SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cannon* [2013] QCA 191
PARTIES:	**R** **v** **CANNON, Charles Edward** (appellant)
FILE NO/S:	CA No 200 of 2012 SC No 743 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 672A *Criminal Code*
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 July 2013
DELIVERED AT:	Brisbane
HEARING DATES:	6 March 2013; 7 March 2013
JUDGES:	Margaret McMurdo P and Fraser JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The parties are directed to lodge and serve any outline of submissions in relation to sentence which they wish to make by 4 pm on 5 August 2013, or by such other time as the registrar directs.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – REFERENCE TO COURT – where the appellant was convicted of one count of trafficking in a dangerous drug and one count of possessing a dangerous drug in excess of 2 grams – where the appellant alleges the prosecution failed to disclose material including an audio recording of an interview with a central witness and the history of that witness being a registered informant – where the obligation for disclosure extends to all things in the possession of the prosecution – whether the obligation of disclosure was breached – whether there has been a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – REFERENCE TO COURT – where fresh evidence given in later court proceedings raise issues relevant

to the credibility of key witnesses at the appellant's trial – where reliability and credit of the witnesses was in issue at the trial – where the jury was directed to have regard to reliability when considering the guilt or innocence of the appellant – whether there has been a miscarriage of justice

Criminal Code 1899 (Qld), s 590AB(2), s 590AH(2)(e)(i), s 590AD, s 590AE, s 668E, s 672A

Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, cited
Grey v The Queen (2001) 75 ALJR 1708; (2001) 184 ALR 593; [2001] HCA 65, distinguished
Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68, considered
Nudd v The Queen (2006) 80 ALJR 614; [2006] HCA 9, cited
Pepper v Attorney-General of Queensland (No 2) [2008] 2 Qd R 353; [2008] QCA 207, cited
R v HAU [2009] QCA 165, cited
R v Rollason and Jenkins; ex parte Attorney-General [2008] 1 Qd R 85; [2007] QCA 65, cited
R v Stafford [2009] QCA 407, considered
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, cited

COUNSEL: J R Hunter QC, with J McInnes, for the appellant
E Wilson QC, with J R Jones, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Crown Law for the respondent

[1] **MARGARET McMURDO P:** The appellant had petitioned for a pardon in respect of his convictions for offences of drug trafficking and aggravated possession in November 2005. The Attorney-General has referred the petition to this Court under s 672A *Criminal Code* 1899 (Qld) in relation to both conviction and sentence. That requires this Court to hear and determine the matter as an appeal by a person convicted. I am not satisfied that, had the evidence been available at trial, there is a significant possibility that a reasonable jury would have acquitted the appellant: *Gallagher v The Queen*.[1] Nor am I satisfied that the further evidence in combination with the evidence led at trial requires the conviction to be set aside to avoid a miscarriage of justice.[2] I agree with Boddice J that the appeal against conviction should be dismissed and, subject to the following observations, with Boddice J's reasons.

[2] The central question for determination in this appeal is whether the prosecution disclosed to defence lawyers the 14 C90 audio tapes recording the interview

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1 (1986) 160 CLR 392, 397, 399, 407.
2 Above Gibbs CJ, 399.

between police officers and the prosecution witness, B, conducted on 3 and 4 January 2003. The many lawyers involved in the appellant's defence gave evidence that they had no record or recollection of receiving the tapes from the police or the prosecution. None, however, could positively state that they did not receive the tapes. It is true that the tapes would have been a bulky item and hard not to notice. Additionally, as they concerned an important prosecution witness, defence lawyers would have regarded them as significant. Defence solicitor, Mr Russo, gave evidence that had he received these tapes his usual practice would have been to apply for a grant of legal aid to have them transcribed. Legal aid records led in evidence in the appeal did not record any grant of aid for this purpose. Had the tapes been provided to the defence lawyers, it is highly likely that the police would also have provided them to the trial prosecutor, Mr Campbell, but he has no recollection or record of receiving the tapes. Like the defence lawyers, he is unable to say, one way or the other, whether or not he received the tapes. On the other hand, former police officer and now Queensland barrister, Mr McDougall, gave positive evidence that he specifically recalled providing copies of the tapes to the appellant's legal representatives, both prior to committal and again during the trial.

[3] It is common ground that the prosecution had a fundamental obligation to disclose the tapes: *R v Rollason and Jenkins; ex parte Attorney-General*.[3] Failure to meet that obligation may mean that the proviso in s 668E(1A) *Criminal Code* can have no application: *R v HAU*.[4] The parties accepted that the onus was on the appellant to prove on the balance of probabilities that the tapes were not disclosed.

[4] I accept that the defence lawyers, Mr Campbell and Mr McDougall each understood the grave significance of their evidence and the need for it to be honest and as accurate as possible. I also accept that they each understood their responsibilities as officers of the Court. I accept they each gave their honest and best recollections. They were all recalling events which occurred many years ago and without the benefit of comprehensive records. The prosecution evidence in the case was large in compass. The committal hearing took place over six days in late 2003. The trial included two pre-trial hearings, in total taking up six court days. The trial itself, took a further 25 court days. It may be that the defence lawyers and Mr Campbell have simply forgotten that they received the tapes after this length of time, not appreciating their significance when they received them. Mr McDougall was the only witness who gave positive definite evidence at the appeal as to the disclosure of the tapes. He remained unshaken in cross-examination and was adamant that he provided copies of the tapes to defence lawyers, both prior to the committal proceedings and during the trial. In those circumstances, whilst I have some real doubt as to whether the tapes were disclosed, I am certainly not satisfied on the balance of probabilities that they were not disclosed.

[5] As to sentence, I would accede to the parties' request that they have an opportunity to make submissions after the publication of these reasons.

[6] I agree with the orders proposed by Boddice J.

[7] **FRASER JA:** I have had the advantage of reading the comprehensive reasons for judgment of Boddice J. There is nothing I wish to add. I agree with those reasons and with the order proposed by his Honour.

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3 [2008] 1 Qd R 85.

4 [2009] QCA 165, [37].

[8] **BODDICE J:** On 17 November 2005, a jury found the appellant guilty of one count of trafficking in a dangerous drug and one count of possessing a dangerous drug in excess of 2 grams. Both offences concerned the dangerous drug methylamphetamine. The appellant was sentenced to 12 years and eight months imprisonment for the offence of trafficking, and a concurrent term of two years imprisonment for the offence of possession.

[9] The appellant filed a notice of appeal against conviction, and an application for leave to appeal against sentence. On 22 June 2007, the appeal against conviction was dismissed, and the application for leave to appeal against sentence was refused.

[10] In 2012, the appellant petitioned the Governor of Queensland for a pardon in respect of his conviction of these offences. The appellant's petition relied on alleged failures by the prosecution to disclose material, and on fresh evidence given in later court proceedings which was said to raise significant concerns about the credibility and reliability of key witnesses at his trial.

[11] By reference dated 31 July 2012, the Attorney-General for the State of Queensland referred to this court the whole of the appellant's case for determination. The reference, made pursuant to s 672A of the *Criminal Code* 1899 (Qld), relates to both conviction and sentence.

Issues raised by appeal

[12] The appellant contends there has been a miscarriage of justice due to failures by the prosecution to disclose relevant documentation in accordance with its obligations, and the availability of fresh evidence given in subsequent confiscation proceedings, and other criminal proceedings.

[13] The alleged failure to disclose relates to an audio recording of an interview between a central witness, B, and officers of the Australian Crime Commission, conducted on 3 and 4 January 2003, and other documentary material indicating that B was a registered informant in 1996, had been approached by police to secure her assistance in the investigation of the appellant and had, from the outset, advised police she was seeking money in return for that co-operation and been told by police the amount of any reward would depend on the result of her co-operation. It is also asserted the prosecution failed to disclose a draft statement from another witness, John Hooning, and recordings of conversations between other witnesses and officers of the Crime and Misconduct Commission.

[14] The additional evidence relates to evidence given by B, after the appellant's trial, and first appeal, at a committal hearing involving Ross Francis Grimes. That evidence is said to raise issues relevant to the credibility of B, Hooning and other key witnesses, Thomas Pfaff, and Sheree Bailey. The additional evidence also related to evidence given by Pfaff, Hooning and Bailey at a subsequent application for confiscation of the appellant's assets under the *Criminal Proceeds Confiscation Act* 2002 (Qld).

[15] In order to understand the relevance and significance of the issues raised, it is necessary to first consider whether the prosecution breached its obligation of disclosure. Thereafter, it is necessary to consider the significance of the issues raised in the context of the matters put in issue before the jury which went to the

credibility, reliability and consistency of those witnesses. Finally, it is necessary to consider whether the matters raised by the appellant, individually or collectively, give rise to a miscarriage of justice, either in the outcome of the trial or in its process.

The offences

[16] The count of trafficking alleged that the appellant trafficked in the dangerous drug methylamphetamine between 31 December 1995 and 15 January 2003. The count of possession alleged the appellant had possession of the dangerous drug methylamphetamine on 14 January 2003.

[17] The appellant was arrested on 14 January 2003. At the time of the appellant's arrest, a quantity of methylamphetamine, representing 2.323 grams of the pure substance, was found at his residence. A search by police also located a quantity of powder containing 55.849 grams of pseudoephedrine, together with 125 unused small clipseal bags and a set of electronic scales.

[18] Prior to his arrest, the appellant and his alleged associates had been the subject of a covert police operation. They had been under surveillance since March 2002. The surveillance included audio recordings from covert listening devices, telephone intercepts, and video recordings.

The trial

[19] The evidence led by the prosecution at trial included surveillance evidence, physical evidence, and oral evidence of drug dealings with the appellant from 1996 to the date of his arrest. The evidence of drug dealings was given by five witnesses: B, Pfaff, Hooning, Bailey and Paul Johnson.

[20] The only evidence of the appellant's involvement in trafficking prior to 1998 was given by B. Her evidence was accepted on sentence as establishing that the appellant had trafficked during the earlier period, although not at the same level as the peak activity between 1998 and 2001.

