SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tamatea* [2013] QCA 399
PARTIES:	**R** **v** **TAMATEA, Eddie Michael** (appellant)
FILE NO:	CA No 59 of 2013 DC No 1597 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2013
JUDGES:	Morrison JA, Margaret Wilson and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant appealed against his conviction of one count of burglary and one count of unlawfully entering a motor vehicle with intent – where members of the jury, one of the Crown witnesses and the Crown prosecutor had made comments about the appellant being in custody – where the trial judge told the jury not to speculate on why the appellant may have been in custody, and reminded them of their obligation to decide the case on the evidence – whether a miscarriage of justice resulted from the trial judge's failure to discharge the jury CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the Crown relied on tracking evidence given by three police officers from the Dog Squad – where the trial judge cautioned the jury in relation to the reliability of that evidence – where the dog handler and police tracking dog had only begun working together as a team in the month before the offences were committed – where the trial judge noted that there was no evidence of whether a new team was likely to be unreliable or

unable to follow a track – whether this amounted to a direction that there was nothing detracting from the tracking evidence – where the trial judge referred to the person being tracked as "the perpetrator" – whether the references to "the perpetrator" took away from the jury the determination of whether the scent being followed was that of the person who committed the offences – where the trial judge, in summing up, summarised the rival contentions topic by topic – whether this amounted to a failure to put the defence case properly or adequately – where pre-recorded evidence was given by a "special witness" under s 21A(2)(d) of the *Evidence Act* 1977 (Qld) ("the Act"), with a support person present under s 21A(2)(e) of the Act – where no direction was given about the presence of the support person – whether the requirements of s 21A(8) of the Act were met

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – whether, after reviewing the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt

Criminal Code 1899 (Qld), s 668E
Evidence Act 1977 (Qld), s 21A(2)(d), s 21A(2)(e), s 21A(8), s 93A

R v Crossman [2011] 2 Qd R 435; [2011] QCA 126, cited
R v Glennon (1992) 173 CLR 592; [1992] HCA 16, cited
R v Lacey [2009] QCA 275, cited
R v Little [2013] QCA 223, cited
R v Nwabueze [2012] QCA 275, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, applied
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: D C Shepherd for the appellant
J A Wooldridge for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons prepared by Margaret Wilson J. I agree with those reasons and the order proposed by her Honour.

[2] **MARGARET WILSON J:** The appellant appeals against his conviction of one count of burglary and one count of unlawfully entering a motor vehicle with intent to commit an indictable offence at night time, both committed on 11 February 2012.

Overview of the facts

[3] In the early hours of 11 February 2012 a dwelling at 14 Lyndon Way, Bellmere was broken into, and a laptop computer, a game console, DVDs, a mobile phone, a remote control, a school bag, a bracelet, a handbag, a wallet and a camera were stolen. Entry was most likely gained by damaging a screen on a window that had been left open. At about the same time a motor vehicle parked in the dwelling's garage was unlawfully entered. Clothing which had been in the vehicle was subsequently found at the point of the damaged window screen of the dwelling.

[4] The dwelling was occupied by Lisa Maria Wease, her two younger half sisters, and her two sons. Her half sister Hayley Wease, who was then aged 11 years, woke about 3.00 am and saw someone near the television. She went back to sleep for a short time, then woke again and got up to go to the toilet. As she did so, she saw a man in the kitchen.

[5] Ms Wease was asleep in her room when the offences occurred, and did not see the intruder. She was woken up by Hayley and two of the other children coming into her room to report that there was a man in the house.

[6] Ms Wease told the children to get into her bed, and then slowly walked out of her room into the rest of the house, turning lights on. There were no other lights on. She saw that things had been disrupted and that some property was missing. The laundry door was open and the back door leading outside was open. She called her neighbours and the police, and locked the back door.

[7] Police arrived after about 10 minutes. Sometime later a police dog handler, Sergeant Brett Martin, arrived with a dog, Jack. The dog tracked a scent, ending at a house at 63 Swann Road, Bellmere at about 4.00 am. There they found the appellant outside on the patio, pulling frantically at the door as if to open it, and saying "Let me in, let me in."

[8] The appellant was interviewed by police from about 5.20 am. He was then arrested and remanded in custody.

The issue at trial

[9] At trial the fact that the two offences were committed was not ultimately in issue. The contentious issue was whether the appellant was the offender who committed them. Of course, it was for the prosecution to satisfy the jury beyond reasonable doubt that the appellant was the offender.

Grounds of appeal

[10] On the hearing of the appeal, the appellant relied on these grounds –

(i) that the trial judge's failure to discharge the jury on account of the following (individually or cumulatively):

- comments by the jury to the bailiff that the appellant was in custody;
- comments that the appellant was "locked up" made by the child Hayley Wease in her statement which was admitted pursuant to s 93A of the *Evidence Act* 1977 (Qld) ("the *Evidence Act*");

- comments by the Crown Prosecutor to the defence witness Judy Leiataua during cross-examination, concerning the custody of the appellant

resulted in a miscarriage of justice;

(ii) that the following errors by the trial judge resulted in a miscarriage of justice –

(a) after properly warning the jury with respect to the dog handler's evidence, effectively negativing that warning by telling the jury they could take into account that there were no questions suggesting that because the handler and the dog were a new team they were unreliable or unable to track;

(b) referring to the person being tracked as the perpetrator of the offence, when that was a matter for the jury to determine in a circumstantial case;

(c) failing to put the defence case properly or adequately in the summing up;

(iii) that the trial judge's directions about the pre-recorded evidence of Hayley Wease did not meet the requirements of s 21A(8) of the *Evidence Act*;

(iv) that the jury's verdict was against the whole of the evidence, thereby rendering it unsafe and unsatisfactory.

