SUPREME COURT OF QUEENSLAND

CITATION:	*R v Falzon* [2009] QCA 393
PARTIES:	**R** **v** **FALZON, Michael Paul** (appellant/applicant)
FILE NO/S:	CA No 65 of 2009 CA No 140 of 2009 SC No 889 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2009
JUDGES:	Keane, Holmes and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed;** **2. Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where appellant convicted of one count of trafficking in methylamphetamine and cannabis sativa and two counts of producing methylamphetamine, and acquitted of two further production counts – whether, by alleging trafficking in two dangerous drugs, trafficking count bad for duplicity – whether evidence of, inter alia, intercepted telephone conversation and of forensic accountant properly admitted – whether provision of trial transcript to jury deprived appellant of fair trial – whether trial judge's definition of trafficking in summing up misleading – whether trial judge's directions to jury fair CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – whether Crown witnesses' evidence reliable – whether sufficient evidence to support conviction of trafficking in cannabis – whether verdicts unreasonable

Driscoll v The Queen (1977) 137 CLR 517; [1977] HCA 43, cited
R v Geary [2003] 1 Qd R 64; [2002] QCA 33, cited
R v Jacobs [1998] 1 Qd R 96; [1997] QCA 114, cited
R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, cited

COUNSEL: J Cremin for the appellant/applicant
M J Copley SC for the respondent

SOLICITORS: Mackenzie Mitchell Solicitors for the appellant/applicant
Director of Public Prosecutions (Qld) for the respondent

[1] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[2] **HOLMES JA:** The appellant appeals his conviction on one count of trafficking in methylamphetamine and cannabis sativa between 1 July 1997 and 1 October 2003 and two counts of producing methylamphetamine between 1 July 1997 and 16 February 2001. One of the production counts carried a circumstance of aggravation, that the quantity of the drug exceeded two grams. The appellant was acquitted of a further two counts of production of methylamphetamine. Each count on the indictment particularised "Ilbilbie" as the place where the alleged offence occurred. The appeal grounds cover an array of complaints of varying merit concerning procedural matters, admission of evidence, the directions given to the jury and a contention that the verdicts were unreasonable. The appellant has also filed an application for leave to appeal against sentence, but has made it clear that whether he maintains that application depends on whether he is successful in his appeal against at least one of the convictions.

The Crown case

[3] The Crown case was that the appellant produced and trafficked in drugs in collusion with another man, James Thomas O'Brien. O'Brien's former de facto wife, Debra Dangerfield, and her son, Corey Dangerfield, gave evidence in the Crown case. Debra Dangerfield said that she formed a relationship with O'Brien in 1997. About three weeks into their relationship, he took her to visit the appellant at a property on Notch Point Road at Ilbilbie, south of Sarina, where he was living with his wife. (The appellant later occupied another property in the Ilbilbie locality, about three or four hundred metres away. The two properties were distinguished in the course of the trial by referring to the first as "Notch Point" and the second as "Ilbilbie".) Asked where her son Corey was at the time of her first visit to the Notch Point property, Ms Dangerfield said that as far as she could recall he was then working for a mining company in Rockhampton.

[4] After their relationship had been on foot for 18 months or so, Ms Dangerfield became aware that O'Brien was involved in some illegal activity when she saw him dealing with large bundles of cash. Within six months of that event, at the Notch Point property, she saw the appellant, O'Brien and a man named Bruce Cummings producing methylamphetamine. The production process took about five days and was undertaken using a home-made laboratory, including glassware and hotplates, in a shed on the property. The last stage of the process, which involved frying the mixture and adding methylated spirits to it, was carried out under the appellant's

high-set house, using frying-pans set up on a bench made from a slab of timber. At least five kilograms of substance was produced; it resembled brown sugar. This evidence gave rise to count 2 on the indictment, the charge of producing methylamphetamine in excess of two grams.

[5] As to the amount involved, a forensic chemist, Dr Peter Culshaw, gave evidence explaining the production process. At its last stage, the substance was heated in order to produce a salt, methylamphetamine hydrochloride. The proportion of methylamphetamine in that salt was up to 85 or 86 per cent. Hypophosphorous acid and hydrochloric acid were used in the process; but, Dr Culshaw went on to say, there was also an entirely different process for producing methylamphetamine, in which phenylacetic acid was used.