[21] B, Hooning, Pfaff, Bailey and Johnson each gave evidence of the appellant's involvement in trafficking between 1999 and 2002. The Crown also led evidence that the appellant had an undocumented source of income of around $1 million between January 1999 and January 2003.

[22] B, Pfaff, Hooning, Bailey and Johnson received reduced sentences, or indemnities, or both, in return for their co-operation in giving evidence against the appellant. The credibility, reliability and consistency of each of those witnesses was a significant issue before the jury.

[23] The Crown case at trial was usefully summarised in the appellant's earlier appeal:

> "[9] During the course of surveillance of the appellant after March 2002, police intercepted a large number of telephone calls which suggested that the appellant was a participant in an enterprise involving the production and sale of methylamphetamine. These recordings were relied upon by the Crown for a number of reasons. Principally, so far as the Crown was concerned, the telephone intercepts served to

record the appellant in the act of transacting sales and acquisitions of the drug and its precursors respectively. They also tended to support the reliability of the evidence of five witnesses who gave direct evidence of dealings with the appellant in relation to his trafficking in methylamphetamine from a time in 1996. These were B, Thomas Pfaff, John Hooning, Sheree Bailey and Paul Johnson.

[10] In relation to the trafficking charge, the Crown's case was that the appellant used pseudoephedrine and ephedrine to make methylamphetamine for sale. In 1998 and 1999, the appellant acquired large quantities of Sudafed tablets from suppliers such as the witness, Hooning. It was alleged that the appellant extracted pseudoephedrine from those tablets with the assistance of the witness, Bailey, who gave evidence to this effect. In 2000 and 2001, the appellant obtained large quantities of ephedrine through the witness, Pfaff.

[11] Each of Hooning, Bailey and Pfaff had been convicted of offences involving the appellant. Each had received a reduced sentence under s 13A of the *Penalties and Sentences Act 1992* (Qld) in return for a promise of co-operation with the authorities in relation to the prosecution of the appellant. Hooning had also been given an undertaking from the Attorney-General that he would not be prosecuted for any offence on his part which his evidence might reveal.

[12] B gave evidence to the effect that the appellant had been selling methylamphetamine in quantities of one ounce or more from 1996. B had been given an undertaking from the Attorney-General that she would not be prosecuted for any offence on her part which her evidence might reveal.

[13] According to the witnesses, Hooning, Bailey and Johnson, the appellant sold methylamphetamine to them and to others in 2002. It should be noted that Johnson had received a reduced sentence in return for his co-operation with the authorities against the appellant.

[14] Mr Ross, a forensic accountant, gave evidence of an analysis of the records of the finances of the appellant and associated companies between 22 January 1999 and 14 January 2003. This analysis revealed an unexplained surplus of about $1,000,000. The witnesses gave evidence to the effect that the appellant had access to 10 or 11 kgs of ephedrine in the period 1999 to 2001 which was made available to him by Pfaff. This would have been able to produce about 7.8 kilograms of methylamphetamine. The sale of this quantity of methylamphetamine was apt to explain the surplus revealed by the financial analysis."[5]

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5 *R v Cannon* [2007] QCA 205.

[24] The appellant did not give evidence at trial. His defence, through cross-examination of the prosecution witnesses, was that he had nothing to do with the production of methylamphetamine, that the evidence of B, Hooning, Pfaff, Bailey and Johnson ought not to be accepted, that there were reasonable explanations for what was recorded in the telephone intercepts and in the other surveillance evidence, that his businesses included a money lending business, on a cash basis, which meant his records did not account for all of his income. His defence also involved an assertion that he regularly used a gym, and formerly owned one, and that ephedrine is a performance enhancing drug.

The evidence of B, Hooning, Pfaff, Bailey and Johnson at trial

B

[25] B gave evidence that she met the appellant in about 1995, and soon after became a regular buyer of speed from him, purchasing on a weekly to fortnightly basis. She had previously obtained drugs from a supplier named "Adam". B said the appellant's drugs were superior to that of her other suppliers.

[26] In December 1996, B was involved in a car accident whilst travelling to Goondiwindi. Police located a quantity of drugs, including methylamphetamine. B said the methylamphetamine was owned by the appellant and the other drugs had been supplied by other named persons. After this car accident, B said she commenced drug deliveries for the appellant to compensate for the loss of those drugs.

[27] B said she once observed the appellant with a large quantity of methylamphetamine packed in sealed bags in a wetsuit. She was unable to give details of where, and when, this occurred other than that the wetsuit was in a vehicle on the outskirts of Brisbane. She was also present on two other occasions when the appellant purchased large quantities of ephedrine from a person named "Sunshine". Sunshine traded in ephedrine, buying it in one or two kilogram lots.

[28] B said Sunshine asked her to locate people to whom he could sell ephedrine. B found Grimes, the appellant and another person. B would exchange the drugs for money. Sunshine would attend and take the money after the transaction. Pfaff's apartment was used for most of these transactions.

[29] B said the first transaction involving the appellant occurred at Pfaff's first unit at Surfers Paradise. The appellant did not meet directly with Sunshine. The appellant collected four containers of ephedrine from B, and left money before departing the apartment. B said the amount of money left was short. B also gave evidence of a second occasion on which the appellant bought six containers of ephedrine at about $35,000 each.

[30] B also gave evidence of a meeting with Pfaff and the appellant at an establishment known as the Pitstop Café. Video surveillance evidence was led of that meeting. It took place on 9 July 2002. Evidence was also led of a telephone call intercepted between the appellant and an associate on 12 June 2002 confirming the purpose of that meeting.

[31] B said that prior to that meeting, Pfaff had raised with B becoming involved in "cooking" speed. B undertook some research on the Internet, and obtained some

information from Grimes. She faxed a list of chemicals for the manufacture of methylamphetamine to Pfaff.

[32] B said during the meeting at the Pitstop Cafe there was a discussion about the chemicals needed for "cooking". There was also an enquiry whether she could get them. Pfaff produced a list which appeared to be the same as her fax but more neatly written. B's fax to Pfaff was an exhibit at the trial.

[33] B also gave evidence of a conversation with Pfaff in 2002 in which he sought phosphorous acid for the appellant. This conversation occurred when B was living at her mother's property at Goondiwindi. That property was searched by police in August 2002. Glassware was located at that time. B was not at the property during the search.

[34] B said she wrote to a police officer, David Rutherford offering to assist police in their investigations around the time of the search of the mother's property. Shortly thereafter she assisted police by introducing Pfaff to an undercover agent.

Hooning

[35] Hooning gave evidence that he was paid by the appellant to attend chemists between Murwillumbah and the Sunshine Coast to buy large quantities of Sudafed between 1999 and 2002. The appellant told Hooning he was using the Sudafed to make methylamphetamine. Hooning also bought amphetamines from the appellant on three or four occasions in 2002.

[36] In 2002, Hooning was given $5,000 by the appellant to purchase drug manufacturing equipment and precursor chemicals used to manufacture ecstasy. Hooning also obtained glassware for the appellant. Hooning was given a list of chemicals. That list was an exhibit at trial. The list contained a number of precursor chemicals for manufacturing methylamphetamine.

[37] Hooning obtained the chemicals and created a receipt on his computer, which he provided to the appellant. That receipt was an exhibit at trial. Hooning said he tried to produce chemicals for the manufacture of methylamphetamine for the appellant. Police surveillance of 1 July 2002 recorded footage of Hooning placing drums into the appellant's vehicle. These drums were said to contain chemicals for the purposes of making methylamphetamine.

[38] Hooning also gave evidence of an occasion when he and the appellant had a dispute regarding the chemicals purchased by Hooning. Evidence was led of an intercepted telephone call between Hooning and the appellant on 30 August 2002. That intercept revealed the appellant threatening Hooning for trying to defraud him. Evidence was also led of an intercepted telephone call between the appellant and the appellant's then partner on 30 August 2002.

[39] Hooning's evidence that he arranged for precursor chemicals to be dropped off to the appellant was said to be supported by a telephone call intercepted by police on 11 September 2002. The appellant and Hooning were recorded as discussing dropping off "fertilizer" and "new ones of those, that one in the drum".

[40] On 9 January 2003, Hooning approached the appellant's daughter. He was wearing a listening device. He was recorded as offering to obtain more Sudafed tablets for

the appellant. The appellant's daughter telephoned the appellant. That telephone call was recorded by the listening device, and intercepted by police. The contents of the telephone call were relied upon as implicating the appellant in drug dealings.

Pfaff

[41] Pfaff gave evidence of selling large quantities of ephedrine to the appellant for the production of methylamphetamine. The first significant sale of ephedrine to the appellant took place in Pfaff's apartment in Surfers Paradise, and involved five kilograms of ephedrine provided in Tupperware containers. The appellant paid roughly $32,000 in cash per kilogram.

[42] The second sale to the appellant was approximately one month later and again occurred in Pfaff's unit in Surfers Paradise. It involved the sale of three kilograms of ephedrine to the appellant in containers. The appellant again paid $32,000 in cash per kilogram. A third sale, involving three kilograms of ephedrine, occurred in the foyer of the Palladium nightclub. The last supply of ephedrine to the appellant was in approximately August 2001.

[43] Pfaff also gave evidence that the appellant offered to teach him how to manufacture methylamphetamine from ephedrine. This education was to cost Pfaff $100,000.

[44] Telephone intercept evidence of a phone call intercepted on 19 April 2002 between Pfaff and the appellant was tendered in evidence. That intercept recorded Pfaff asking if he could catch up with the appellant to "get that little bit off you". Pfaff said that referred to a sample of methylamphetamine he was obtaining for an associate. A further telephone intercept from 20 April 2002 was tendered as confirming Pfaff's evidence.

[45] Pfaff also gave evidence the appellant had difficulty removing "blockers" from the Sudafed tablets. He offered to ask B how to do it. A telephone call between Pfaff and B, intercepted on 26 April 2002, referred to "steam" and "caustic".

