is not a case which calls for any further exploration of this issue.

[32] (ii) The appellant contends that an adjournment ought to have been granted at the commencement of the trial to permit a handwriting expert to examine the entries in Mr Hart's Second-Hand Dealers Register, particularly the appellant's signature which he had always denied was his. As the primary judge appreciated, the prosecution case was not dependent upon handwriting analysis. As mentioned above, Mr Hart identified the appellant as the person who engaged in the transactions the subject of the charges. The primary judge refused the adjournment and he was correct to do so.

The "new" indictment

[33] The appellant contends that the primary judge erred by forcing him to plead to a new indictment which he had not been shown to him before arraignment. The appellant identifies no prejudice which would flow from this. As Mr G Cash for the respondent has submitted, an examination of the judgment record shows only one difference. On the first indictment count 7 alleged "on or about 3 July 2010". This was altered on the fresh indictment to "on or about 2 July 2010". There is nothing in this complaint.

Taking a "special verdict"

[34] The appellant is particularly aggrieved that he was unaware of the provisions of s 568(9) of the *Criminal Code.* He had directed his research to s 624 which is quite irrelevant. Section 568 sets out particular rules in relation to indictments which charge stealing, receiving, fraud, forgery and uttering. Subsection (9) provides that if a jury finds "specially" that a person charged with entering or being in premises and stealing property therein, stealing all or part of property the subject of an indictment, or receiving all or part of property having reason to believe the property is stolen, did any of those things or more than one of them:

> "but can not say which of the offences (the ***alternative offences***) was committed by the person, the trial judge must enter a conviction against the person for 1 of the alternative offences in accordance with subsection (10)."

That is what occurred here and the primary judge, as required by sub-s (10), treated the convictions as convictions for receiving tainted property.

[35] It is not the case, as the appellant contends, that the jury were not satisfied beyond reasonable doubt of the appellant's guilt of an offence of dishonesty. They were satisfied beyond reasonable doubt that he had committed one or other but could not say which. This s 568 allows for. There is no merit in this complaint.

Conduct of legal representatives.

[36] The appellant in his written submissions has contended that he was "severely disadvantaged" because his solicitor was absent for much of the trial leaving

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8 *Nicholls v The Queen* (2005) 219 CLR 196 per McHugh J at 219.

a trainee, particularly during the examination of Mr Hart. He notes that counsel did not cross-examine Mr Hart about inconsistencies in his committal testimony about the "Sarina Russo girl" or anyone else writing up the Register and this failure may have been due to the absence of the solicitor. A perusal of the trial transcript demonstrates that defence counsel was assiduous in putting what were clearly his instructions to the several witnesses and, in particular, cross-examined Mr Hart at some length. There is no merit in this complaint.

Evidence of Mr Hart

[37] The appellant, in effect, contends that the jury ought not to have accepted Mr Hart's evidence identifying him as the seller of the stolen property. There is no doubt that Mr Hart made a plain error when he was asked questions about one of the guitars the subject of counts 4, 5 and 6. The entry in the Second-Hand Dealers Register was shown to Mr Hart during evidence-in-chief. The goods are described as "OLP Base (sic) Guitar … Monterey Bass Acoustic" Mr Hart said that he had dealt with the appellant in relation to those transactions. He read "OLP" when shown the Register as referring to an "old" bass guitar.[9] He went on to elaborate that he put "old" in because it may have had some scratches or been well worn. The prosecutor asked was it "old" or "O-L-P", but Mr Hart maintained that it meant "old" even in the face of the photographs on which the letters could clearly be seen. That error was plain. The jury could consider it along with other contradictions in Mr Hart's evidence. However, the contradictions and additions were in respect of small details, which often were details not given to investigating police. The jury were entitled to have regard to Mr Hart's evidence that he engaged in hundreds, if not thousands, of transactions and that those, the subject of the charges, had occurred several years earlier. It was open to the jury to accept the combined evidence of the complainants – identifying their property as the property which had been received by Mr Hart within a day or two of discovering the theft – and Mr Hart's evidence – that he had bought that property from the appellant whom he knew well. Any weaknesses in Mr Hart's evidence were not such as to cause the jury to doubt the correctness of his evidence on the central issue, namely that Mr Hart identified Mr Millar as the person who sold him the stolen property.

The evidence of Detective Caulfield

[38] The appellant contends that police failed to investigate the offences adequately by not employing a handwriting expert to ascertain if some or all of the signatures in the Register were by someone other than the appellant. Police had other sufficient evidence which would contradict the appellant's assertion – made often in his record of interview (appended to the appellant's outline) – that he had not signed Mr Hart's Register and (by inference) he was not involved in any of the transactions. There is nothing in this point.