[6] Ms Dangerfield had a recollection of seeing the appellant and O'Brien performing another "cook" in the same shed at the Notch Point property; it was not the subject of a production charge. Afterwards they packed the equipment into a large toolbox. She also said that she had heard the appellant, O'Brien and a man who bore the nickname "Grunter" (Grant Millington) discussing the removal of the laboratory to Millington's premises. Ms Dangerfield regularly drove O'Brien from place to place because he had no licence. She recalled a particular trip to Adelaide; they left from the Notch Point property. O'Brien and the appellant split two lengths of timber, hollowed them out and put methylamphetamine in each, then screwed them onto the tray of O'Brien's truck and painted them to match the vehicle so that they looked like part of it. She and O'Brien drove to Adelaide, where the pieces of timber were removed and the methylamphetamine retrieved.

[7] Ms Dangerfield gave evidence of seeing large amounts of cash in connection with the appellant and O'Brien. On one occasion her son, Corey, who had been working for the appellant, flew to Brisbane wearing a jacket with large amounts of cash in $50 notes in its pockets, which he gave to O'Brien. On another occasion, she was present when the appellant and O'Brien put a million dollars in cash on a table at the Notch Point house, and photographed O'Brien with it. She identified the photograph, which was tendered in evidence. The table on which the cash was sitting was a large slab of timber, the same on which, she said, the frying-pans used in methylamphetamine production were placed on other occasions.

[8] When she met the appellant, Ms Dangerfield said, he had little in the way of assets. Over the time she knew him, he accumulated a large amount of machinery, including articulated trucks, prime movers, and bulldozers. In her presence, the appellant and O'Brien discussed becoming involved in a mining venture at Coober Pedy in order to launder money by pretending to have profited from opal mining. They spoke about giving large sums of money, $30,000 on each occasion, to an accountant in Mackay who would assist in the laundering process. In cross-examination, however, she agreed that she might be mistaken about the appellant's having been present when that conversation took place. She conceded that her memory was affected by her having suffered head injuries in an accident.

[9] Ms Dangerfield was cross-examined about statements she had made to the effect that O'Brien and others had produced methylamphetamine, with her assistance, at her property at Kaimkillenbun, near Dalby. Those productions, she agreed, had nothing to do with the appellant. However, she maintained, she and O'Brien took large amounts of money to the appellant's house, and she could recall seeing him

count money there. In the respect of the earlier production at Notch Point involving the appellant, she accepted that her recollection was a "snapshot" memory, and that at the committal proceeding she had described having a picture in her mind "of seeing things bubbling", mentioning O'Brien and Cummings, but not the appellant, as nearby. She said that he was not there for the drying out process. She agreed that, watching the production, she could "only assume that what they were making was speed"; that her estimate of the amount of methylamphetamine was a guess; and that on a previous occasion she had said that it was about four kilograms.

[10] In re-examination, Ms Dangerfield was reminded of her evidence at the committal, which included a detailed description of the appellant, O'Brien and Cummings unpacking glassware from a metal box and putting it on the bench in the shed. It was then she had described her "snapshot" memory of seeing bubbling chemicals and had said that everybody at that stage was "just getting around", going on to identify what O'Brien and Cummings were doing, but not the appellant. She explained that her guess as to the amount of the substance produced was based on familiarity with the weight of sugar, because it was a similar substance in terms of weight for quantity.

[11] Corey Dangerfield was about 15 when his mother formed a relationship with O'Brien in 1997. He, like his mother, spoke of an incident in which O'Brien produced a large sum of money from his motor vehicle. After a year or so, O'Brien organised for him to work for the appellant at Notch Point in the hope that he would get some experience in working with heavy machinery. He stayed there between 18 months and two years. He helped convert an old chicken pen at Notch Point (the shed identified by Debra Dangerfield as the site of a production) into a stable and also helped build a shed with three bays on the appellant's property at Ilbilbie. After the shed was built, O'Brien sent him a utility which was delivered by car carrier. When it arrived at Ilbilbie, it contained toolboxes in which were beakers, hot plates and saucepans, as well as a lunch box with marijuana in it. He smoked some of the marijuana with the appellant, who took the rest. The other items were stored in the three-bay shed at Ilbilbie.

[12] Corey Dangerfield said that he had seen a number of productions of methylamphetamine both on the Ilbilbie block and the Notch Point block. The first was in the shed at Ilbilbie. He saw O'Brien, the appellant and a man called Steve Philp setting up the hotplates and glassware on a bench. About an hour later, he saw that they had produced a "cluggy, maroony substance" in a frying-pan on a hotplate. He was made to wash the frying-pans they had used, which were later buried in the toolboxes down near a dam.