[46] Pfaff said the appellant also sought an alternative method to produce methylamphetamine without the use of ephedrine. Pfaff spoke to B who faxed him a list of ingredients which Pfaff passed on to the appellant. The list, located by police in the appellant's car, was tendered at trial. It included reference to a "magnetic stirrer". A telephone intercept on 20 May 2002 recorded Pfaff as telling the appellant that "she" could help obtain a piece of equipment called a "magnetic stirrer".

[47] Pfaff also gave evidence that he contacted the appellant to try and source a pound of speed for an undercover agent. A telephone intercept on 21 October 2002 recorded a conversation between Pfaff and the appellant. Pfaff told the appellant the person was "pretty keen". The appellant replied his friend was out of town.

[48] Pfaff gave evidence of trying to facilitate the sale of liquid ephedrine to the appellant from a supplier, Donnelly. A telephone intercept on 3 July 2002 recorded the price and amount available. Shortly afterwards a call was intercepted between Pfaff and the appellant in which they agreed to meet. Later that day, a conversation was intercepted between Pfaff and Donnelly in which Pfaff enquired about the percentage. Pfaff also enquired about whether it is pure. Donnelly is recorded as saying it is pure ephedrine. This purchase ultimately did not go ahead. The liquid was hypophosphorous acid.

[49] Pfaff also gave evidence that he provided a sample of ephedrine to the appellant in exchange for $1,000. A telephone intercept on 27 November 2002 recorded Pfaff arranging a meeting with the appellant referring to a "carton" that Pfaff had for the appellant. Surveillance footage of a meeting was tendered at trial. Pfaff confirmed this was the meeting. Pfaff said he was handed $1,000 in cash in exchange for a bag with pseudoephedrine in it.

Bailey

[50] Bailey gave evidence that from 1999 onwards the appellant paid her to extract ephedrine from Sudafed tablets. This was undertaken on about seven times. The appellant supplied the Sudafed tablets and a 20 litre drum of methylated spirits. The appellant told her the ephedrine was to make methylamphetamine. Later, the appellant told her he no longer needed her to undertake the process because he was getting ephedrine from America. It was contended at trial that this evidence was consistent with the evidence of Pfaff.

[51] Bailey also gave evidence that the appellant asked her if she would sell methylamphetamine for him. She declined as she did not know how to go about it. Bailey, however, purchased methylamphetamine from the appellant on three occasions. Bailey purchased an ounce at a time at a cost of $3,000. The last purchase was in August 2002. Telephone intercepts on 30 May 2002 were tendered at trial wherein the appellant arranged to meet Bailey. Bailey tried to purchase methylamphetamine on other occasions from the appellant but was unsuccessful. A telephone intercept on 13 August 2002 was tendered at trial wherein Bailey was recorded as asking if "there is anything at all" and the appellant replying "nothing happening at the moment".

[52] Bailey gave evidence that her friend offered to sell the appellant some Sudafed but the appellant declined the offer because it was too expensive. Two telephone intercepts on 29 April 2002 were tendered at trial. The latter recording recorded the appellant claiming "they want 70 for 10".

[53] Bailey gave evidence the appellant provided her with a small sample of chemicals and asked her to test it. She was unable to do so and returned it to him. In a telephone intercept on 28 November 2002, tendered at trial, Bailey was recorded as saying "it's a bit strange stuff". She then arranged to return the chemicals to the appellant in 20 to 30 minutes at Bunnings.

[54] On 14 January 2003 police executed a search warrant at Bailey's house. They found microwaves and other equipment that Bailey said had been used to extract ephedrine from Sudafed.

Johnson

[55] Johnson gave evidence that he purchased methylamphetamine from the appellant on two occasions. The first purchase, on 1 July 2002, involved half an ounce for $1,700. This purchase was said to be supported by two telephone intercepts on 1 July 2002. A recording produced from a listening device in the appellant's car and video surveillance and other police observation evidence was also tendered as supporting Johnson's first purchase.

[56] Johnson said the second purchase, on 2 July 2002, involved a quarter of an ounce. Two telephone intercepts on 2 July 2002 were tendered at trial. During the first telephone call the appellant, in response to a request if he could provide the same amount as yesterday, is recorded as responding "probably half at the moment".

[57] Johnson gave evidence that after that transaction had taken place he realised he had overpaid the appellant. He sought a refund. The second telephone intercept on 2 July 2002 was tendered to support this evidence. A listening device in the appellant's car also recorded money being counted aloud.

Present appeal

[58] Section 672A of the *Criminal Code* provides:

> "**672A Pardoning power preserved**
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> Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of Her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may—
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> (a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or
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> (b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly."

[59] The words "the whole case" mean the whole of the evidence properly admissible, whether "new", "fresh" or previously adduced in the case against, and the case for, the appellant.[6] The issues to be determined are the same as those on an appeal, namely, whether there has been a miscarriage of justice.[7] The court is also required to consider whether the overall strength of the prosecution case requires the court to apply the proviso contained in s 668E of the *Criminal Code*.[8]

[60] The concept of a miscarriage of justice falls into two distinct categories: outcome and process. The distinction was explained by Gleeson CJ in *Nudd v The Queen*:[9]

> "In this context, the concepts of justice, and miscarriage of justice, bear two aspects: outcome and process. They are different, but related.
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> In *Davies v The King* ((1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ), this Court said:
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> > From the beginning, [the English Court of Criminal Appeal] has acted upon no narrow view of the cases

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6 *Mallard v The Queen* (2005) 224 CLR 125 at 131.

7 *Pepper v Attorney-General of Queensland [No 2]* [2008] QCA 207 at [12].

8 *Mallard* at 131.

9 *Nudd v The Queen* (2006) 162 A Crim R 301 at 304.

> covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice, a duty also imposed upon the Supreme Court of Victoria. … It has consistently regarded that duty as covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.

This emphasis upon outcome and process as requirements of justice according to law is fundamental and familiar. It informed the explanation of miscarriage of justice given by Barwick CJ in *Ratten v The Queen* ((1974) 131 CLR 510 at 516):

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the court of criminal appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.
>
> That is one instance of a miscarriage: another is where the appellant has not had a fair trial. There is no need here to refer to the various circumstances in which a trial may become unfair. Some of these are mentioned in the reasons of the Full Court. But it may be that even where there have been irregularities at the trial there may be no miscarriage of justice if the court forms the opinion that no jury of reasonable men, properly instructed and alive to their responsibilities, would fail on the evidence to convict the accused.

The common statutory provision governing criminal appeals, of which s 668E of the Queensland Code is an example, covers matters

of both outcome and process, referring to jury verdicts which are unreasonable or cannot be supported having regard to the evidence, to wrong decisions (of a judge) on any question of law, and to any other ground for concluding that there was a miscarriage of justice. These grounds for allowing an appeal are followed by a qualification, often referred to as a proviso, to the effect that, even if a point raised by the appellant has been made out, the appellate court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. The proviso was considered recently by this Court in *Weiss v The Queen* ((2005) 80 ALJR 444). The concluding sentence in the passage from the judgment of Barwick CJ in *Ratten* adopted a formula sometimes used to explain the practical effect of the proviso. What is significant for present purposes is the qualified manner in which Barwick CJ expressed himself. Some irregularities 'may' involve no miscarriage of justice if the appellate court forms a certain opinion about the strength of the case against the appellant. The corollary of that proposition is that a defect in process may be of such a nature that its effect cannot be overcome by pointing to the strength of the prosecution case. It is impossible to state exhaustively, or to define categorically, the circumstances in which such a defect will occur. In *Mraz v The Queen* ((1955) 93 CLR 493 at 514), Fullagar J said that 'every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed' and that, if there is a failure in any of those respects 'and the appellant may thereby have lost a chance which was fairly open to him of being acquitted', then there is a miscarriage of justice. That well-known passage relates the failure of process to the loss of a chance of acquittal. Even though it is impossible and undesirable to attempt to reduce miscarriages of justice to a single formula, there is at least one circumstance in which a failure of process cannot be denied the character of a miscarriage of justice on the ground of the appellate court's view of the strength of the prosecution case. That is where the consequence of the failure of process is to deprive the appellate court of the capacity justly to assess the strength of the case against the appellant. There may be other circumstances in which a departure from the requirements of a fair trial according to law is such that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case. If there has been a failure to observe the conditions which are essential to a satisfactory trial and, as a result, it appears unjust or unsafe to allow a conviction to stand, then the appeal will be allowed.

The concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider; for not all miscarriages involve error. Process is related to outcome, in that the object of due process is to secure a just result. Justice, however, means justice according to law, and the observance of the requirements of law according to which a criminal trial is to be conducted has a public as well as a private purpose. An unjust conviction is one form of miscarriage.

> Another is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just. Another is a failure of process which departs from the essential requirements of a fair trial."

[61] A miscarriage of justice, by virtue of the outcome, exists where the court is satisfied the accused is innocent or there exists such doubt as to his or her guilt. A miscarriage of justice, by virtue of the process, exists where the court is satisfied the appellant has not received a fair trial, including having regard to fresh evidence.[10] Irregularities in a trial will not necessarily lead to a conclusion that there has been a miscarriage of justice. A court may conclude there has been no miscarriage of justice if a jury, enlivened to its responsibilities, would have convicted in any event.