The jury knew the appellant was in custody

[11] The appellant's record of interview was played towards the end of the first day of the trial.[1]

[12] Apparently after the Court then adjourned, one or more of the jurors mentioned to the bailiff having seen the appellant speaking to a young woman in the back of the courtroom. According to the bailiff, one of the jurors asked whether that was acceptable. The bailiff responded –

> "Well, no, it's not my business. If you've got a problem with it, you put it in a note and I'll give it [to] his Honour."

Another juror said –

> "Well, he must be in gaol because he's always turning around and constantly talking to this girl."

The bailiff said –

> "Yeah, if you got a problem [indistinct] put it in a note and I'll give it to his Honour."

The jury did not send a note to the trial judge, but the next day the bailiff raised the matter with his Honour.[2]

[13] Shortly before the luncheon adjournment on the second day of the trial, his Honour gave the jury the following direction –

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1 AR 290.

2 AR 330-331.

> "Members of the jury, I just wanted to speak to you about a small issue. The Bailiff indicated to me that – I assume at the end of evidence yesterday – that one or more of you said to him that you'd noticed the defendant speaking apparently to a friend at the back of the Court yesterday, and that in the course those comments by that jury member another jury member speculated about the possibility that the defendant may have been in custody and was why he was talking him [sic].
>
> I want to say two things: one is, that it's important that you judge the case on the facts of the case; that is, the evidence, and I spoke to you about that yesterday, the importance of that. Secondly, I wanted to indicate to you that it's important that you not speculate as to why people might be doing things.
>
> Sometimes people might speak during the course of the trial to friends for all sorts of reasons, and it's not a logical or rational deduction that that in any way means someone's in custody. And in any case, even if they were, that wouldn't be relevant to the exercise of your discretion in any case because people can be in custody for all sorts of reasons and it doesn't indicate anything about the facts of the case.
>
> But the primary thing is not to speculate about such matters; it's really nothing more than guesswork and it could lead you down a completely different track. One thing that police dogs try to avoid doing and it's important that you do so as well.
>
> So I think it's – I have made my point clear and we can proceed."[3]

[14] On the third day of the trial recordings of Hayley Wease's evidence were admitted pursuant to ss 93A and 21A of the *Evidence Act*.[4]

[15] In the s 93A statement Hayley described the intruder and what he was wearing. The questions and answers included –

> "S CON TOMLINS: So you said that he had black hair.
> WEASE: Yeah.
> S CON TOMLINS: So can you tell me a little bit more about his hair.
> WEASE: He was sort of like, um, well yesterday I went to the chemist with dad.
> S CON TOMLINS: Mmhmm.
> WEASE: And I saw the same sort of hair.
> S CON TOMLINS: Okay.
> WEASE: But um.
> S CON TOMLINS: Mmm.
> WEASE: They said that like the police and stuff have been saying that he's locked up like.
> S CON TOMLINS: Yep
> WEASE: Yeah so, it wasn't him and."[5]

[16] Later on the third day of the trial, Judy Leiataua was called by the defence. She was cross-examined about her friendship with the appellant. She denied having had any

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3 AR 334.
4 AR 442-443.
5 AR 624-625.

contact with defence lawyers before giving a statement to police eight months after the incident. The following exchange then occurred between the prosecutor and her –

> "Had you spoken with Mr Tamatea at any time?-- No, I have not.
>
> And so in the entire time he's been in custody you haven't had anything to do with Mr Tamatea?-- Nuh."[6]

She denied having written to the appellant or having any contact with him at any time. She denied having had a chance to chat with him "that evening".

[17] Shortly after this part of the cross-examination of Judy Leiataua, defence counsel made an application for the discharge of the jury. He relied on the prosecutor's mentioning that the appellant was in custody, as well as the reference to his being in custody in Hayley's s 93A statement and the juror's speculation that he was probably in custody. The trial judge refused the application.[7]

[18] In his summing up the trial judge said –

> "You've got to approach your duty dispassionately, deciding the facts upon the whole of the evidence. This case, it's particularly important because of some speculation, I suppose, about whether or not the defendant has, in fact, been in prison for some or all of the time since this offence, and indeed, during questioning yesterday, the Crown Prosecutor asked one of the witnesses whether or not she'd spoken to the defendant during a period when he was in prison.
>
> You should ignore all of that. It's nothing to do with this case. There are many reasons why people might be in prison. You don't know the circumstances of it or for how long any of these events may or may not have taken place. They are entirely irrelevant, and it's vitally important that you ignore them from your consideration. You've got to approach the case on the basis of the evidence that's given.
>
> Similarly, in respect of the possibility of any discussion between the defendant and people at the back of the Court and any comments or gestures by people at the back of the Court, they're all irrelevant to your consideration.
>
> As I said, I can't emphasise enough how important it is that you determine the matter only by considering the facts of the case."[8]

Subsequently, his Honour said –

> "I spoke to you earlier in this summing-up and during the course of the trial about the importance of not speculating about matters and in particular about whether or not the defendant was in prison, or any case of the importance of determining the matter by consideration only of relevant evidence and adhering to my directions on matters of law.
>
> There is not any evidence about how or why or how long the defendant may have been in custody. There are many reasons why

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6 AR 454.
7 AR 468-472.
8 AR 524-525.

> a person may be in custody, and speculation about why the defendant may be or may have been, or for how long is entirely and utterly irrelevant and unhelpful.
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> You can be sure, if you did so, you'd not make an accurate or reliable guess. In any case, as I said, it's entirely irrelevant. The reason that that event may have transpired doesn't assist you in concluding whether beyond reasonable doubt police dog Jack and Sergeant Martin tracked the perpetrator of the crimes, if you find they occurred, to 93 Swann Road [sic],[9] or whether in doing so, a mistake may have been made as [defence counsel] suggests so as to cause you to have a reasonable doubt about whether the tracking was true and accurate and correct and reliable.
>
> You must, and I direct you, ignore any considerations about whether or for how long or why or when the defendant might have been or be in custody."[10]

[19] Whether to discharge the jury was within the discretion of the trial judge. It is not for this Court to review his Honour's exercise of that discretion. Rather, the issue on appeal is whether his Honour's failure to discharge the jury resulted in a miscarriage of justice.