[13] Productions also took place at Notch Point. Dangerfield recalled one which took place under the appellant's house there, in which O'Brien was showing the appellant what to do. They used a single burner with a frying-pan, sitting on a table made from a tea tree slab, to produce what he described as a "maroony coloured gel". (That evidence was the subject of count 3, of which the appellant was acquitted.) O'Brien placed the substance in a plastic bag, which the appellant held open for him, and then concealed it in a hollowed out log. Later, Corey Dangerfield said, he saw the appellant trying to cook with the remainder of some bottles of chemicals which had also arrived with the utility, again using the frying-pan and the single burner under the house (count 5, of which the appellant also was acquitted). On this occasion, the product boiled away to nothing. About a week later, O'Brien returned to the property and accused the appellant of wasting a quarter of a million dollars.

[14] Corey Dangerfield described another production of methylamphetamine at Notch Point (count 4), in the chicken pen shed. He had to collect the equipment boxes and stack them outside the shed. He left the property for a couple of hours; on his return, he was again told to clean the equipment. On this occasion, the appellant instructed him to put sump oil on the side of the shed, in order to hide the signs of a "cook", and to re-sheet it with corrugated iron. There were other productions about which he could not recall much, although he remembered that Bruce Cummings was present for one. One day, on instructions, he moved the boxes of equipment to Grant Millington's property, to another shed which he had also helped build. The appellant and O'Brien helped him unload the boxes and put them in a room of the shed. He was told to keep an eye on the gate to the property and also on Millington's children while Millington and O'Brien remained in the shed over a couple of hours. When they left the property, the boxes of equipment were carried in the appellant's vehicle.

[15] On about five occasions, Corey Dangerfield said, on the appellant's instructions, he flew from Mackay to Brisbane carrying cash in sums of between $40,000 and $60,000. On all but one occasion he was met by O'Brien and delivered the money to him; in the remaining instance, he gave it, on O'Brien's instructions, to Bruce Cummings. The appellant told him that if he were found in possession of the money he should say that "they" (presumably the appellant and O'Brien) had struck opal at Coober Pedy and the cash was for maintenance of vehicles there. He was aware of the Coober Pedy venture. The appellant had told him that they had found nothing of importance on the site. He once saw three small opals said to have come from the mine there.

[16] Dangerfield said that over the period of his employment with the appellant he bought cannabis from him, three or four ounces per week at $300 an ounce, and on-sold it to his friends. After he told the appellant what he was doing with the cannabis and how he was finding it hard to make ends meet, the appellant started to sell him the cannabis for $150 an ounce. He enquired of the appellant about the cost of larger amounts and was told it would be $3,000 for a full pound or $2,000 for a half a pound, but he did not buy those quantities.

[17] In cross-examination, Corey Dangerfield admitted that he had sold cannabis for O'Brien over a long period of time, making a profit from doing so, in an arrangement unrelated to the appellant. He agreed that in an earlier statement to police he had described seeing the appellant, Bruce Cummings, Millington and another man retrieving laboratory equipment and erecting it at the shed at Ilbilbie before the occasion he had described in evidence, when his utility had arrived with equipment. He had also said in an earlier statement that although the glassware which arrived was stored in the shed at Ilbilbie, some bottles of chemicals and a drum marked "Poison" were taken to the Notch Point property. He accepted that in his committal evidence he said he had not seen the appellant in possession of methylamphetamine or selling or packaging it, although he now distinguished the single occasion when the appellant had assisted O'Brien to bag methylamphetamine immediately after it was prepared. He had given a different order as to where the "cooks" occurred, and he was unsure of whether the first production he saw was under the house at Notch Point or at Ilbilbie.

[18] The evidence of production in the chicken pen shed at Notch Point received some support from the results of testing by a forensic chemist, Mr Ma, on

30 October 2003. After a layer of corrugated iron sheeting was removed from an inner wall of the shed, another layer of the corrugated iron, in eight vertical panels, remained. Mr Ma took swabs from each of those panels, some of which were covered with a dark brown oily substance. The two panels on the far left and the two panels on the far right each were found to contain traces of methylamphetamine. No methylamphetamine was detected on swabs from the four centre panels. Mr Ma also took a swab from the light fitting in the area under the house at Notch Point, but it yielded nothing of interest.

[19] On the same day, Mr Ma was photographed taking a swab from the surface of a table at the Ilbilbie property; the table in the photograph resembles that used to display cash at Notch Point. Methylamphetamine and tetrahydrocannabinol were both detected on the swab. Mr Ma took swabs from the shed on Millington's property: from five places on the corrugated iron walls, from two patches on the ceiling, and from the cover of the fluorescent light. Of those, the swabs from the light fitting and the ceiling were found to contain methylamphetamine. Containers of hydrochloric acid were also found at the property.