Refusing application to tender documents

[39] The appellant complains that the primary judge erred in refusing defence counsel's application that the jury be permitted to see copies of his driver's licence and/or 18 plus card. Detective Caulfield had given full evidence about the particulars on those documents. They corresponded with the information recorded in the Register. Detective Caulfield, in response to a question in cross-examination, said he had

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9 AR 160.

spoken to a Mr Neil Millar about the appellant's 18 plus card but had not taken a statement from him. The appellant contends that he did not have possession of that card at the time of, at least, one of those transactions with Mr Hart and thus could not have produced it. He raised this in his police interview.

[40] The judge received a note from the jury asking for a photocopy of the appellant's licence and 18 plus card after the close of the prosecution case. His Honour observed that the evidence about those documents had been led without challenge through Detective Caulfield. His Honour declined to allow those documents to be put into evidence. There was no error in his Honour declining the jury's request.

[41] After this ruling the appellant was called upon and neither gave nor called evidence.

Summing-up

[42] The appellant raises a number of complaints about the summing-up.

(i) Right to silence breached

[43] The appellant contends that the primary judge breached his right to silence by his reference to the doctrine of "recent possession". The primary judge explained that where a defendant:

> "is proved to have been in possession of property which had recently been stolen, the jury may, not must, but may, in the absence of any reasonable explanation draw the inference that he stole the property or received the property. Before any such inference can be drawn the prosecution must prove that the defendant was in possession of the property."[10]

[44] The primary judge referred to the evidence of the complainants with respect to their property and the short period of time which elapsed between the report of the theft and the presentation of the property to Mr Hart's establishment. His Honour continued:

> "[t]he defendant must have had an opportunity to give an explanation in the circumstances where if he is innocent an explanation might reasonably be expected. Those circumstances do not include the situation where a defendant having been duly cautioned declines to answer questions by the police, and also does not include his decision not to give or call evidence in his own defence. As I say, you can't take the fact that he hasn't given evidence or called evidence in his own defence as evidence against him. It doesn't strengthen the Crown case."[11]

[45] His Honour noted that there was evidence that the appellant had had some contact with police in the course of the investigation which gave him an opportunity to give an explanation.

[46] In *Bruce v The Queen*[12] the High Court observed:

> "Where an accused person is in possession of property which is recently stolen, the jury is entitled to infer as a matter of fact, in the

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10 AR 279.
11 AR 280.
12 (1987) 61 ALJR 603.

> absence of any reasonable explanation, guilty knowledge on the part of the accused. Such an inference will be drawn from the unexplained fact of possession of such property and not from any admission of guilt arising from the failure to proffer an explanation. It is the possession of recently stolen property in the absence of explanation or explanatory circumstances, which enables the inference to be drawn. Thus the absence of any reasonable explanation must not itself be explicable in a manner consistent with innocence."

That was the approach of the primary judge and there was no impermissible departure from the appellant's right to silence.

(ii) Incorrect standard of proof

[47] The appellant complains about the direction which led to the s 584(9) verdict. He contends that "possibility" replaced the test of satisfaction beyond reasonable doubt in the judge's summing-up. Any sensible reading of his Honour's careful and extensive directions to the jury demonstrates that that is not the case. His Honour, in the impugned passages, was telling the jury of the different ways in which they could approach the application of the facts as they found them to the charges. His Honour explained that if the jury accepted that the property was stolen, and stealing property is a crime, then that would be sufficient to satisfy that requirement in the charge.

[48] His Honour went on:

> "However, there is another possibility which is open and this arises from the fact that the inference which it is open to you to draw from the recent possession, if you accept that that occurred, was that the accused stole the property or had received the property. Now, in order to be satisfied that he was the one who actually stole the property, you would have to exclude beyond reasonable doubt that his possession of the property was as a result of his having received it from someone knowing that it was stolen, or having reason to believe that it was stolen. In the same way, in order to be satisfied that the accused had received the property from someone else with reason to believe that it had been stolen, you would have to be satisfied beyond reasonable doubt that he hadn't stolen himself."[13]

[49] His Honour then said:

> "It would be possible on the basis of the application of the doctrine of recent possession to arrive at a situation where you are satisfied beyond reasonable doubt either that the defendant stole the property himself, or that he received the items referred to in count 2 with reason to believe that they had been stolen by somebody else, but you are unable to say which rather than the other was the case. If that situation arose, you find the accused not guilty of count 1 and also not guilty of count 2. But if you find the accused not guilty of both of those counts, then my associate will go on to ask you "Do you find the accused guilty" or "the defendant guilty of stealing

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13 AR 290.

> or receiving, but you are unable to stay which?" Now, if you are satisfied beyond reasonable doubt that the defendant …"[14]

In these passages his Honour correctly informed the jury of the way in which they could return a verdict consistently with the provisions of s 584(9). There was no departure from the requirement of satisfaction beyond reasonable doubt.