[62] The court must consider, and come to its own conclusion, "on the whole case". It may derive assistance from how a previous appellate court dealt with the matter, but is not bound by the previous decision.[11] Where an appellant contends the appeal is properly to consider evidence not presented at trial, a determination must be made as to whether the evidence is "fresh" or "new". Evidence that was neither available at trial nor discoverable with reasonable diligence constitutes "fresh" evidence. Evidence that was not led at trial but which was discoverable exercising reasonable diligence is "new" evidence.[12]

[63] If the evidence required to be considered is fresh evidence, an assessment must be undertaken of its probative value having regard to its cogency, plausibility and credibility.[13] A miscarriage of justice will only arise if the new evidence is "apt to engender in the appeal court a reasonable doubt as to the appellant's guilt".[14] If the fresh evidence is apt to engender in the court a significant possibility that a reasonable jury would have acquitted in all of the circumstances,[15] the appeal must be allowed if a miscarriage of justice is shown to have occurred.[16]

[64] In undertaking this assessment, the Court cannot act on speculation or attempt to predict what a jury would or would not do. An objective analysis must be undertaken to determine whether or not there has been an actual miscarriage of justice. The relevant factors were identified in *Weiss v The Queen*:[17]

> "Three fundamental propositions must not be obscured. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt.

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10 *Ratten v The Queen* (1974) 131 CLR 510 at 516.
11 *R v Stafford* [2009] QCA 407 at 132.
12 *Mickelburg v The Queen* (2004) 29 WAR 13 at 129; *R v Butler* [2010] 1 Qd R 325 at 333.
13 *Gallagher v The Queen* (1986) 160 CLR 392 at 400-402; *Mickelburg* at 301; *Ratten* at 520.
14 *R v Stafford* [2009] QCA 407 at [50].
15 *Gallagher* at 399, 402.
16 *Gallagher* at 399.
17 (2005) 224 CLR 300 at 315-316.

> Reference to inevitability of result (or the converse references to 'fair' or 'real chance of acquittal') are useful as emphasising the high standard of proof of criminal guilt. They are also useful if they are taken as pointing to 'the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record'."

The obligation to disclose

[65] The obligation upon the prosecution to disclose relevant material in its possession to an accused person is fundamental.[18] Relevantly, for present purposes, that obligation required disclosure by the prosecution of all things in the possession of the prosecution that would tend to help the case for the accused, other than things disclosure of which would be unlawful or contrary to the public interest.[19]

[66] The obligation extends to disclosure of a copy of any statement of a witness which is in the possession of the prosecution.[20] Statement includes audio recordings.[21] It also extends to relevant material held by an independent investigative body.[22]

[67] A thing is in the possession of the prosecution if: it is in the possession of the arresting officer or a person appearing for the prosecution; it is in the possession of the Director of Public Prosecution; or, the arresting officer or a person appearing for the prosecution is aware of the thing's existence and is, or would be, able to locate it without unreasonable effort.[23]

Was the obligation breached?

[68] The appellant contends the prosecution failed to comply with its obligations of disclosure in relation to production of the audio recording of an interview conducted between police officers and B on 3 and 4 January 2003. The prosecution also failed to disclose documentation establishing that B had become a registered police informant soon after a car accident in 1996; and that police had initiated contact with B in August 2002, when the investigation of the appellant was becoming stale.

[69] The appellant also contends the prosecution failed to disclose a draft of the statement made by Hooning, and audio recordings of Hooning and Pfaff in February or March 2003.

Were the audio recordings with B disclosed?

[70] The audio recordings of the interview with B on 3 and 4 January 2003 formed the basis for the statement signed by B in the prosecution of the appellant. Those audio recordings, spanning 14 C90 tapes, were not transcribed until well after the appellant's trial. Accordingly, the issue for determination is not whether a transcript should have been disclosed but whether copies of the audio recordings were disclosed by the prosecution. It is accepted by the Attorney-General that those recordings constituted a relevant thing in the possession of the prosecution which

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18 *R v Rollason and Jenkins, ex parte Attorney-General* [2008] 1 Qd R 85.
19 *Criminal Code* s 590AB(2).
20 *Criminal Code* s 590AH(2)(e)(i).
21 *Criminal Code* s 590AD.
22 *R v Hargraves, Hargraves and Stoten* [2008] QSC 267.
23 *Criminal Code* s 590AE.

should have been disclosed to the appellant in accordance with the prosecution's disclosure obligations.

[71] Alastair McDougall, a former police officer previously attached to the Australian Crime Commission, and now a barrister-at-law, gave evidence that the audio recordings were disclosed to the appellant's legal representatives on two occasions. First, prior to the committal. Second, during the trial. He also recalled providing to the appellant's legal representatives, on two occasions, a log of all communications between himself and B.

[72] The appellant was represented by numerous solicitors and barristers throughout the course of his prosecution. Each gave evidence of having no recollection of ever receiving the audio recordings. Each said receipt of those recordings was important, and likely to be recalled if the recordings had been disclosed to the defence.

[73] There were times when the appellant was self-represented. However, there is no issue the audio recordings were disclosed during those periods. McDougall specifically recalls disclosing them to the appellant's legal representatives.

[74] McDougall cannot recall the name of the appellant's legal representative to whom disclosure of the audio recordings was first made by the prosecution. However, in support of his assertion that the audio recordings were disclosed, McDougall relies on a log which records that the audio recordings were uplifted from the exhibits room by him on 17 July 2003 and returned on 25 August 2003. The committal commenced on 28 October 2003.

[75] McDougall says the audio recordings were uplifted in order to make copies. McDougall did not physically copy them, others undertook that task.[24] It was his usual practice to return the original tapes to the exhibit storage after copying, and to provide one copy to the defence and retain one copy for his records.[25]

[76] McDougall accepted, in cross-examination, that his statement for the proceeding was prepared on 20 July 2003, and that uplifting the tapes was part of that preparation. However, that event does not explain why the tapes were not returned to the register until 25 August 2003, over one month after the completion of McDougall's statement. This extended period would be consistent with McDougall's assertion the audio recordings were copied at this time.

[77] McDougall's contention that that was the purpose of uplifting the tapes is also supported by a consideration of the other items uplifted by him on 17 July 2003. Two other exhibits were uplifted at that time. Both were recordings. All exhibits were returned on the same date, 25 August 2003.

[78] It is significant only audio and video cassette recordings were uplifted by McDougall on 17 July 2003. It is also significant those audio and video recordings represented all of the recordings then held as exhibits, and that all of those exhibits were returned on the same date. Those matters are consistent with McDougall's assertion that the purpose of uplifting the audio recordings on 17 July 2003 was to copy them for disclosure to the defence. I accept his evidence in this regard.

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24 Transcript 06032013 1-33 at 30.

25 Further Affidavit A McDougall, para 13.

[79] Once it is accepted that the audio recordings were copied, there is no basis upon which to reject McDougall's assertion that those copies were provided to the appellant's then legal representatives. The fact that none of those legal representatives can recall receiving or seeing those audio tapes does not render it unlikely they were disclosed by the prosecution. The brief was voluminous, and there were multiple changes in the legal representation of the appellant. No records were kept by the various solicitors as to what was supplied to the appellant's succeeding legal representative.

[80] It was contended that McDougall ought not to be accepted as his responses in cross-examination during the Grimes proceeding evidenced a lack of recollection that the process of taking B's statement had been recorded at all. However, a consideration of McDougall's evidence during the Grimes proceedings merely indicates caution in his responses. He initially indicated the process had been recorded by him. Further, his explanation that he was unsure at that time, being some five years after the events, is entirely understandable. It is a completely different situation where he is being asked to recall whether audio recordings were disclosed by him in circumstances where he has good reason to recall events surrounding their disclosure.

[81] The conclusion that copies of the audio recordings were provided to the appellant's then legal representatives prior to committal renders it unnecessary to determine whether McDougall also provided copies of those recordings to the appellant's legal representatives on a second occasion. However, for completeness, I will set out my conclusions on that issue.

[82] McDougall recalled providing another copy of the audio recordings, during the trial to the appellant's then solicitor, Peter Saggers. They were contained in a clipseal bag. McDougall specifically recalls this event as he was annoyed he was required to provide another copy of the recordings when he had previously provided them to the appellant's legal representatives.

[83] Saggers does not recall ever receiving a copy of the audio recordings. Whilst he cannot categorically say he did not receive them, he considers he would recall receiving them as he had specifically sought all transcripts or notes of conversations between investigators and B. Saggers said he was very interested in securing that material.

[84] Both McDougall and Saggers impressed as trying their honest best to recall events from many years ago. Each gave good reason for recalling whether copies of the audio recordings had been produced during the trial. However, their recollections cannot be reconciled with each other. It is necessary to consider the surrounding material to see if it favours one or other version.

[85] McDougall does not recall if he made notes of the occasion he provided the tapes to Saggers. He no longer has access to his diaries for that period. However, Saggers produced a diary note made in the course of the trial which specifically referred to material supplied by the prosecution. Saggers' note, made on 25 October 2005, is in the following terms:

> "~~* First occasion MacDougall~~
>
> Alastair McDougall

- we have all recorded conversations

  2 x R of I 3/1

  Bogabilla

  Tolsher

  Motel with Aurelia"

Saggers' interpretation of his note is that it is a record of confirmation by McDougall that the only recorded conversations are those listed by Saggers.

[86] Saggers' note is significant for two reasons. First, it is consistent with McDougall's contention that the reason another copy of the recordings was provided by him was that the defence specifically raised, in the course of the trial, the issue of any further recordings. Second, it was made the day after the defence had raised with the trial Judge that the defence were awaiting a tape recording from Mr McDougall.

[87] That exchange, late on 24 October 2005 was in the following terms:

> "WITNESS LEAVES COURTROOM
>
> HER HONOUR: Are there any matters that either of you wish to raise?
>
> MR FRASER: Can I just raise something, your Honour? I just wanted to flag this – I'm reminded by my instructing solicitor – and that is this: I'm in a position where I could start my cross-examination of Ms B, but there is one piece of information we are still waiting on and it's a conversation – it is a tape of a conversation that she had with Mr McDougall. Mr McDougall, I think, is going to provide it to Mr Saggers. We are still waiting on it. There's plenty I can go on with, but I would like to be able to be in a position to have a look at that material tonight, if I can.
>
> HER HONOUR: I think it is really important that that be provided as soon as possible if it hasn't already been provided.
>
> MR CAMPBELL: Yes, your Honour.
>
> HER HONOUR: What's the hold-up?
>
> MR CAMPBELL: I'm not sure. I left that with the officer concerned. I understand he's been taking up with the defence directly."