[20] In cross-examination of Mr Ma, this exchange took place:

> "Now, I'd like to clarify with you, at the address at Notch Point Road you saw nothing consistent with the production of methylamphetamines; is that right?-- Ah-----
>
> This is at the place where the shed was swabbed and where the light fitting was swabbed?-- Yes, there's no indication or no equipment or chemicals in relation to----"

Mr Ma later said that from his "general observation" there was no indication of drug production at Ilbilbie. In re-examination, he was asked about the area under the house at Notch Point, and said that whether vapour from a methylamphetamine production process touched the light fitting would depend on whether the area was left open, and the wind conditions.

[21] After Debra and Corey Dangerfield had spoken to the police, a number of telephone conversations involving the appellant and O'Brien were the subject of lawful intercepts, including a series of conversations between the appellant, O'Brien, a man named Les Phillips and another called Wayne Bradshaw. It was prefaced by a conversation between O'Brien and Phillips on 27 February 2003 which contained nothing inculpatory, but revealed that Phillips sometimes identified himself as "Reg". The significant conversations occurred in May 2003 between the appellant, Phillips and Bradshaw concerning what, on the Crown case, was phenylacetic acid.

[22] On 3 May 2003, Bradshaw told the appellant that he needed to talk to him to discover "the exact name". The appellant said he knew it and could spell it; was "one [name] but it's sorta like a two". The appellant then spoke to Phillips and asked whether what Phillips had was what Bradshaw wanted, whether it was the "same as before". Phillips told the appellant that it was the same as "that time we went to Melbourne… with Bristle"; it started with "P". Shortly afterwards the appellant rang Bradshaw and said "it's the same as it was before". Over objection, counsel was permitted to lead evidence for the purpose of giving some context to those conversations. A police officer named Kos gave evidence that Les Phillips had pleaded guilty in Melbourne in 1993 to offences involving use and transportation of phenylacetic acid.

[23] Other conversations of interest included one on 7 March 2003, when a person named "Dave" telephoned the appellant and asked him if he had "dope"; the appellant responded, "I've got nothing". On 16 September 2003, the appellant was telephoned and informed that O'Brien had been intercepted by police in a vehicle containing a large quantity of pseudoephedrine. On the same day, the appellant rang Bradshaw and said:

> "[T]his thing could escalate" …
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> I'm going home tomorrow and if I got to fucken move a few things around you know… I might fucken you know I might send the D9 fucken north you know… South west".

(which seems to have been a reference to one of the bulldozers which the appellant had acquired). On 30 October 2003, Millington rang the appellant telling him that the police had been to his property and had swabbed things. He reported that they had said the appellant and O'Brien were "cooking" up here. The appellant responded, "Fucked if I know how they know that". Millington explained that the source of their information was Corey Dangerfield.

[24] The appellant was interviewed by police on 30 October 2003. He said that his primary source of income was opal mining at Coober Pedy. He was in partnership with O'Brien, who had contributed $30,000, invested in a bulldozer. In about 1996, they had struck opal, which brought them about $150,000. They used it to buy the D9 bulldozer. Over a couple of weeks in the following year, they had mined opals which they sold to a Chinese buyer for $600,000 in cash. Initially the applicant said that money had been banked, but he retreated from that claim, referring to having it in "a port". They had spent about $320,000 on heavy equipment in 1997. Over the period between 1997 and 2000 they had made only about $10,000, but he had lived off the earlier income.

[25] The appellant said he continued to receive payments from a man named Mark Absalom, who used a machine for sorting opals in which the appellant had invested. Under their agreement, Absalom paid him a percentage of the money he made from mining. All the figures could, he said, be obtained from the Taxation Department. All his and his wife's funds came from Coober Pedy; he had given O'Brien some small amounts. He denied having produced methylamphetamine with O'Brien.

[26] Police seized various financial documents concerning the appellant, his wife, O'Brien and associated businesses and companies. The appellant and O'Brien were directors and share holders of a company, J & M Developments (Qld) Pty Ltd, and, with the appellant's wife, of another company, J & M Opal Mining (SA) Pty Ltd. The appellant and his wife had also operated a partnership with a registered business name, "Falzon Portable Sawmills", the name of which reflected its undertaking, and which was followed by a second partnership, "Falzon Farming", which ran a livestock business. A forensic accountant, Ms Sharp, produced a spreadsheet which showed the income from the various entries between January 1999 and the end of September 2003 at approximately $1 million, while outgoings were approximately $2.5 million, the difference being unaccounted for. The spreadsheet was admitted without objection, and the Crown was not required to tender the source documents from which it was derived.

[27] Ms Sharp had worked from bank records, company tax returns, invoices and working papers obtained from the appellant's accountant and company tax returns,

as well as property and vehicle searches. She was able, she said, to reconcile source documents showing expenditure, such as receipts and invoices, to the profit and loss statements prepared by the accountant. So far as income was concerned, however, the only source documents were what purported to be opal mining invoices paid by Absalom, the amounts of which totalled $379,940, and an invoice book in relation to some contracting work done with the heavy machinery.