[20] Counsel for the appellant did not criticise the trial judge's directions to the jury. He submitted that, notwithstanding those directions, the nature of the information that had come to the attention of the jury (namely, that the appellant was in custody) gave rise to a real risk of reasonable apprehension on the part of a fair-minded and informed observer that the jury would not discharge its task impartially.[11]

[21] I do not accept that the information was of that type. I do not accept such a risk existed. It is to be expected that jurors will appreciate that sometimes a defendant is remanded in custody until his trial, and sometimes not, and that there can be many reasons why a defendant is in custody before his trial.

[22] It is also to be expected that jurors will conscientiously follow the directions of the trial judge.[12] The trial judge gave the conventional directions about the onus of proof and deciding the case only on the evidence. His Honour told the jury not to speculate on why the appellant may have been held in custody, reminded them of their obligation to decide the case on the evidence, and told them that speculation upon why the appellant was remanded in custody would not help them resolve matters in the case.

[23] Whether the three times the appellant's being in custody was raised be considered individually or cumulatively, his Honour's directions on the third day of the trial and in the summing up were entirely proper and adequate to diffuse speculation on the false issue of why that was so and to concentrate the minds of the jurors on the real issues.

[24] In these circumstances, his Honour's refusal to discharge the jury did not result in a miscarriage of justice.

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9 Throughout the summing up, his Honour erred in referring to "93 Swann Road" instead of "63 Swann Road". He corrected this in a redirection: AR 571.

10 AR 541-542.

11 Transcript 1-5 – 1-11. See *Webb v The Queen* (1994) 181 CLR 41; *R v Crossman* [2011] 2 Qd R 435.

12 *R v Glennon* (1992) 173 CLR 592 at 603.

Directions about the evidence of the dog handler

[25] In his summing up, the trial judge twice told the jury that the real issue in the case was whether the appellant was correctly identified as the intruder, and in this regard whether the police dog Jack's tracking was reliable and accurate.[13] His Honour went on to talk about expert evidence generally and to tell the jury that the evidence of the three officers from the dog squad (Martin, Hansen and Lanaro) was expert evidence.[14]

[26] His Honour said –

> "In this case, there's, of course, only the evidence of the three police officers. No contrary opinion evidence has been accepted. There's been evidence about the ability of police dog Jack to track the scent of offenders. You ought give strong consideration to that view only if the matters on which it's based have been proved to your satisfaction and beyond reasonable doubt reasonable doubt. [sic]
>
> In this particular case, you also need to take extra care because the dog, you won't be surprised to know, it can't give evidence, it can't be cross-examined or otherwise scrutinised in the way a person's evidence is scrutinised.
>
> You should be careful to avoid overestimating the reliability of the operation of the dog senses. To do so might cause you to have an automatic acceptance that what Sergeant Martin said about the dog, and the fact that the defendant was found at the house automatically means he's guilty.
>
> It could cause you to too rapidly arrive at a conclusion of his guilt. You need to take care and to look with some circumspection at the evidence about the tracker dog.
>
> However, if conscious of this warning, and after assessing the evidence of the witnesses who've spoken about police dog Jack's abilities and Sergeant Martin's interpretation of his behaviour, you are, having regard to all of the evidence, led beyond reasonable doubt to the conclusion that the defendant did break into the complainant's house and steal the items and enter the car, then you can convict, of course."[15]

[27] Sergeant Martin was an experienced dog handler. He had been in the Dog Squad since 2006 and in due course he had become the officer in charge of the Redcliffe District Dog Squad, a position which entailed managerial and training responsibilities. Jack was an experienced tracker dog.

[28] Sergeant Martin and Jack had only begun working together as a team in the month before these offences were committed. Before doing so, they had undergone training called "reteaming" to ensure they would be operational as a team.

[29] The trial judge said to the jury –

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13 AR 520, 532.
14 AR 536-537.
15 AR 537-538.

> "I want to talk about two other – briefly two other bits of evidence before I go to the addresses of both counsel.
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> …
>
> The second matter that I wanted to raise with you – and this is because of the suggestion made in the defence Counsel's submission – that Sergeant and Police Dog Jack were a newly teamed team. And it's quite clear they were."[16]

His Honour reviewed the evidence of Sergeant Martin in this regard, and continued –

> "I say this to you: that in that evidence there was no specific questions directed to the question, and obviously no answer directed to the question, of whether or not an experienced dog and an experienced handler, a new team was likely to be unreliable or unable to follow a track. It's a matter for you. You can apply your common sense. You are entitled to take it into account but there is no specific evidence that – and it wasn't put to Sergeant Martin – that because they were a new team, that there was likely to be mistakes made. They're matters that you can take into account."[17]

[30] Counsel for the appellant submitted that his Honour effectively told the jury they could reason, from the absence of specific evidence of new teams being unreliable, that there was nothing detracting from Sergeant Martin and Jack's reliability.[18] He submitted that this direction undermined the earlier direction to be careful to avoid overestimating the reliability of the tracking evidence.

[31] However, as counsel for the respondent submitted, what his Honour was talking about was how Sergeant Martin and Jack's being a newly formed team was relevant to their reliability. He told the jury this was a matter for them, and that they could apply their common sense. His Honour fairly pointed out that there was no specific evidence on the point. He did not invite the jury to take the absence of evidence about the reliability of a new team into account in support of its reliability.[19]

[32] His Honour did not draw attention to evidence that was favourable to the respondent.[20] He did not remind the jury that Sergeant Hansen, who conducted the training to reteam Sergeant Martin and Jack, considered that Sergeant Martin could handle Jack.[21] Nor did he remind them of Senior Sergeant Lanaro's evidence that it does not take an experienced police dog handler very long at all to learn the idiosyncrasies of a particular dog.[22]

[33] I am unpersuaded that his Honour's directions on this point resulted in a miscarriage of justice.