[88] Saggers' note records "2 x R of I 3/1". That notation can only properly be interpreted as a reference to two records of interview on 3 January 2003. McDougall gave evidence that he undertook a formal interview with B on 3 January 2003 following which he again spoke to B for the purpose of the provision of a statement. Both processes were recorded on 3 January 2003, although the latter process continued into 4 January 2003. Whilst there is no reference in the note to 4 January, this is not surprising as that day was merely a continuation of the process commenced on 3 January 2003.

[89] A transcript of the formal interview conducted on 3 January 2003, only four pages in length, had been provided to the defence. An earlier conversation with B on 3 January 2003, for the purposes of arranging for B to be interviewed later that day, was also recorded by police. A copy of the transcript of that recording was provided to defence on 25 October 2005.

[90] On its face, Saggers' note is capable of being interpreted as confirmation by McDougall that the defence have been provided with copies of all recorded conversations, including the conversations on 3 January 2003. Such confirmation is consistent with McDougall's evidence that the recording had been provided at an earlier time.

[91] It may be that McDougall and Saggers were at cross purposes in this conversation. Saggers obviously considered the earlier conversation arranging for the formal interview to also be an interview. However, it does not follow that McDougall's confirmation that the defence already had all recordings is other than a reference by him to the formal interview, and the recording later that day, and the next, of the taking of B's statement. McDougall refers to only two interviews with B on 3 January 2003.[26] First, the formal interview. Second, the process of taking the statement which commenced on 3 January 2003 and concluded on 4 January 2003.

[92] Some support for this conclusion comes from the fact that McDougall, on the morning of 25 October 2005, provided Saggers with a copy of the transcript of the earlier conversation on 3 January arranging for an interview. There is no suggestion he provided a copy of the audio recordings of that conversation.

[93] Having regard to the content of Saggers' note and all of the circumstances, I am not satisfied McDougall did not provide a further copy of the audio recordings. This conclusion is reached notwithstanding the unlikelihood Saggers would not recall receiving 14 C90 tapes in a clipseal bag in the course of the trial process. That would represent a significant and sizable object to be supplied during the trial, particularly having regard to the specific requests for the production of all conversations between investigators and B.

[94] The appellant accepted that the onus was on him to establish that the prosecution had not disclosed these audio recordings. The appellant has not satisfied that onus. I am satisfied that copies of the audio recordings had been provided at an earlier time.

[95] The multiple changes in the appellant's legal representatives, in circumstances where no clear records were being kept as to what was being forwarded from previous legal representatives to new legal representatives, renders it entirely plausible that those audio recordings were misplaced despite having been disclosed by the prosecution. Other material had been supplied by the prosecution at an earlier time to the appellant's previous legal representatives which was not in the possession of Saggers or the appellant's counsel.[27]

Was B's history of being a registered informer disclosable?

[96] It is accepted by the Attorney-General that B's history as a previously registered police informant was not disclosed to the appellant. It is contended it could not be

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[26] Amended Affidavit A McDougall para 14.

[27] AB 184.

disclosed as disclosure was prohibited by s 119 of the *Drugs Misuse Act* 1986 (Qld) which provides:

> "**119 Protection of informers**
>
> (1) Where an informer supplies information to a police officer in respect of the commission of an offence defined in part 2 the informer's identity at all times shall be kept confidential.
>
> (2) A person who discloses the name of an informer, or any other particular that may be likely to lead to the informer's identification, is guilty of a crime.
>
> Maximum penalty—5 years imprisonment.
>
> (3) A person is not criminally responsible for an offence defined in subsection (2) if the person proves that the disclosure was made in good faith for the protection of the interests of the informer or for the public good."

[97] The fact that B was an informant in the appellant's investigation was relevant. The appellant's legal representatives were aware of that fact. It was specifically referred to in the committal hearing, and in the criminal trial.[28] However, disclosure of that information does not mean the prosecution was required to disclose that B had previously acted as a police informer in totally unrelated investigations, if such disclosure would be unlawful.

[98] Section 119 is designed to protect the identity of persons who provide information about others. That protection includes persons who have previously disclosed such information. Their identity, as prior informers, is subject to protection, even if their involvement in disclosing offences in respect of a later investigation is revealed by reason of their being called as witnesses. The relevant issue is the provision of information in respect of the offence the subject of the prosecution.

[99] The prosecution's obligation to disclose things in the possession of the prosecution is expressly subject to the disclosure of the thing not being unlawful, or contrary to the public interest.[29] Disclosure of B's prior involvement as an informer in other operations would be prima facie unlawful.

[100] Even if B's informer profile from 1996 could have been disclosed without breaching s 119, her informer profile was not properly the subject of disclosure in the present case. There is no evidence it was within the possession of the prosecution as defined in s 590AE of the *Criminal Code*. The prosecutor did not know of it, the arresting officer did not know of it, and it was not discernable by reasonable inquiry as there was no notice of a need to search for such a document.

Were the letters from B disclosable?

[101] The appellant contends there was an obligation on the prosecution to disclose handwritten documents sent by B to police officers in or about August 2002. The

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28 See AB 72, 107; AB 1107.

29 *Criminal Code* s 590AJ(2). A similar constraint or obligation exists in s 590AC(1).

documents in question comprise four handwritten pages. It is unclear if they were sent as one letter or as several letters. The recipient, Rutherford, cannot now recall.[30]

[102] The existence of a letter, sent by B to Rutherford in August 2002, was disclosed by the prosecution to the appellant prior to trial. The letter was expressly referred to by B in her evidence-in-chief.[31] However, the letter itself was never provided to the appellant as the prosecution was unable to locate it at trial. In the course of preparation for this appeal, the letter was located in the prosecution material. It had been mistakenly filed in a miscellaneous file within the offices of the Director of Public Prosecutions.

[103] The obligation to disclose is limited to documents in the possession of the prosecution. Relevantly, those documents are defined as being documents which are held by the Director of Public Prosecutions' office or the existence of which is known to the prosecutor or to the arresting officer. On the evidence, the prosecution disclosed the existence of the letter but could not produce it at the time despite reasonable enquiries. There was no breach of the prosecution's obligation to disclose pursuant to the *Criminal Code*.

[104] The appellant contends the obligation to disclose, contained within the *Criminal Code*, is specifically expressed as not derogating in any way from any other requirements to disclose relevant documentation. There is, and has been, a general obligation of disclosure. Its importance was acknowledged in *Grey v The Queen*.[32] However, that duty was also met in that the existence of the letter was disclosed, and all reasonable attempts were made at the time to locate the letter.

Was Hooning's draft statement disclosed?

[105] The appellant contends there was a draft statement of Hooning which was not disclosed by the prosecution. The appellant relies on a reference in Hooning's interview to a draft statement. It is accepted a draft statement would be disclosable pursuant to the prosecution's obligations of disclosure.

[106] However, the evidence is that any "draft" statement was a work in progress which became the original statement. No versions of the earlier document were kept by the investigating officer. In those circumstances, there is no evidence to support a finding that a draft statement of Hooning ever existed in a form which could be disclosed by the prosecution.

Were other relevant recordings not disclosed?

[107] The appellant also contended there were other audio recordings relating to Hooning and Pfaff made by officers of the Crime and Misconduct Commission in February or March 2003. There is, however, no evidence that those recordings exist, or were ever in the possession of the prosecution. In those circumstances, the appellant has not established there was a breach of the prosecution's duty of disclosure in respect of other recordings.

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30 Amended Affidavit D Rutherford paras 21 - 25.

31 AB 1107.

32 (2001) 184 ALR 593.

Was B's approach by police disclosed?

[108] In the committal hearing of Grimes in 2008, a letter dated 26 August 2005, sent by McDougall to the prosecutor at the appellant's trial, Brendan Campbell, was raised wherein McDougall stated that the authorities decided to approach B after the investigation into the appellant was going "stale". This letter was never disclosed to the defence. Campbell has no recollection of ever receiving it. However, it was accepted that he did receive it as the letter was forwarded internally to the Director at that time.

[109] This letter was a significant document. It ought to have been disclosed by the prosecution to the appellant's legal representatives. However, it does not follow from its contents that B's assertion that she approached authorities was factually incorrect.

[110] A consideration of the evidence supports a conclusion that at or around August 2002, two events occurred. B attempted to contact Rutherford in Goondiwindi. This occurred shortly after police had conducted a raid on her mother's property. At or about the same time, police determined to approach B.

[111] The fact that police decided to approach B does not detract from the accuracy of B's assertion that she approached authorities offering her assistance. The handwritten document sent by B at the time, supported that conclusion. That letter was known to the defence at trial,[33] although it was unable to be located by the prosecutor at trial. The contents of the handwritten document add little to that forensic fact. The defence knew of the police raid on B's mother's property at the time, and B accepted at trial that her motivation for contacting police was money.

Was B's financial reward disclosed to the defence?

[112] B admitted at trial that her motivation for contacting police was money. The defence expressly addressed the jury on that aspect. However, the defence were unaware B had actually received a financial reward. That fact, referred to in McDougall's letter to Campbell, was never disclosed by the prosecution. It should have been disclosed, as the letter was in the possession of the prosecution.

Additional evidence

[113] The appellant contends that as a consequence of evidence given in subsequent trials, there exists further a body of evidence which casts great doubt on the reliability and credibility of the witnesses B, Pfaff, Hooning and Bailey.

[114] In respect of B, it is contended that B gave evidence during Grimes' committal that she did not meet the appellant until after the birth of her daughter. As her daughter was born in September 1998, this casts doubt on B's evidence at trial that she met the appellant some time in 1995. It also casts doubt on her evidence of the appellant's involvement in trafficking prior to 1998.