[28] Of the amounts expended between January 1999 and the end of September 2003, some $1.56 million represented outgoings from J & M Development (Qld) Pty Ltd. Over the same period its income was $106,000. A large part of the expenditure was for prime movers, trailers and earthmoving equipment. Nothing in the material, Ms Sharp said, indicated that any loan had been obtained to pay for those items. The excess of outgoings over sources of income before the opal invoices were taken into account was just over $1.9 million; taking those invoices into account it was about $1.5 million. She had not factored in personal expenditure.

[29] In cross-examination, Ms Sharp accepted that if the appellant's word was taken about having received $750,000 from opal sales and that figure were to be regarded as separate from and in addition to the amounts paid by Absalom, the resulting addition would give an income of more than $1.2 million from opal mining alone. Alternatively, if the taxation returns and business activity statements for the companies were to be regarded as authentic, notwithstanding the absence of any supporting source documents for them, the combined income from J & M Developments and J & M Opal would be in the order of $1.45 million, to which could be added amounts from other forms of income for the various entities, resulting in income totalling $1.8 million.

The appeal grounds

The trafficking count

[30] The appellant asserted that the learned judge had erred in allowing the trial to proceed on a count which alleged trafficking in two dangerous drugs, methylamphetamine and cannabis sativa. In essence, the contention seems to be that the count was duplicitous. In written submissions, there was an advance on the ground of appeal, in that it was said the charge should not have been permitted to go to the jury because the evidence was not sufficient to establish trafficking in cannabis beyond reasonable doubt. I will deal with the latter aspect in considering whether the conviction was unsafe.

[31] As to the former complaint, it is to be noted, firstly, that there was no motion to quash the indictment and the appellant entered a plea to the charge. Secondly, *R v Jacobs*[1] is authority for the proposition that such a count is not bad for duplicity in circumstances where:

> "[t]he essence of the charge was carrying on the business of drug trafficking and the particulars of the dangerous drugs contained in the count were no more than particulars of some of the dangerous drugs that the Crown relied upon."[2]

That reasoning was adopted in *R v Geary*.[3] The Court in *Geary* went on to observe that in such a case it was "not inappropriate" for the trial judge to direct the jury that

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1 [1998] 1 Qd R 96.

2 At 101.

3 [2003] 1 Qd R 64.

it would be sufficient for the prosecution to prove trafficking in any one of the drugs identified in the charge.[4] Where the drugs involved were specified in different schedules under the *Drugs Misuse Act* 1986 (Qld), it might be appropriate to take a special verdict under s 624 of the *Criminal Code*. Alternatively, the sentencing judge could make a finding of fact on the balance of probabilities, under s 132C of the *Evidence Act* 1977 (Qld), as to what dangerous drugs were involved in the trafficking.

[32] There is, I think, a good deal to be said for the taking of a special verdict from a jury in a case such as this, where there are two drugs in respect of which trafficking is charged and the evidence is distinct in respect of each. However, no special verdict was sought by counsel. The learned judge made clear in discussions before proceeding to sentence that she was doing so on the basis that the trafficked drugs were both methylamphetamine and cannabis, and it was not contended by the defence at trial that the approach involved any error. The ground of appeal as framed implies that the learned trial judge should unilaterally have moved to quash the count, but in the absence of any application for her to do so, and on the authority of *Jacobs* and *Geary* that such a count is not necessarily duplicitous, no error has been demonstrated in that regard.

Error in admitting evidence

[33] The appellant submitted that the trial judge should have excluded various items of evidence in the exercise of the *Christie*[5] discretion. They were: the telephone conversation between O'Brien and Phillips on 27 February 2003; the evidence of Mr Kos; and the evidence of Ms Sharp. In relation to the evidence of the telephone conversation, it was said that there was no clear reason for which the evidence was adduced, but it carried the risk of guilt by association; similarly, the evidence of Mr Kos was of limited probative value and raised a possibility of the jury's embarking on a process of reasoning involving guilt by association.

[34] The conversation between O'Brien and Phillips contained nothing of prejudice to the appellant, or, for that matter, anyone else. In any case, the jury was clearly directed that the purpose of its introduction was solely to establish that Phillips was known as "Reg". Insofar as association with O'Brien was damaging to the appellant, that association appeared in many other forms, including the evidence of other telephone conversations between them and the evidence of Corey and Debra Dangerfield; unsurprisingly, since the Crown case was one of criminal complicity between O'Brien and the appellant. Mr Kos' evidence was probative in enabling the jury to understand what, on the Crown case, was being discussed between Phillips and the appellant in their telephone conversations, and the jury was instructed that it was led simply for that purpose. There was some prejudice in the evidence, since it showed that the appellant was acquainted with a man convicted of a drug offence, but it was not such as to transcend its probative value. There is nothing in these points.