[50] The appellant also contends that the primary judge's manner of delivery was so fast that the jury would have struggled to follow him.

[51] There are no identified errors in the summing-up. It may be observed that no relevant re-directions were sought.

Second application to adduce new evidence

[52] By this application the appellant seeks "an order for the production" of "all photographs taken as sworn to under oath by police officer Anthony Vernados … in statement dated 27th October 2010". In support of this application the appellant appends the statement of Mr Hart taken on 6 July 2010. Mr Hart said that on 17 June 2009 the appellant came into the shop and sold a saxophone and "a Legend Amplifier" for $110. At para 8 Mr Hart stated that the appellant had signed the Register next to writing "[t]his Legend Amp is also mine to sell". Mr Hart described the amplifier as "LE40B Base (sic) Amp with no serial number". He said he had since sold the amplifier.

[53] Constable Wilkins gave evidence that he attended Mr Hart's premises on 3 July 2010 where he took possession of property which, by reference to the Register, Mr Hart said was property that the appellant had sold to him. Exhibit 17, the field property receipt given to Mr Hart, was said by Constable Wilkins to represent all the property that was taken that day. Item 6 referred to "Legend LE40B S/N –".[15] The appellant contends that since that property, according to Mr Hart, had been sold, Constable Wilkins cannot have taken that amplifier:

> "… and shows that police have left the property and the sales register book with Mr Hart, at issue here is the unexplained and unidentified entries in the sales register used to convict the applicant."

[54] It appears to be the appellant's contention that police have enabled Mr Hart to write-up the Second-Hand Dealers Register consistently with the charges. That allegation was not put by defence counsel to Constable Wilkins. That amplifier was not the subject of any charge. There does not appear to have been any photograph of it in police custody. The difference between the field receipt and the evidence about the amplifier raises, at most, an issue of the reliability of the description of the property seized or, of Mr Hart's recollection about an item not the subject of charge. The interests of justice do not require any further investigation of this matter.

Unsafe verdict

[55] Mr Hart was extensively cross-examined about his Second-Hand Dealers Register entries. He was unshaken about the identity of the appellant. He had had many dealings with him including selling the appellant a small car. Mr Hart explained

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14 AR 290-291.

15 AR 359.

that he had explained from the beginning of their relationship to the appellant that the goods brought to his store had to be his to sell. The appellant had often mentioned the provenance of those goods which he brought in to sell, such as having purchased them at an auction or from band members (in the case of the band equipment), or buying bicycles from members of a religious group returning to their home country.

[56] Despite the assiduity of the appellant in identifying minor inconsistencies in Mr Hart's evidence and a certain casualness by Mr Hart in making full entries in the Register at the time of the transaction, there was ample evidence, as discussed above, by which the jury could be satisfied that it was the appellant who sold the items, in respect of which he was convicted, to Mr Hart. The complainants' evidence identifying their stolen property from the property retrieved from Mr Hart's store was compelling and they were not challenged that it had been stolen very close to the dates when it was sold to Mr Hart.

[57] On the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty in the way found by the jury.

Conclusion

[58] The appellant in his lengthy written and oral submissions has raised no matter which would suggest any error in the conduct of the trial or the nature and quality of the evidence to give rise to a conclusion that there has been a miscarriage of justice.

Application for leave to appeal against sentence

[59] The appellant was sentenced for two counts of fraud and two counts of receiving. Consistently with the provisions of s 568(10) of the *Criminal Code*, the primary judge imposed sentences of three years and four months imprisonment in respect of each of the offences. The appellant had been in custody for 31 days in 2010, in respect of the charges the subject of the trial and other charges, and for 21 days in 2011, in respect of other matters. None of that time could be declared, but the primary judge took account of that period and reduced the head sentence by two months from the sentence which he otherwise regarded as appropriate.

[60] The appellant contends that the sentence imposed is manifestly excessive. In his written submissions the reasons which he advances for this contention are several: there was no violence involved; the offences were completely unsophisticated because fake identification is easily available; a previous conviction for like behaviour occurred in May 2002, being a gap of four years and ten months after being released from custody in October 2004 so that the community was not truly at risk; he had performed 19 months parole without incident from October 2004 and therefore had demonstrated that he was not a risk to the community; a small amount of property involved. The appellant submitted that an appropriate sentence was two years imprisonment with court ordered parole after three to four months.