[115] B also gave evidence at Grimes' committal that she owed the appellant money in October 2000. This casts doubt on the information provided in the course of giving her statement that she had paid the debt to the appellant in 1999. At Grimes'

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[33] AB 472-20; AB 1107-10.

committal, B also said she gave Adam's details to police at the time of the car accident in 1996, casting doubt on her assertion the speed found in the car at that time was owned by Cannon.

[116] The appellant further submits that during Grimes' committal, B did not give any evidence that she had supplied ephedrine to the appellant until she was prompted, in evidence-in-chief. She also gave evidence that her daily planner, which had been seized in a raid, did not contain the appellant's telephone number which was consistent with B not knowing the appellant very well.

[117] Finally, in respect of B, the appellant submits there is evidence B had a drug debt paid by police, and that B gave conflicting accounts of when she witnessed the quantity of amphetamines in a wetsuit in the appellant's car.

[118] In respect of Hooning, it is alleged there were inconsistencies between Hooning's evidence at trial as to when he was on the methadone program and evidence called during the confiscation proceedings from a doctor with Queensland Health.

[119] The appellant also contended that evidence given by Bailey in the confiscation proceedings was inconsistent with that given in the appellant's trial and with the information supplied to police during her interview. A similar complaint is made in relation to later evidence given by Pfaff.

[120] Viewed individually, each of the matters raised in respect of B does not give rise to an issue which could be said to seriously call into question the reliability and credibility of a witness whose recollection of dates and timeframes was admitted to be poor and whose reliability and credibility was fundamentally in issue at trial. Viewed collectively, a similar conclusion arises. The matters relate to the giving of evidence about events many years before where it would be expected that even a witness with a reasonable grasp of dates would have difficulty recollecting precisely the date or sequence of various events.

[121] Similarly, the alleged inconsistencies in respect of Hooning, Bailey and Pfaff relate to peripheral matters which could not be said to have seriously undermined the reliability and credibility of witnesses who at trial were said to be so lacking in reliability and credibility that their evidence ought not be accepted by the jury.

[122] The appellant's legal representatives cross-examined Hooning at trial in relation to when he commenced on the methadone program. It was apparent, from his answers, that he had an inability to be accurate as to the date. The appellant's legal representative also cross-examined Bailey and Pfaff on the accuracy of the recollection.

Was there a miscarriage of justice?

[123] The prosecution failed to disclose to the appellant the letter from McDougall dated 26 August 2005. It contains matters relevant to issues which went to B's credibility and reliability.

[124] The audio recordings, although disclosed, were not used at trial. They are properly to be viewed as new evidence as although they were available, they were not used at trial. Their non-use was not due to any forensic decision on the part of the appellant's legal representatives. The remaining material relied on by the appellant

was not reasonably available to the appellant. These materials are properly to be regarded as fresh evidence to be considered in determining whether there has been a miscarriage of justice in all of the circumstances.

[125] The inaccessibility of this material to the appellant's legal representatives gives rise to a question of whether this court should hold, having regard to the principles in *Mallard*, that the appellant's conviction involved a degree of procedural unfairness amounting to a miscarriage of justice warranting the quashing of those convictions and the ordering of a new trial. Matters may assume an entirely different complexion in light of facts and matters previously ignored or unknown.[34]

[126] The outcome of a trial may be influenced by a non-compliance with the prosecution's obligation to disclose.[35] Such non-compliance gives rise to a departure from the requirements of a properly conducted trial. The issue for consideration in that event is whether there has been a substantial miscarriage of justice. The effect of the relevant authorities was detailed in the joint judgment of Brennan, Dawson and Toohey JJ in *Wilde*[36]:

> "Those authorities establish that where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice if the applicant has thereby lost 'a chance which was fairly open to him of being acquitted' to use the phrase of Fullagar J in *Mraz v The Queen* or 'a real chance of acquittal' to use the phrase of Barwick CJ in *Reg v Storey*. Unless it can be said that, had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused, the conviction must be set aside: see *Driscoll v The Queen*; *Reg v Storey*; *Gallagher v The Queen*. Unless that can be said, the accused may have lost a fair chance of acquittal by the failure to afford him the trial to which he was entitled, that is to say, a trial in which the relevant law was correctly explained to the jury and the rules of procedure and evidence were strictly followed: see *Mraz v The Queen*. The loss of such a chance of acquittal cannot be anything but a substantial miscarriage of justice." (Footnotes omitted)

[127] Where there has been non-compliance with the obligation to disclose, the question is whether the accused suffered a forensic disadvantage from the non-disclosure. In considering that question, a court cannot ignore even a relatively slim possibility that the defence was forensically disadvantaged by the non-disclosure. It is enough if the opportunity which the defence was denied, could have made a difference to the verdict.[37]

[128] The appellant submits that when consideration is given to all of the material which the appellant did not have access to at the time of the trial, he was deprived of a material forensic opportunity in that innocent hypotheses "may have been too

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34 *Mallard* at 132 [13].
35 *Grey v The Queen* (2001) 184 ALR 593.
36 *Wilde v The Queen* (1988) 164 CLR 365 at 371-2.
37 *R v HAU* [2009] QCA 165 at [40].

readily negatived on the basis of evidence accorded more credit than it should have received" having regard to the new material which calls into question the reliability and creditworthiness of the witnesses B, Pfaff, Hooning and Bailey.

[129] This forensic opportunity is said to be real as there was proffered an innocent explanation for the appellant's dealing in ephedrine. The appellant contends he was also deprived of the forensic opportunity to advance that the material was consistent with his assertion that police had procured and encouraged the witnesses to falsely implicate the appellant. The appellant also lost the opportunity to apply to have excluded various aspects of the evidence.

[130] The appellant also contends that the matters referred to raise whether a jury ought to have entertained a reasonable doubt such as to constitute a material injustice in the outcome of the prosecution. In this respect, the appellant relies upon the observations of Keane JA (as his Honour then was) (with whose Reasons Fraser JA agreed) in *R v Stafford*[38]:

> "It will be appreciated that the focus of present concern is upon the fairness of the trial process rather than the substantive justice of the outcome. So far as substantive justice is concerned, however, it cannot be said that a verdict of acquittal at a fair trial is entirely unthinkable. One cannot proceed on the footing that the jury might have reached a fantastic or far-fetched conclusion. But as McHugh J said in *Stevens v The Queen*, juries:
>
> > ' "themselves set the standard of what is reasonable in the circumstances" (*Green v The Queen* (1971) 126 CLR 28 at 33). … Nor is a reasonable doubt "confined to a "rational doubt", or a "doubt founded on reason" in the analytical sense' (*Green v The Queen* (1971) 126 CLR 28 at 33)'. Jurors may have a reasonable doubt about the guilt of the accused although they cannot articulate a reason for it other than they are not satisfied beyond reasonable doubt that the Crown has proved its case.'"

[131] The appellant contends that the unavailability of the audio recordings deprived him of a significant forensic opportunity as the audio recordings reveal investigating officers regularly asked leading questions, and did not include in the signed statement inconsistencies in the information provided by B.

[132] However, a consideration of the audio recordings, and of B's signed statement, does not support such a conclusion. Early in those audio recordings, B was asked about her initial involvement with "speed". In response to a question whether she at that time was involved in selling or making speed, B replied "selling". Thereafter, the following exchange occurred:

> "SGT GOUGH: Who were you selling it for?
>
> B: Um there was a guy called Adam … which was who [her boyfriend] got his off.
>
> SGT GOUGH: Ok.

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38 [2009] QCA 407 at [145], [146].

B: Um also basically around that time Charles comes into the scene."[39]

Later, B provided the following response to the investigator's question:

"SGT GOUGH: Started selling speed at around this time and I got the speed from Adam.

B: Mmhmm. But mainly Charlie though."[40]

[133] References to the appellant were not as a consequence of any leading questions. They were on each occasion volunteered by B. Later references to the appellant's activities constituted a summary of B's earlier assertions.

[134] There is also no substance in a contention that the investigating officer gave responses suggesting he was unhappy or uncomfortable with the answers being provided by B. The responses given by the investigating officer occur in the context of a statement being contemporaneously prepared on a computer.[41] On occasions, the words attributed to the investigator are plainly a reading back by the investigator of parts of the statement he is typing during the interview.[42] Those entries cannot be characterised as questions, let alone leading questions, or as expressing displeasure with her response.

[135] The appellant also contended there were differences in B's description of the appellant in the audio recordings to that recorded in the statement. However, this contention fails to have due regard to the difference between what was a question and answer process and a signed statement. It is understandable that the former may contain numerous questions and answers in respect of a particular topic, including answers containing information about which B expresses some hesitation or uncertainty.

[136] A consideration of B's description in the interview, and that contained within the statement, starkly indicates the difference. In the interview, the following questions and answers are recorded:

"SGT GOUGH: Do you remember speaking to Charlie –

B: Yes –

SGT GOUGH: At the party?

B: Yes.

SGT GOUGH: And um what do you remember about him physically? What, how would you describe him?

B: Um, I don't know um.

SGT GOUGH: How old do you reckon he was at the time?

B: Well he's a lot older than what I am he's.

SGT GOUGH: He's a lot older than what I was.

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39 AB 3635-15.
40 AB 3636-60 - 3637-1.
41 AB 3634-10-40.
42 For example, AB3646-30; AB3647-35.

B: Mm. Um, I don't know. Probably about forty. I'm not a hundred percent sure –

SGT GOUGH: He might have been about forty?

B: Mm he was an older man.

SGT GOUGH: Forty years old. What did he look like? Fit? Fat? Tall, skin, thinny, short, fat? Big afro. Bald.

B: He's um yeah broad.

SGT GOUGH: Yeah.

B: Um.

SGT GOUGH: Cross you're indicating –

B: Yeah –

SGT GOUGH: Which –

B: Shoulders.

SGT GOUGH: Ok.

B: His shoulders.

SGT GOUGH: Ok.

B: He's not fit.

SGT GOUGH: Broad shoulders.