[35] The appellant made a number of complaints of Ms Sharp's evidence, arguing generally that it should not have been admitted because it was:

> "[s]o prejudicial in the form presented as to substantially outweigh its probative value, so as to be misleading to the jury, leading to potential prejudicial and incorrect reasoning by them."

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4 At 67.

5 *R v Christie* [1914] AC 545.

The only specific complaint made which seems to involve any question of fairness is that the procedure adopted, of combining assessment of the income and expenditure of the appellant and his wife with that of O'Brien, could again have an effect of implanting a notion of guilt by association in the minds of the members of the jury. Other matters raised were that there was no explanation for the time periods selected; that reports prepared by Ms Sharp did not use the same sorts of source documents for the assessment of income as for expenditure; that they were not "conducted in a completely objective manner"; that they did not give "a realistic and practical consideration to the Falzon environment"; and that they relied on assumptions. Some of those complaints were not explained, and since neither report was in evidence, it is difficult to understand the submissions; but, in any event, most of the issues raised seem matters for cross-examination and for submission to the jury.

[36] As to the more explicit submission that there should not have been an assessment of the appellant's affairs combined with that of O'Brien, it can be said, firstly, that there was no objection to the evidence being presented in that form; and secondly, that it was inevitable, since the bulk of the expenditure was that of J & M Developments Pty Ltd, in which O'Brien and the appellant were the sole directors and shareholders, that their affairs were considered jointly, so as to ascertain whether either had the means to fund the company's expenditures. As to the selection of the period from 1999 to 2003, it seems reasonable to suppose that it related to a number of matters: the first of the two companies, J & M Developments, was incorporated in September 1998; the first of the mining claims in the name of the appellant was registered on 6 December 1999; the period over which Debra and Corey Dangerfield spoke of seeing methylamphetamine production was roughly from the beginning of about 1999; and the police searches took place in October 2003.

[37] Ms Sharp was, as she explained, limited in the source documents which she could find. She did not accept the income figures which appeared on the financial statements and returns prepared by the appellant's accountant, and was prepared to accept the expenditure figures from those documents only because they were supported by other source documents. The individual items of income and expenditure were displayed on the spreadsheet; defence counsel was at liberty to, and did, cross-examine about each entry and what it related to. The evidence was not objected to. It had a strong probative value, and there was no basis for an exercise of discretion against its admission, even had it been sought.

Provision of transcripts to the jury

[38] The appellant argued that a miscarriage of justice had occurred because the jury had been given the transcript of the evidence of the trial, edited, of course, of any discussion occurring in its absence. The learned judge thought it appropriate to take that step because of the expected length of the trial. (In fact, the trial occupied 11 sitting days over a fortnight.) At the point where Ms Sharp was about to give evidence, mention was made of the fact that the jury would have the transcript. The learned judge asked defence counsel whether he had dropped his opposition (presumably expressed at an earlier review, since any objection taken does not appear in the trial transcript) to the idea. From the discussion that followed, it appears that he had previously resisted the notion purely on the basis that it was not usually done. But he now said:

> "I think I was relying on instincts. But as your Honour, I think, is probably going to give them the transcript, and I think your Honour will give them the transcript, then I – I think they're getting a fair degree of assistance."

The jury was given the usual warning that the transcript was not evidence but merely an aid to recollection.

[39] In written submissions here, counsel relied on this passage from the judgment of Gibbs J in *Driscoll v The Queen*:[6]

> "The danger is that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is out of all proportion to its real weight."

That passage, of course, concerned whether a jury should be provided with a copy of an unsigned record of interview, which could, as Gibbs J pointed out, add nothing to the oral evidence of the police as to what had been said. The "paramount requirement", he went on to say, was that the trial should be conducted fairly; the question was whether admission of the unsigned record would tip the scales unfairly against the accused.

[40] Questions of fairness and balance are relevant here, but are to be applied in an entirely different context. *Driscoll* concerned an unsigned record of interview whose authenticity was challenged. In the present case, there was no issue about the accuracy of the transcript, which recorded what the jury had already seen and heard the witnesses say. A more apposite authority is *R v Tichowitsch*,[7] which, as here, concerned the trial judge's discretion to provide the jury with a transcript of the evidence. Consistently with what was said in *Driscoll*, Williams JA observed that in the exercise of that discretion:

> "[t]he overriding considerations must be that of ensuring the jury are in the best position to arrive at a true verdict, and ensuring that the accused receives a fair trial."[8]

Nothing is pointed to in this case which would indicate that provision of the transcript deprived the appellant of a fair trial. Nor does it seem that defence counsel at first instance advanced any reason to suppose it would have an adverse effect; indeed, he seems to have warmed to the idea over the course of the trial.