The trial judge's references to "the perpetrator"

[34] Counsel for the appellant accepted that the evidence established that the dog picked up a track and followed the scent to 63 Swann Road, where the appellant was

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16 AR 556.
17 AR 558.
18 T 1-15.
19 Outline of submissions for the respondent at 5.6.
20 Outline of submissions for the respondent at 5.8.
21 AR 303-304.
22 AR 349.

found.[23] He submitted that the trial judge's references to the "real issue" being whether Sergeant Martin and Jack had tracked "the perpetrator" to the address where the appellant was found presumed a fact in issue for the jury – namely, whether the scent being followed was that of the person who entered the house and committed the offences. He submitted that his Honour erred in not directing the jury that it was a matter for them whether the footprints seen in the dew on the grass outside the house at 14 Lyndon Way and the track followed by the dog belonged to the person who broke into the house.[24]

[35] There are passages in the summing up relating to the reliability of the tracking evidence where his Honour referred to the person being tracked as "the perpetrator". If viewed in isolation they might be thought to proceed from the assumption that the person tracked was the offender. However, they must be considered in the context of the whole summing up. To illustrate my point, I shall set out those passages referred to by counsel for the appellant in his written submissions, [25] placing them, in italics, sequentially with other statements by the trial judge during the summing up.

[36] Very early in his summing up the trial judge told the jury –

> "The real issue is whether or not it was the defendant who committed that offence, and I'll come to that."[26]

Subsequently, his Honour said –

> *"The real issue is whether or not in this case, the tracking by police dog Jack and by Senior Constable Martin was reliable and accurate in identifying the perpetrator of the crime, and it's primarily to that question that I'll assume you'll direct your mind.*
>
> *There is other evidence that the Crown says is corroborative of the reliability and accuracy of Jack's tracking, and we'll come to that in due course but that seems to me to be the central issue in the case."* (*Emphasis added*)[27]
>
> "… it seems beyond dispute that the complainant's house was burgled and the car entered by someone, and the real issue is whether it was the defendant."[28]
>
> *"You don't have to accept my view on it, but you might well think that the real issue here is, as I've said a number of times, whether or not the defendant who was identified by Sergeant Martin, and he says by the dog as the intruder, whether that was an accurate and reliable identification."* (*Emphasis added*)[29]
>
> *"The reason that that event [the defendant being in custody] may have transpired doesn't assist you in concluding whether beyond reasonable doubt [sic] police dog Jack and Sergeant Martin tracked the perpetrator of the crimes, if you find they occurred, to 93 Swann*

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23 T 1-20.
24 T 1-18.
25 Outline of submissions for the appellant at page 15, footnote 41.
26 AR 516-517.
27 AR 520.
28 AR 531.
29 AR 532.

> *Road [sic], or whether in doing so, a mistake may have been made as [defence counsel] suggests so as to cause you to have a reasonable doubt about whether the tracking was true and accurate and correct and reliable."* (*Emphasis added*)[30]
>
> "The prosecution must prove all these elements beyond reasonable doubt: that the defendant entered the dwelling. As I said, you might have little doubt that someone entered the dwelling, and the real issue might be whether you are satisfied beyond reasonable doubt that it was the defendant."[31]
>
> *"You may well conclude that in the area where Police Dog Jack's mannerisms caused Sergeant Martin to conclude the perpetrator had stopped, perhaps to go through items of equipment or otherwise, so as to leave a scent pool in the laneway, that he was indeed on the track of the perpetrator since the complainant later found her son's name tag in that exact area."* (*Emphasis added*)[32]

Shortly before summarising counsel's addresses, his Honour said –

> "The ultimate issue is whether you find beyond reasonable doubt that the offences were committed by the defendant. Ultimately, that may well depend on whether you find beyond reasonable doubt that Police Dog Jack and Sergeant Martin tracked the offender from Lyndon Way to where the defendant was apprehended, about an hour and a quarter after the offence, outside of the dwelling at 93 Swann Road [sic]. If, after having heard all of the evidence, you are left in doubt about whether it was the defendant, or find positively that it was not, then your duty is, as I've said, is to acquit. If the evidence satisfies you beyond reasonable doubt that he committed the offences, then your duty is to convict."[33]

[37] In summarising counsel's submissions, his Honour reminded the jury of what defence counsel had said about the reliability of the tracking evidence. In doing so, he reminded them that defence counsel relied on the fact that at the complainant's house the dog was cast not at the exit from the house but on footprints adjacent to the front right side of the house. He reminded them of the prosecutor's submission that that fact should not affect their assessment at all because it was quite clear the footprints were left by the perpetrator: they were the only ones in the dewy grass and they led to the area in the laneway where the name tag was found and eventually to the area near the creek where the bag containing the wallet was found. He reminded them that defence counsel said it would have been more reliable if done from the exit to the house.

[38] Thus, his Honour was at pains to tell the jury that the ultimate issue was whether the Crown had proved to the requisite standard that the appellant was the offender. The Crown's case was a circumstantial one, and if the jury found the tracking evidence accurate and reliable, it was a circumstance they could take into account as consistent with the appellant's guilt. In the course of summarising the competing submissions, his Honour drew the jury's attention to the question of whether the track was left by the person who had broken into the house.

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30 AR 542.
31 AR 542.
32 AR 548.
33 AR 555.

[39] The trial judge's references to the "real issue" being whether Sergeant Martin and Jack had tracked "the perpetrator" to the address where the appellant was found did not detract from his repeated definition of the ultimate issue. Nor did they take away from the jury the determination of whether the scent being followed was that of the person who entered the house and committed the offences.

[40] I am unpersuaded that his Honour's references to "the perpetrator" resulted in a miscarriage of justice.