B: He's not fit. Um he's not got you know decent muscles, got decent arms.

SGT GOUGH: Mmhmm. Did he have muscly arms?

B: Yeah but not overly.

SGT GOUGH: Ok.

B: Probably someone's who's not lazy but –

SGT GOUGH: Mm –

B: Indulges on food.

SGT GOUGH: So fit looking or? Doesn't matter. We can –

B: Ah –

SGT GOUGH: Come back to it. You –

B: He's got a bit of a gut on him so –

SGT GOUGH: Oh has he? Oh –

B: I don't know like –

SGT GOUGH: Alright –

B: Um.

SGT GOUGH: Not that's alright no, no, I'm just –

B: Yeah –

SGT GOUGH: Not now but what did he like then, what do you remember what he looked like then? I mean –

[END OF TAPE RECORDING]

SGT GOUGH: Itself off. Caught us by surprise. B ah?

B: Yep.

SGT GOUGH: The time is now three fifty um there's only probably a ten second period there where the –

B: Mmhmm –

SGT GOUGH: Tapes were off so we'll just keep going.

B: Yep.

SGT GOUGH: We were talking about Charlie when you first met him.

B: Mmhmm.

SGT GOUGH: What he looked like. It's, it's not of major importance –

B: Mmhmm –

SGT GOUGH: Um did he have tattoos.

B: Yes.

SGT GOUGH: Ok. You remember that?

B: Yes.

SGT GOUGH: Can you remember what, where he had tattoos?

B: Where exactly no but um –

SGT GOUGH: I remember that he had tattoos.

B: Mmhmm.

SGT GOUGH: But I don't remember where,

B: He had a bit more hair than what he has now."[43]

[137] Her statement recorded the following description:

> "I remember speaking to Charlie at the party. I remember Charlie was a lot older than I was. He might have been about 40 years old at the time. He had broad shoulders. I remember that he had tattoos but I don't remember where. I don't know what he did for a living but I know that he had lots of money. I can't remember how long we spoke for or what we talked about."[44]

[138] The statement contains those descriptions which had a level of certainty. The failure to include the other aspects in the statement did not constitute a sanitisation of B's information. Further, the reference to the appellant having "a gut" was not necessarily inaccurate having regard to the photograph images tendered on appeal. Not surprisingly, they showed differing profiles which may properly be said to show "a bit of a gut".

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43 AB 3654-3656.

44 AB 4000.

[139] The alleged inconsistencies relied upon in respect of B's audio recorded interview as part of the preparation of her statement do not involve matters that materially affected the significance of her direct evidence of purchasing drugs from the appellant, particularly against the background of the surveillance evidence confirming the meeting at the Pitstop Café between B and the appellant.

[140] As to the remaining matters, the jury was already apprised of evidence that B was an informant for the police, had approached the authorities, had been the subject of search around that time and that material advantages were a factor in her approach to assist authorities. The fact that B had previously been a police informant, that police had independently determined to approach her to seek her assistance, and had paid her some monies would not materially have altered a jury's assessment of B's reliability and credibility having regard to the serious challenge to that reliability and credibility at trial. This conclusion does not involve seeking out possibilities "to explain away troublesome inconsistencies".[45]

[141] It also cannot be said the defence was forensically disadvantaged by the non-disclosure of McDougall's letter having regard to the material already known about B, including that police had searched her mother's property around the time she said she approached police, and that financial reward was a motivation for that approach to police.

[142] The evidence led at trial involved an overwhelming case against the appellant in respect of trafficking in methylamphetamine in the latter period the subject of the trafficking charge. Not only was there evidence of drugs being found in his possession, and of surveillance and telephone intercepts consistent with the appellant's involvement in drug transactions, there was also forensic accounting evidence in respect of $1 million in unexplained income against a background of evidence that the appellant had access to large quantities of ephedrine in the period 1999 to 2001 which would have been able to produce a significant quantity of methylamphetamine. Those quantities would explain the surpluses revealed by the financial analysis.

[143] In addition to that evidence, there was direct evidence given by B, Pfaff, Hooning and Bailey as to the appellant's involvement in the sale and production of methylamphetamine between 1992 and 2002. That evidence involved each, independently, giving evidence of the appellant's involvement in the purchase and extraction of components for the production, and the possession and sale of methylamphetamine.

[144] Each of those witnesses' credibility and reliability was the subject of significant challenge at trial. Those challenges included the fact that each of those witnesses was dishonest, involved in drugs, had reasons to ingratiate themselves with police, and had given evidence in circumstances where they had either received reduced sentences or indemnities. Specific directions were given by the trial judge in relation to matters in respect of each of those witnesses which were adverse to their reliability. The significance of these directions was noted in the appellant's earlier appeal.[46]

[145] By way of example, it is useful to record what was said by defence counsel in his closing address about B:

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45 *Mallard* at 135 [23].

46 *R v Cannon* [2007] QCA 205 at [57]-[58].

"Well, let me, if might, move on to B. This is the woman described as a former prostitute who has now turned to her God or turned to Allah, seemingly, I suppose, in the hope of some sort of redemption. Well, what do we know about her? What do we know about her? And you really do have to look at these people that are being paraded in here. She is a long term drug user. Seven grams of speed per day. Drug addict. Drug supplier. Make no mistake about it – drug supplier. A person who suffers from anxiety, who suffers from depression, who has attempted suicide. You might think she is someone who maybe unhinged, someone who might be a little bit emotionally unstable.

We then come to the car accident, 1996, one of these anchor points, you see. One of these anchor points. Let's look at this anchor point. She lied – she lied to the police in relation to the drugs found in her car, the LSD, the cannabis, the speed. She told the police – she told the police that those drugs were for her own use. Clearly they weren't. What compounds it, members of the jury – because in her statement and what she has told you , 'Look, I took them up there mainly to sell.' – but what compounds that lie to the police is that she allowed her lawyers to lie on her behalf. Now, I'm not suggesting her lawyers were liars. Quite the contrary, but she compounds it by allowing her lawyers to lie on her behalf in the Supreme Court, no less. Now, you think about it for a moment. You think about it, how you would feel if someone told you something, and on the strength of what they told you you got up and represented them or did something for them and said, 'Look, Johnny has told me this', da, da, da, and then you found out that Johnny has got you to tell a lie. You would be dreadfully upset, I would suggest. Dreadfully upset. Make no mistake about it. That's what she has done.

We then come to another anchor point, I suggest, Boggabilla, August 2002, the Moree police, because there's glassware there and she denied any knowledge of it. Well, I will leave that to you to ponder, but I would suggest she knew everything about it.

She was – there was an initial interview with Mr McDougall that happened sometime in August 2002 and there was a later interview. What emerges, members of the jury, is this, that she said that she was, in fact, selling some drugs that she had manufactured. In her initial interview – and this is significant – there is not one word of a mention of a debt being owed to Mr Cannon. In her initial interview – and again I suggest to you this is significant – there is not one mention, not one word of doing deliveries for Mr Cannon, these drug deliveries, and in that initial interview, members of the jury, she is the one who is asked by Mr McDougall – I think there had been some discussion about her turning things around or putting it all behind her – is there any other motivation? Money. Money. I mean, it is not out of the goodness of her heart, not out of civic duty. Again, this was volunteered, fortunately by Mr McDougall, that during that interview she mentions the name Charles or Charlie, but doesn't mention Mr Cannon's surname, Cannon. This is

someone that says they were doing deals with him, many, many times, et cetera, et cetera. It is just nonsense.

We do know that there is a fellow by the name of Grimes, that he was involved in some of this. Is it possible that she somehow substitutes the involvement, Grimes for Cannon? I don't know. It is not that difficult, I would suggest, for a polished liar to be able to do such a task. It is a matter for you. It is a matter for you.

In the evidence before you she spoke of threats by Donnelly. You might recall that. Not one mention of that to the police in her interview. In her second interview. Indeed, it doesn't appear in her statement. Yet she says, 'I was concerned about the safety of' her family. Remember when she first spoke to the police, Donnelly is at large. Donnelly is at large. I mean, is she making it up as she is goes along? That's what you have to ask yourself with her. You saw her.

Then we come to her initial interview. She says – this is when she was first spoken to – five to ten supplies. But then when she gives her evidence to you, 'It is becoming a weekly event'. A big difference. A big, big difference. Well, they are all matters for you.

I would suggest to you, members of the jury, the cold, hard facts of this case suggests the only time that my client has ever met – ever met Mr Cannon was at the Pitstop – sorry – the only time he met Miss B, sorry, was at the Pitstop, that one occasion, that one occasion, one occasion only.

Well, let's go on. She gives evidence of these ephedrine deals with Cannon. She says she was there. She says, in effect, at one point, members of the jury, that she was going to be the fall guy for $50. That's her evidence. That's what she wants you to believe. 'Look, I'm going to be there. If I get caught, I will be in a hell of a lot of trouble, but I'll do it for 50 bucks, notwithstanding I've got a young child'. That's what she says she was getting out of it. She was going to take the blame for Pfaff and Donnelly for $50. As I say, it is worth noting at the time she had a long child.

Let me move on to the aspect of the phone number, the phone number being on 1234. She has to concede she may have got that from Pfaff. She didn't get it from Cannon, I would suggest, and you might want to take this on board, that it seems from what Mr Walker says, that the number – you can infer this – that the number was only intercepted as from 19 April 2002, and, yet – and yet, in the hundreds of calls involving that line, that mobile line, there is not one interception of any calls involving, on the one hand, Mr Cannon, on the other, Miss B. Not one. Not one call.