The summing up

The definition of trafficking

[41] The learned judge directed the jury that trafficking was an expression of wider import than selling; it meant "knowingly engaging in the movement of drugs from source to ultimate user". The critical question was whether the appellant was

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6 (1977) 137 CLR 517 at 542.
7 [2007] 2 Qd R 462.
8 At 469.

> "carrying on a business of trafficking in methylamphetamine and cannabis, or one of them, at some time between the dates, and at the place, mentioned in the indictment."

The direction was, the appellant said, misleading because it suggested that trafficking was transportation of drugs. The jury should have been told that the prosecution had to establish several transactions done for gain over more than a brief period; and, it was said, her Honour should have nominated with certainty where the two drugs charged were trafficked, and to whom.

[42] The extended meaning which the learned judge attributed to "trafficking" comes from *R v Elhusseini*.[9] It was particularly appropriate in a case where the trafficking took the form both of selling, in the case of the marijuana, and movement, in the case of the methylamphetamine, of the drugs from their source, where they were produced, to others. It was a matter for the jury whether it was prepared to infer from the financial evidence combined with the evidence of the Dangerfields that the appellant produced methylamphetamine which found its way to others along the supply chain in return for substantial amounts of money. It was not necessary that the Crown prove precisely to whom the appellant provided the methylamphetamine produced on his properties, nor where those transactions took place; and, as counsel for the respondent pointed out on this appeal, if the Crown case were accepted, there was no issue as to the repetition of the activity. The appellant's counsel at trial did not seek any redirection, and no miscarriage of justice is demonstrated.

The directions in relation to the Dangerfields' evidence

[43] The learned judge used Microsoft's PowerPoint program to replicate parts of her summing up electronically. Her Honour gave extensive warnings about the evidence of the Dangerfields: as indemnified witnesses, as co-offenders, as former drug users whose memory might be affected, and, in the case of Debra Dangerfield, as a person who had suffered from head injuries. She cautioned the jury that it would be dangerous to convict the appellant on their evidence unless they found that it was supported in a material way by independent evidence implicating him of the offences. In that context, her Honour said, both in the PowerPoint and orally:

> "Consider any inconsistencies with any earlier statements they may have made and consider your own assessment of them in the witness box. Carefully consider what evidence there is that might independently support their evidence."

[44] The appellant made two complaints: that the latter statement might imply to the jury that the Dangerfields' evidence had not been contradicted; and that the judge had failed to tell the jury that the cross-examination of Corey Dangerfield resulted in his "recanting or admitting inconsistent facts". The first seems an improbable inference to draw from the instruction, which was simple and orthodox. But, in any case, the Dangerfields' evidence was not in fact contradicted by any evidence called for the defence, and insofar as it is suggested that cross-examination produced contradictions, the learned judge subsequently reminded the jury on a number of occasions to consider what they had said in cross-examination. She specifically mentioned inconsistencies in Corey Dangerfield's evidence about bringing money to Brisbane. None of his answers in his cross-examination went so far as a

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9 [1988] 2 Qd R 442 at 451.

recantation of the principal themes of his evidence as to the appellant's involvement in producing methylamphetamines, selling cannabis, and possessing large amounts of money.

The example of a question not amounting to evidence and the PowerPoint

[45] The appellant complained that the learned judge had used as an example of a question which did not become evidence, because it did not receive an affirmative answer, this question, put to Corey Dangerfield in cross-examination:

> "You didn't see Falzon in possession of any powder, did you?"

To which Dangerfield replied:

> "I did see him in possession of powder."

Her Honour emphasised to the jury that it was an example taken at random.

[46] This is a specious point, made all the more so by the fact that the learned judge had told counsel at trial that this was an example she had found, had offered to use instead any alternative they suggested, and had received no response. In similar vein was a complaint that the type in the PowerPoint was larger at some places, emphasising parts of the Crown case. But it is quite obvious that the size of the print depended on how much had to be conveyed in the particular slide; in fact, the presumption of innocence was set out in some of the largest print in the PowerPoint.