Whether the trial judge adequately put the defence case – structure of summing-up

[41] In *RPS v The Queen*[34] Gaudron ACJ, Gummow, Kirby and Hayne JJ said –

> "[41] Before parting with the case, it is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence." (*References omitted.*)

[42] This Court reaffirmed the applicability of that test in Queensland in *R v Lacey*[35] where de Jersey CJ, Keane, Muir and Chesterman JJA said –[36]

> "[7] It was held also in *RPS v The Queen* that while it is incumbent on the trial judge to put the accused's case fairly in summing up, there is no obligation on the trial judge to repeat the arguments of counsel in detail. The trial judge's duty will be discharged by a fair and balanced approach reminding the jury of the issues in the trial, the applicable law and any commentary on the evidence which the judge sees fit to make." (*References omitted*)

Margaret McMurdo P did not take issue with this statement of principle.[37]

[43] The trial judge introduced his summary of counsel's addresses by saying –

> "I'll turn then to the addresses of the parties. I'll start with the defendant's counsel address. During the course of it may I interpose some of the things that the Crown Prosecutor said during his and

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34 (2000) 199 CLR 620 at 637.
35 [2009] QCA 275.
36 [2009] QCA 275 at [7].
37 [2009] QCA 275 at [50].

> some of my own observations. I'll then in that way have covered much of the Crown's address by the time I come to it…"[38]

[44] Counsel for the appellant submitted that this approach was unfair to the appellant, because the defence submissions were identified and then effectively countered or explained away by the contrary argument of the prosecution or by his Honour's own observations. In his written submissions he said there were about six or seven occasions when defence points were countered, but he did not particularise any of them in either his written or his oral submissions. By contrast, he submitted, there was only one occasion when a point made by the prosecution was countered.[39]

[45] However, as counsel for the respondent submitted, the method employed by his Honour could equally be seen as identifying all that the prosecution could say or had said in response to the defence contentions.[40]

[46] In his oral submissions counsel for the appellant emphasised that he was not suggesting deliberate bias on the part of the trial judge. But in his submission the process adopted by the trial judge created unfairness, in that it may have left the jury with the impression that if the defence case or argument was answerable, the appellant was guilty. He submitted that this may have reversed the onus of proof.

[47] There was nothing inherently wrong in the trial judge's summarising the rival contentions topic by topic. This was a case where it may well have been of more assistance to the jury for his Honour to remind them of what each side said topic by topic rather than by a complete recitation of one side's contentions followed by a complete recitation of the other's. It would have been preferable for him not to have included his own observations on some of the issues in this part of the summing up. However, his Honour was careful to maintain a balanced presentation. He devoted only a short time to summarising submissions by the prosecution apparently not addressed by the defence. He ended this part of the summing up by reminding the jury of one of the central contentions of the defence case – that none of the stolen property was found on the appellant, and telling them that was something they must consider in determining whether they were satisfied beyond reasonable doubt of the appellant's guilt.[41]

[48] There was no inadvertent reversal of the onus of proof in the way the trial judge summarised counsel's addresses. Nor did his Honour fail properly or adequately to put the defence case to the jury. The process adopted by his Honour did not result in a miscarriage of justice.

Section 21A(8) of the *Evidence Act*

[49] Hayley Wease was interviewed by police on 13 February 2012. The interview was video-recorded, and admitted into evidence pursuant to s 93A of the *Evidence Act*.[42]

[50] Hayley also gave oral testimony before a judge some months before the trial as a "special witness'' under s 21A of the *Evidence Act*. When she gave that evidence, she was in a vulnerable witness room, which was connected by closed circuit

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38 AR 558.
39 Outline of submissions for the appellant para 54.
40 T 1-39.
41 AR 567.
42 Ex 22 at AR 606-691.

television to the courtroom where the judge and legal representatives were. A support person was present in the vulnerable witness room at the time, pursuant to a direction earlier given by another judge under s 21A(2)(d). That evidence was video-recorded pursuant to a direction under s 21A(2)(e) and admitted at the trial pursuant to s 21A(6).[43]

[51] By s 21A(8) –

> "(8) If evidence is given, or to be given, in a proceeding on indictment under an order or direction mentioned in subsection (2)(a) to (e), the judge presiding at the proceeding must instruct the jury that—
>
> (a) they should not draw any inference as to the defendant's guilt from the order or direction; and
>
> (b) the probative value of the evidence is not increased or decreased because of the order or direction; and
>
> (c) the evidence is not to be given any greater or lesser weight because of the order or direction."

[52] In his opening remarks to the jury, the trial judge said –

> "… in respect of a child witness in this case the evidence will be by way of a video recording. That's the usual way the evidence of children is given in our Courts. There's nothing unusual about [it] in this case, there's reasons for that and you don't give it any lesser or greater weight because it's by way of a video."[44]

His Honour made no mention of the presence of the support person in the room with the child when she was giving her evidence.

[53] His Honour's direction satisfied s 21A(8) with respect to the direction under s 21A(2)(e). However, in failing to refer to the presence of the support person, his Honour did not satisfy the requirements of s 21A(8) with respect to the direction under s 21A(2)(d).[45]

[54] The conviction may be upheld notwithstanding the non-compliance with the mandatory requirements of s 21A(8) only if, after reviewing the whole of the record, this Court is satisfied that there has been no miscarriage of justice in terms of s 668E of the *Criminal Code* (Qld).[46]

Unsafe and unsatisfactory verdict

[55] Section 668E of the *Criminal Code* provides relevantly –

> **"668E Determination of appeal in ordinary cases**
>
> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

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43 AR 10-14; 443.

44 AR 210.

45 *R v Little* [2013] QCA 223 at [21]-[24].

46 ibid at [24]; *Weiss v The Queen* (2005) 224 CLR 300 at 317.

> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." (*Emphasis added*)

[56] In *SKA v The Queen*[47] the High Court considered what is required of an appellate court under s 6(1) of the *Criminal Appeal Act* 1912 (NSW), which provides that the court "shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground it is unreasonable, or cannot be supported, having regard to the evidence." French CJ, Gummow and Kiefel JJ said –[48]

> "*The task of the Court of Criminal Appeal*
>
> [11] It is agreed between the parties that the relevant function to be performed by the Court of Criminal Appeal in determining an appeal, such as that of the applicant, is as stated in *M v The Queen*[49] by Mason CJ, Deane, Dawson and Toohey JJ:
>
> > 'Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'
>
> [12] This test has been restated to reflect the terms of s 6(1) of the *Criminal Appeal Act*. In *MFA v The Queen*[50] McHugh, Gummow and Kirby JJ stated that the reference to 'unsafe or unsatisfactory' in *M* is to be taken as 'equivalent to the statutory formula referring to the impugned verdict as 'unreasonable' or such as 'cannot be supported, having regard to the evidence'.'
>
> [13] The starting point in the application of s 6(1) is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses.[51] However, the joint judgment in *M* went on to say:[52]
>
> > 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.'
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> …

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47 (2011) 243 CLR 400.

48 *SKA v The Queen* (2011) 243 CLR 400 at 405-406.

49 (1994) 181 CLR 487 at 493. See also *R v Nwabueze* [2012] QCA 275 at [22] – [24] per White JA with whom Muir JA and Martin J agreed.

50 (2002) 213 CLR 606 at 623-624 [58].

51 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.

52 *M v The Queen* (1994) 181 CLR 487 at 494.

> [14] In determining an appeal pursuant to s 6(1) of the *Criminal Appeal Act*, by applying the test set down in *M* and restated in *MFA*, the Court is to make 'an independent assessment of the evidence, both as to its sufficiency and its quality'.[53] In *M*, Mason CJ, Deane, Dawson and Toohey JJ stated:[54]
>
> > 'In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'.' "

Heydon and Crennan JJ dissented as to the result, but nevertheless affirmed that the test propounded in *M* should be applied.

[57] Thus, it is necessary to review the whole of the evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.

The tracking evidence

[58] According to Sergeant Martin and the other police witnesses who gave evidence on the point, the conditions were ideal for tracking – the air was cool and still, a dew had set in, and the grass was lush and mown. He initially cast Jack down the left side of the driveway, but found nothing. Then he identified a single set of footprints in the dew in an area behind the letterbox, close to the house. They were spaced about a metre apart, and in his opinion were tracks from a single person who was running. He cast Jack at that location. Jack immediately indicated human scent and started tracking.

[59] There was no evidence that any of the police officers had walked in that area, and neither Ms Wease nor Hayley went outside before Jack was deployed.

[60] Jack followed the scent along the front of adjoining properties until he and Sergeant Martin reached 2 Lyndon Way. Using a torch intermittently, Sergeant Martin could see footprints, still a metre apart, moving down in front of the houses. Jack then tracked into an easement which ran from Lyndon Way to Piggott Road. They went along a concrete footpath to a bushed area near the end of a drain bordering Piggott Road. Jack indicated a scent puddle in that bushed area ("the first scent pool").[55]

[61] They continued westbound on the southern side of Piggott Road, then across to the other side of Piggott Road continuing westbound until the Swann Road intersection, the across the intersection into Bellbrook Avenue. As Jack did so, Sergeant Martin could see footprints in the torchlight. From there Jack tracked to an easement at the top of a cul de sac; the easement led into council land with mown lawn and trees in between. Jack followed the scent in a north easterly direction through this land towards Swann Road, Sergeant Martin again seeing the footprints as he did so. Jack continued tracking in a northerly direction, parallel to Swann Road, between a drain and the rear of some silver coloured reinforced vehicle barriers. The vehicle barriers ended at the confluence of Swann Road and Almond Way (to its west).

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53 *Morris v The Queen* (1987) 163 CLR 454 at 473 per Deane, Toohey and Gaudron JJ.

54 *M v The Queen* (1994) 181 CLR 487 at 492-493 (*footnotes omitted*).

55 AR 370.

[62] Jack crossed Swann Road at that point and went into a mown parkland/bushland area. About 20 metres into the bushland he indicated another scent pool ("the second scent pool").[56] It was about 20 metres wide. The site of the second scent pool was close to Wararba Creek, although the creek was not visible at night.

[63] Sergeant Martin found the exit from the scent pool, and Jack immediately commenced tracking. They tracked along Swann Road in a southerly direction, crossing the road as they approached the Bellbrook Avenue intersection. The property described as 63 Swann Road is at the intersection, with frontages to both Swann Road and Bellbrook Avenue.

[64] They tracked to the entry to the property, which was off Bellbrook Avenue. It was about 4.00 am. There was a single set of footprints running up to the front door. Sergeant Martin could tell from the dog's behaviour that he was extremely close to the source of the track. Jack went to the front door and then across the front of the house and down the side of the house, into the backyard. Sergeant Martin noticed a single set of footprints, about a metre apart and running. He could see from Jack's behaviour that he had located his prey. In a back patio area Sergeant Martin saw a wet print of a barefoot on the concrete. Then he saw the appellant facing directly on to a glass sliding door: he was pulling at the door frantically, but it was not opening; he was saying, "Let me in, let me in."[57]

[65] Sergeant Martin identified himself and instructed the appellant not to move. The appellant immediately turned around and put his hands out in the officer's direction. He had nothing in his hands, and did not drop anything. He said he was just having a cigarette, but according to Sergeant Martin there was no smell of smoke or any other indication of his doing so.[58] He was barefooted.[59]

[66] In response to a call from Sergeant Martin, other officers arrived shortly and searched the property at 63 Swann Road. None of the stolen property was found on the appellant or at the property.

Expert evidence as to the reliability of the tracking evidence

[67] Sergeant Martin gave evidence that police dogs are trained to, and do, "scent discriminate".[60] If the scent track is temporarily lost, when recast the dog will track the same scent, not the freshest scent.[61]

[68] Sergeant Hansen, an experienced dog squad instructor, gave evidence of the general training procedures, and of Jack in particular. He trained Jack in the early months of 2009 and ranked him in the top 10 per cent of dogs he had trained. He also conducted the training to reteam Jack with Sergeant Martin, and noted in his competency assessment of the pair –

> "Series of tracks run over four days, all in the very good to excellent range. Handles hard surfaces and handler reads dog well. A determined tracking dog."[62]

He considered that Sergeant Martin handled Jack properly.