Well, again, it is entirely a matter for you. When she is pressed for details, members of the jury, as to what year, whereabouts did this happen, who was there, she has a sudden memory loss. 'I can't remember. I can't remember. I've taken so much speed.', or something. Then we come on to a very important aspect of this

whole evidence and that is the differences between, on the one hand, Mr Pfaff, and on the other hand, B. Let me just outline some of them. Pfaff said that B had no dealings at all with Mr Cannon in relation to the ephedrine. Well, that's contrary – flies in the face of what B says. B says that she met Charles Edward Cannon at a party with Pfaff and working as best we can, it had to be sometime in 1995, and you might recall when I asked Mr Pfaff about this, Pfaff said, 'Well, look, I first met Mr Cannon, it wasn't until 2000, more likely 2001.', no mention of meeting him at a party. No mention of meeting with B. It is just nonsense from B. Then B has her, Pfaff and Donnelly socialising with Mr Cannon, certainly at – it appears in the statement – at the Palladium. Well, you might recall, I asked Mr Pfaff about that. The effect of his evidence really, members of the jury, is that Donnelly and Mr Cannon, didn't know each other. Then you might think, if that's the case, Donnelly, Cannon, not knowing each other, what an extraordinary coincidence that in this milieu of drugs that were going up to Goondiwindi in 1996, that she's got some drugs from Cannon, she's got some drugs from Donnelly and she ends up owing them both. They don't know each other. They never have. It is just nonsense. Total nonsense.

The effect of what B tried to convey is that she'd gone to – I'd suggest, gone to Mr Cannon's house with Mr Pfaff and you might recall I asked Mr Pfaff whether that had ever happened. Answer, 'No.' Because it is important to remember what Mr Pfaff told you, not just on oath, but what he said in his interview, that B didn't know Cannon, back then, that is when they ephedrine transactions were allegedly taking place. The effect of it, and he said, members of the jury, that it didn't appear to him that Pfaff – sorry – didn't appear to Mr Pfaff, that Mr Cannon and Miss B knew each other at the meeting at the Pitstop. It is just – it is just sheer nonsense to suggest otherwise.

Then we come, as I say, to the surveillance, and you might want to consider this, because in this business about the phone calls, she, at one point had said, 'Well, I had called Charlie Cannon that phone.' You might recall, under cross-examination she said, 'Yeah, I had used it. I had rung him on that number.' Absolutely no proof of it. Not one. Not one telephone interception. Then we come to the surveillance about March 2002, January 2003, one meeting, one meeting only where there is Mr Cannon and B together and the telephone interceptions for that same period, not one call between them, not on the mobile, not on the land line, not anywhere.

Then, of course, there is this difference, B says there was a woman that came to Pfaff's unit during the second deal. Well, Pfaff says that that didn't happen, not in the sequence that she said it happened, that she was physically there when the deal was going on, that is, this other woman. That's not what Pfaff says. Then, of course, B says, 'Look, I was only getting $50.' It sort of grew a bit later when she was pressed about it. Mr Pfaff says he would split half the proceeds with B. Well, entirely a matter for you.

Just for completeness sake, B speaks of paying $4,000 for an ounce back in the '90s and, yet, everyone else is talking about paying $3,000 some many years later. Well, it is entirely a matter for you, but, in my submission, when you go through – when you go through B's evidence and ask yourself what sort of person is she? What's her track record like? Has she a record for dishonesty? Has she lied to the courts before? Has she lied to the authorities? Can she be trusted? Is she mentally stable? When you go through that check list, I would suggest to you her evidence ends up on the scrap heap.

You might want to consider this, in relation to the Pitstop meeting, B didn't and couldn't rule out what was discussed at the meeting was, in fact, ephedrine production and it was worth remembering this – it is worth remembering this, because there is a tie in – Pfaff in his record of interview with the police thought that ephedrine and amphetamines was the same. Wasn't prepared to say what was to be produced amounted to amphetamines. It is entirely a matter for you. That's an unusual coincidence, you might think.

Then we have – I ask you to play this – this is on Exhibit 17. It is the phone call on 19 June 2002 at 11.11 A.M. It is part of – I better make sure I'm right – Exhibit 17 which is the telephone interceptions, based on Mr Pfaff. This is the call, you might recall this, members of the jury, where Mr Pfaff and B are having a conversation. There is discussion about writing the letter, the bogus letter, I would suggest, suggesting that Pfaff owed B some money, and you might recall the cross-examination of Mr Pfaff that he didn't seem to think, oh, there is anything wrong with writing a bogus letter to your superannuation company in the hope that you'd get money. In fact, in the end he claimed privilege. But what is very, very interesting, members of the jury, is that towards the end of that phone call, Mr Cannon is described as this – this is B – 'Yeah, I reckon he's just playing us. I got that feeling too. I've just – I've sort of given up on the idea, actually. I just thought' – sorry – 'I just thought, you just, you know, I just don't think he's that keen'. See, this is 19 June. He's not that keen. He's playing them around. Because later on my client is described, very, very, keen. Mr Pfaff – oh, very, very keen. It is nonsense. It is nonsense. That's what – that's what was said in that phone call. You listen to it and listen to it carefully, members of the jury.

As I say, it is worth repeating at this stage that as between Pfaff and Mr Cannon, the phone calls are almost entirely of Mr Cannon, not the other way around. There is a fobbing off, I would suggest, by Mr Cannon, but in the main, in a number of calls, he wants to talk about money lending. You can really say this, members of the jury, as between the two of them, in the observable period, nothing came out of it. Nothing came out of it. We don't know what was in those samples given to Mr Cannon. Might have been strawberry topping. I don't know. You don't know. We know this much that his track record in providing samples to Barnes was a complete fiasco.

> Significantly, members of the jury, there is no follow-up meeting where the three of them get together, that is Cannon, B and Pfaff. Significantly, B says it was Pfaff putting pressure on her, Pfaff. Then you ask yourself, look, there is some discussion in amongst all this about hypophosphorous acid. B thought it was for Cannon. It seems Pfaff when he was talking about it was dealing with the woman called Sam. What do you make of that? Cannon, Mr Cannon was never, ever, requested to supply anything, whether it be cocaine, methylamphetamine, anything, nothing, in those phone calls by Pfaff. He's told this – well, Barnes is told this, 'He only deals in pounds. He only deals in pound'. Where is the evidence of that? It is about as credible as my client showing up with $250,000. It didn't happen. And in relation to any big deals that Pfaff may talk about, the surveillance, whether it be electronic, whether it be physical, whether it be telephone intercepts, whether it be listening devices, nothing. A big, fat, nothing.
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> Well, as I say, when you analyse B, a history of lying to the police, she has lied to the Court, I suggest to you she has a somewhat dubious history as to her mental health. She has a history of drug abuse and, of course, members of the jury, she has her own problems with drugs. She cannot, in my submission, adequately supply details of matters, important matters when she is taxed and as I say to you, she at odds with Mr Pfaff on crucial details. Again, I would suggest to you, members of the jury, her evidence cannot be trusted. It cannot be brought into play here in the process of seeing whether or not the crown has proven its case beyond reasonable doubt. You would disregard it. It doesn't assist the Crown."[47]

[146] The additional matters identified by the appellant do no more than call into further question the reliability and credibility of B. That reliability was squarely in issue at the trial. A jury was carefully directed to have regard to those matters in considering the guilt or innocence of the appellant. It cannot be said that the additional material, even allowing for the fact that a jury may therefore have considered minor inconsistencies in a different light, deprived the appellant of a material forensic advantage.

[147] The matters identified in respect of Pfaff, Hooning and Bailey similarly go only to their reliability and credit in circumstances where the reliability and credit of each of those persons was significantly in issue at trial, and the subject of specific attack in closing address by the defence counsel.

[148] In determining whether the appellant has suffered a miscarriage of justice it is also necessary to have regard to a compilation of the additional material to see whether it gave rise to a procedural unfairness or the possibility of altering the outcome such as to constitute a miscarriage of justice.

[149] However, even considering the material together it cannot be reasonably said that the jury would have entertained a reasonable doubt about the guilt of the accused. That case relied on direct evidence of drug dealings as well as independent surveillance and financial accounting evidence. It was not a circumstantial case.

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47 SAB 113-118, (errors in original).

[150] Further, unlike *Grey*, the undisclosed letter from McDougall did not convert a witness said to be reliable into one whose credit and reliability was seriously in question. B's credit and reliability was always seriously in issue at trial.

[151] The new or fresh evidence does not call into question the "central plank" of the prosecution case.[48] That evidence also does not have the effect that the jury was misled.[49] The new or fresh evidence, at best, raises further examples of inconsistencies in the witnesses' versions, or further bases to question the reliability of their evidence in circumstances where the jury had before it multiple examples of inconsistencies in the accounts given by the witnesses together with specific issues said to adversely affect their reliability and credibility. It was a matter directly considered by the jury at the appellant's trial.

[152] The new or fresh evidence does no more than raise issues relevant to the reliability and credibility of witnesses whose reliability and credibility was directly in issue, and about whom the jury was expressly warned as to the dangers of acting on their evidence. The new and fresh evidence, neither individually nor collectively, altered the issues to be considered by the jury. These issues included B's motivation for assisting police, the circumstances of that assistance, her knowledge of the appellant, the consistency of her account of when she met him, and the reliability of her claim that the appellant was involved in drug trafficking against a background of B having identified other suppliers in her early involvement with the appellant, including "Adam". The fact that B gave police in 1996 Adam's "details over" [50] would not materially alter an assessment of her credit because she agreed at trial she had lied to police about the drugs at the time.[51]

Conclusion

[153] The appellant has not established that the additional material relied upon by him, either as fresh or new evidence, is of such a nature that its unavailability at trial led to the loss of a substantial possibility of a finding of not guilty or to procedural unfairness in his trial. There is no basis to find any miscarriage of justice in the appellant's conviction.

[154] I would dismiss the appeal against conviction.

[155] In accordance with a request made by both parties at the hearing, they should have an opportunity to make submissions about sentence after publication of the Court's findings. I would direct that the parties lodge and serve any outline of submissions in relation to sentence which they wish to make by 4 pm on 5 August 2013, or by such other time as the registrar directs.

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48 *Mallard* at 135 [23].
49 *cf Stafford* at [149].
50 AB 3835-50.
51 AB 1117-40.