[61] The appellant, as noted by the primary judge, has a lengthy criminal history predominantly for offences of dishonesty and including similar offences to the present. The appellant was sentenced by Judge Boyce QC in the District Court on 6 November 2003 after pleading guilty to seven counts of receiving stolen property and seven counts of fraud. The plea was on the first day of the trial after seeking unsuccessfully to have the trial adjourned. His Honour noted that the appellant had

a significant criminal history for a young man, having been before the court many times where he was repeatedly treated with leniency and given every opportunity to change his ways. His Honour described the appellant as "a persistent and determined offender with a history of anti-social behaviour".[16] Those offences were committed on bail and whilst the appellant was the subject of a suspended sentence. He was sentenced on each of the seven counts of receiving to two-and-a-half years imprisonment, and to 18 months imprisonment on each of the seven counts of fraud, to be served cumulatively on the term of imprisonment then being served, with eligibility for early release on parole after serving nine months imprisonment (to take account of the plea of guilty). The primary judge noted that the Court of Appeal described the sentence imposed by Judge Boyce QC as "moderate".

[62] In the case at hand, the appellant was on parole and on bail in respect of other offences when the present offending occurred which, as noted by the primary judge, were aggravating circumstances. The primary judge noted that although the appellant agreed to be interviewed by police no relevant concessions or admissions were made. He denied any involvement in these offences. No remorse was apparent. At the time of sentence the appellant was 41. He was 38 to 39 at the time of the offending. He was single with one child who lived with the child's mother. The appellant lived with his parents and had their support.

[63] His Honour further noted that in June 2007 and April 2008 the appellant was before the Magistrates Court for possession of tainted property and on each occasion he was fined. In June 2009 he was before the District Court for possession by night of instruments of house breaking and sentenced to six months imprisonment released immediately upon parole. His Honour noted that in February 2012 the appellant was dealt with for trespass, entering or remaining in a dwelling or yard.

[64] This conduct, as his Honour correctly observed, signified "a persistent and significant criminal history for similar offences" which justified the submission of the prosecutor that the appellant was a recidivist. Personal deterrence was, accordingly, a matter of particular importance.

[65] The matter proceeded through a full committal with witnesses required for cross-examination. There was no co-operation in the administration of justice by any admissions. In his submissions before this court the appellant rejected the description of his conduct as that of a recidivist. He was at pains to demonstrate the small number of actual receiving convictions in his criminal history overlooking that it was a long history of dishonesty.

[66] In the course of sentence submissions the prosecutor indicated that an approach had been made to defence counsel before the trial offering full discharge of the indictment in return for a plea of guilty to two receiving and two fraud charges. The appellant contends that he was unaware of this offer and that had he had that opportunity he may have given evidence himself or pleaded, the more so, had he understood that a special verdict was open on the alternative charges of stealing and receiving because such a case would have been harder to defend.

[67] That submission should be rejected. At the appellant's request the court delayed hearing the defence submissions until the appellant's father could be present. In the 25 minutes or so that the transcript suggests the court was adjourned, having heard

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that contention of the prosecution that an offer had been made, the appellant could have taken the matter further.

[68] The primary judge was referred by the prosecutor to *R v Carroll*[17] where a 52 year old man with a very extensive criminal history pleaded guilty to single counts of receiving and fraud. He was sentenced to three years imprisonment with release after a third because of the plea. That was said by this court to be within range. Defence counsel had contended that the range was between 18 months and two-and-a-half years for the head sentence, largely because there were few offences and the value of the property was quite modest. He submitted that the source of the appellant's criminal conduct was his addiction to gambling.

[69] Against the appellant's extensive criminal history, including for like offences, the sentencing remarks of Judge Boyce QC in 2003 for almost identical offending, and the circumstances that this offending was committed whilst the appellant was on parole and on bail, a firm sentence was required for personal deterrence. There was no claim for leniency open to the appellant having gone to trial and having failed to co-operate in any way.

[70] The application for leave to appeal against sentence should be refused.

Administrative matter

[71] The verdict and judgment record requires correction to show the appellant's conviction pursuant to s 568(9). It records only two convictions for fraud. The court order sheet has been correctly endorsed consistently with the verdicts given by the jury and includes "special verdict – stealing or receiving – guilty" after counts 1 and 2 and counts 4 and 5. After counts 7 and 8 appears "special verdict – stealing or receiving – not guilty".

[72] Rule 62(5) of the *Criminal Practice Rules* permits the proper officer[18] to amend the record if it is inaccurate in any respect. If a copy of an inaccurate record has been given to the chief executive (corrective services), the proper officer must replace the copy with a copy of the record amended. The verdict and judgment record requires amendment. The court will draw this matter to the attention of the proper officer.

[73] The orders which I propose are:

1. Refuse the applications to reopen the evidence.
2. Dismiss the appeal.
3. Refuse the application for leave to appeal against sentence.

[74] **GOTTERSON JA:** I agree with the orders proposed by White JA and with the reasons given by her Honour.

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18 For the Supreme Court, the sheriff, deputy sheriff or registrar: Schedule 6, *Criminal Practice Rules* 1999.