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56 AR 385.
57 AR 388-392.
58 AR 392-393.
59 AR 276; 398.
60 AR 408.
61 AR 414.
62 AR 204, Ex 10 at AR 728.

[69] Senior Sergeant Frank Lanaro was a previous handler of Jack. He gave evidence of training with Jack over distances considerably greater than the tracking loop in the present case. He was very confident of Jack's ability to track human scent both in a training environment and in an occupational environment. He said he had done over a thousand tracks with Jack, and that if Jack lost a scent he always went back to the original scent, and not a secondary one.[63] He said it did not take an experienced police dog handler very long at all to learn the idiosyncrasies of a particular animal.[64]

What the appellant told police

[70] The appellant was interviewed by Constable Pollard from about 5.20 am. He was wearing a black T-shirt with an ice-cream on the front and the word "ice-cream" on the back, and long dark blue track pants, and shoes.[65] It was common ground that he did not have shoes on when Sergeant Martin apprehended him.[66]

[71] The record of interview was played at the trial.[67] The appellant was 23 years old. He said that a mate had driven him to the Leiataua residence at 63 Swann Road, arriving at about 6.00 pm. He said that apart from the mate driving him and Judy Leiataua to the local convenience store and back to the house shortly after 6.00 pm, he had remained at the house until Sergeant Martin and Jack arrived. He had spent the time on the couch in the living room, drinking and watching television. He had gone outside for a smoke about 10 times, using a side door. He was outside, having just had a smoke, when Sergeant Martin and Jack arrived.

[72] The prosecution submitted that the appellant lied about how he came to be outside on the patio at the time. It relied on his being on the patio, pulling frantically at the door as if to open it and saying "Let me in, let me in", and the door being locked, as demonstrating that what he told police was a lie. It submitted that he lied out of consciousness of guilt.

Discovery of name tag from school bag at site of first scent pool

[73] Ms Wease accompanied Sergeant Martin to the site of the first scent pool. She searched the area with a torch and found the name tag from her son's school bag, which was one of the items stolen. It was open to the jury to infer that the person tracked had dropped the name tag, and to use that as a circumstance consistent with the appellant's guilt.

Discovery of other items in yard

[74] Subsequently Ms Wease found some of the other items which had been taken from the house discarded and strewn around the yard. However, items listed on the indictment were never recovered.

Discovery of bag in creek

[75] That morning Darryl McEwan was in his kayak in Wararba Creek at Caboolture. He paddled upstream as far as the golf course to fish, and subsequently turned round

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63 AR 344.
64 AR 349.
65 AR 272-273.
66 AR 552.
67 Ex 5 at AR 272, 289, 701-723.

and proceeded back. On the way back he found a bag floating in the creek. He marked on a map the approximate place where he turned round as "X" and where he found the bag as "W".[68] Mr McEwan retrieved the bag, looked inside and found a wallet. While he was looking at the contents of the wallet, the bag slipped back into the water and sunk. He identified Ms Wease as the owner of the wallet from the driver's licence and credit cards it contained. Later that morning he returned the wallet to Ms Wease, who recognised it as hers.

[76] Wararba Creek was a freshwater creek with no obvious current at the time.[69] There was no evidence of the distance between W and the second scent pool identified by Jack. Of the various maps that went into evidence[70] only the track map prepared by Sergeant Martin[71] bore a scale – one which may have been distorted when the map was subsequently photocopied for the appeal record. It was not possible to estimate that distance from those maps. The only evidence of the relationship between the site of the second scent pool and the water was Sergeant Martin's evidence that the creek bank was about 10 to 15 metres high. He said that it dropped off "Pretty much straight away"; that it was "a very steep edge".[72]

Fingerprint evidence

[77] Four fingerprints were found at the complainant's residence – two on the garage rolling door which opened to the backyard, one on the inside front passenger window of the complainant's vehicle, and one on a door handle inside the laundry. None of them matched the appellant's fingerprints.[73]

Hayley Wease's evidence

[78] Hayley Wease's s 93A statement[74] was recorded on Monday 13 February 2012, two days after the offences were committed. She told police that she spent the "other night" (Friday night to Saturday morning) at her half sister Lisa's place in Lyndon Way, where she slept on the double bed in the spare room with her nine year old sister Kayla and her eight year old nephew Jayden. Around 3.00 am she awoke and could see someone near the television. She thought it was Lisa, and went back to sleep for a short time. She woke up again, and got up to go to the toilet. As she walked through the house toward the toilet, she saw that the laundry door was open. She looked in the kitchen, where she saw a man. He turned round, and on seeing her, started running. She screamed, and went into Lisa's bedroom and told Lisa there was someone in the house. Jayden was with her at that point. Hayley estimated that it all happened in twenty seconds, although she was not counting.

[79] Hayley described the man as having black hair and being a little bit chubby. She reckoned he was white, but she was not sure. When she was subsequently asked more about his hair, she answered in terms of seeing someone at the chemist shop with the same sort of hair.

[80] She was asked about the intruder's clothing. She said that when he turned around, she looked at his shirt. She thought it was black, with "a bit of green on it", but she

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68 AR 246; 726.
69 AR 246.
70 Ex 4 at AR 726; Ex 18 at AR 800; Ex 20 at AR 801; Ex 21 at AR 802.
71 Ex 21 at AR 802.
72 AR 385.
73 AR 445-446.
74 AR 606 ff.

was not sure. She thought there could have been a little picture or something on the side of or in the middle of the green, but she was not sure: she said that "it could have been nothing", but she "just remembered seeing green on the shirt". It had short sleeves like a normal shirt. It might have had a collar, but she was not sure. He was wearing skate type pants to below the knees: she was "pretty sure" she could see some leg, but they could have been full length pants. She thought they were black. He was wearing black coloured skate shoes.

[81] During cross-examination in the course of giving the s 21A evidence on 12 November 2012, Hayley confirmed that the description she gave police was the best she could do, and that she had seen the intruder only briefly. She confirmed her recollection that the only light that was on was the toilet light. When it was suggested she could not be certain the person she saw was a man, she said she was "pretty sure it was a man."[75]

Judy Leiataua

[82] Sisters Judy and Siniva Leiataua lived at 63 Swann Road with their parents. They both gave evidence for the defence. At trial, they were aged 20 and 27 respectively.

[83] Judy Leiataua said that the appellant came to their house unexpectedly, arriving at about 5.30 pm. She and the appellant spent the evening at the house, alternating between the lounge room and the adjoining patio area, and not going out at any time before police arrived in the early hours of the morning. They drank and talked, and the appellant smoked cigarettes. By 11.00 pm or midnight when they stopped drinking, they had each consumed about 12 pre-mixed drinks.[76] The appellant smoked "Whiteox rollies".[77] Meanwhile, her sister Siniva was in her room using a laptop computer.[78]

[84] Judy Leiataua said that just before a police officer with a dog arrived she was in her bedroom, where she had been for about 15 minutes, putting on her pyjamas and getting ready for bed. That was the only time she had left the appellant alone, apart from going to the toilet. When they arrived, she was at the sliding door, which she had just opened to go out to the appellant who was sitting at a table on the patio.[79]

Siniva Leiataua

[85] Siniva Leiataua was a shift worker, and had spent most of the day sleeping. She spent most of the evening in her bedroom using her laptop computer, although she emerged from time to time for a cigarette or to go to the toilet. She said she fell asleep, but was awake when the police arrived.[80] She seemed to be referring to the officers who arrived shortly after Sergeant Martin and Jack. When she came out of her bedroom, the door to the patio was open, but the back door, which was right next to her room, was closed.[81]

Discussion

[86] Counsel for the appellant submitted that there were a number of aspects of the evidence which ought to have raised a reasonable doubt in the mind of the jury –

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75 AR 13-14.
76 AR 449-450.
77 AR 452.
78 AR 450.
79 AR 451.
80 AR 483.
81 AR 492. And see plan Ex 9 at AR 727.

- The evidence about the location of the bag containing the wallet in the creek and the path of the tracking was inconsistent with the proposition that the person who disposed of the bag in the creek was the person being tracked, as the path described by Sergeant Martin did not indicate that the person being tracked went in the area near where the bag was found in the water.
- Any fingerprints found at the house did not match those of the appellant.
- Possibly apart from a name tag, no property taken from the house (some of which would have been cumbersome to carry) was found on the path tracked. No property was found on the appellant and none was located at the house at which he was located relatively soon after the offence was committed.
- The commencement point of the tracking was not in or near the exit (laundry door) from the complainant's house.
- The appellant denied the offending both at the house where he was located and later in an interview with police.
- The defence witnesses strongly suggested, if not established, that the appellant remained at their house during that evening.[82]

[87] It was open to the jury to find that the tracking evidence was accurate and reliable, and it was open to them to be satisfied that the person tracked was the offender.

[88] Sergeant Martin initially cast Jack down the left side of the driveway but found nothing. Jack immediately indicated human scent and started tracking when he was cast in the area at the front where footprints were observed on the dewy grass. Nothing turned on those footprints being found at the front rather than the rear of the house.

[89] There is a paucity of evidence about the relationship between the second scent pool and the place where Mr McEwan said he found the bag containing the wallet. I agree with counsel for the appellant that the inference the bag was found approximately where it was thrown into the water was open.[83] In my view the trial judge overstated the evidence somewhat when he said in his summing up that the tracks led to "the area near to the creek where the bag was found by Mr McEwan the next day floating in the creek."[84] Counsel for the respondent's submission that the location of the bag in the creek was supportive of the person tracked being the perpetrator of the offences, given that the creek itself was in the vicinity of the second scent pool,[85] was, in my view, too broad brush.

[90] However, even if the evidence of where the bag was found is disregarded as too uncertain, there were other circumstances consistent with the person tracked being the offender. The location of the name tag at the site of the first scent pool strongly supported the conclusion that the person being tracked had taken the school bag to which it belonged from the house. The tracking ended on the patio at 63 Swann

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82 Outline of submissions for the appellant para 58.
83 T 1-25.
84 AR 560.
85 T 1-40.

Road, where the appellant was frantically pulling at a locked glass sliding door, and saying, "Let me in, let me in." The jury was entitled to treat his explanation of how he came to be on the patio as a deliberate falsehood, told out of a consciousness of guilt.

[91] It was for the jury to assess the credibility of the Leiataua sisters; they were entitled not to accept that evidence.

[92] Hayley Wease saw the intruder only briefly and in less than ideal lighting. While her description of his clothing did not exactly match the police evidence of what he was wearing, there were some common features – a dark coloured shirt, with a picture on the front of it, and dark coloured pants. She said he was wearing shoes, but Sergeant Martin said he was barefooted when he found him on the patio. It was for the jury to consider the inconsistencies between Hayley's evidence and that of the police; and they were entitled to conclude that Hayley was mistaken in her recollection.

[93] There were unexplained circumstances inconsistent with the appellant's guilt. None of the stolen property was found on the appellant or at 63 Swann Road, and various items listed in the indictment were never recovered. Fingerprints found at 14 Lyndon Way were not his.

[94] On reviewing the whole of the evidence I am nevertheless satisfied that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was the offender. In my view, there has been no miscarriage of justice.

Disposition

[95] The appeal should be dismissed.

[96] **NORTH J:** I have read the reasons for judgment of Margaret Wilson J and have conducted my own independent review of the evidence at trial. For the reasons given by Margaret Wilson J, I agree with the order proposed by her Honour.