The summing up of the defence case

[47] There was a complaint of the brevity of the learned judge's summing up of the defence, but since the appellant had not given or called evidence, and the defence case was confined to submissions on the basis of cross-examination, it was inevitable that a much shorter direction would be given in respect of it. The learned judge summarised it; she said that the defence had submitted that the jury could not rely on the evidence of either Dangerfield, that there was no evidence at Notch Point or Ilbilbie of implements or ingredients for the manufacture of methylamphetamine, and that since the appellant was involved in the cash economy of opal mining, the jury could not be satisfied that the excessive expenditure over known income was as a result of trafficking in drugs, rather than the cash sales of opals. It is significant that defence counsel at trial had no complaint to make of that summary, which accurately reflected his address.

Ms Sharp's evidence

[48] It was said that the learned judge failed in her summing up to address the cross-examination of Ms Sharp, which, it was suggested, showed that the appellant's expenditure was not from drug trafficking but a legitimate source. But the cross-examination showed nothing of the sort. Ms Sharp simply performed additions on the basis of the hypotheses put to her by defence counsel, that the appellant's version in the record of interview of having received $750,000 from opal sales in cash should be accepted, or that statements and returns for which there were no supporting source documents should be taken at face value. The learned judge reminded the jury of the defence argument that the appellant's involvement in the cash economy of opal mining meant that it could not be satisfied that the difference between known expenditure and income flowed from trafficking in drugs as

opposed to cash sales of opals. She was certainly not obliged to put it to the jury in terms of something which had been proved through Ms Sharp's evidence, because it had not.

[49] The appellant also submitted that a direction was required in respect of Ms Sharp's evidence because the law required a warning wherever it was "necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case", citing *Longman v The Queen*[10] and other authorities for that proposition. But the jury had seen the cross-examination of the financial analyst and was in as good a position as the trial judge to assess her evidence. There was nothing about this type of evidence which was peculiarly within the knowledge or experience of the learned judge so as to require any special warning.

Unreasonable verdicts

The production counts

[50] It was submitted in respect of count 2 that Debra Dangerfield's concession of a "snapshot" memory should be taken as an indication that she was in fact confusing what happened at Notch Point with her recollection of what had happened at her property at Kaimkillenbun, where production took place in which the appellant was not involved. And while her evidence was that the production was done in the chicken pen shed, she had also said that there were frying-pans under the house, a further reason for regarding her memory as suspect. Counsel also argued that Ms Dangerfield had placed the production at Notch Point as taking place at a time when her son was working in Rockhampton, which meant that it must have been before the arrival of his utility with the equipment.

[51] In any case, it was contended, Ms Dangerfield had simply assumed that methylamphetamine was being produced at Notch Point. And the Crown could not prove beyond reasonable doubt that more than two grams of methylamphetamine was produced, because Dr Culshaw had not actually seen the drug and could not speak as to its quality, as opposed to saying in general terms that the proportion of methylamphetamine in the salt ultimately produced was 85 to 86 per cent. Debra Dangerfield did not give any evidence of the purity of the drug she saw produced. Finally, the learned judge had wrongly told the jury that methylamphetamine residue had been found on a table top at Notch Point, leading the jury wrongly to convict on that count, on the supposition that the table identified by Debra Dangerfield had methylamphetamine on it.

[52] But it was not put to Ms Dangerfield that she was confusing production at the two different sites, and the mere fact that she accepted a description of her recollection as "snapshot" furnished no reason to suppose that she was. Her recollection of a process which began in the shed and continued under the house was not inherently implausible. The suggestion that she had placed the production at a time before the arrival of the equipment seems to be a misapprehension of the evidence. Her evidence was that it was on her very first visit to Notch Point, early in her relationship with O'Brien, that Corey Dangerfield was working in Rockhampton. She did not see the production until some months later.

[53] The jury might reasonably have thought that, although Ms Dangerfield had conducted no chemical analysis of the substance she saw produced at Notch Point,

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[10] (1989) 168 CLR 79 at 86.

her experience qualified her to give evidence from which they could infer it was indeed methylamphetamine. Given that Ms Dangerfield spoke of four or five kilograms, the jury was also entitled to infer that an amount in excess of two grams of methylamphetamine had been produced. If it accepted Ms Dangerfield's evidence, the alternative inference, that an amount less than two grams was produced, would hardly have been a reasonable one. No greater precision as to quantity was required in order to convict on the charge.

[54] What the learned judge had told the jury about the table was that the evidence which could support Corey Dangerfield in respect of count 3 (production under the house at Notch Point) was Dr Culshaw's evidence of how methylamphetamine was produced (consistently with what Dangerfield described), and the evidence about the drug residue found on the table top at Ilbilbie, if the jury concluded it was the same one that was at Notch Point. That inference was open to them because of the resemblance between the photograph of the table which Mr Ma swabbed at Ilbilbie, and that with which O'Brien and his money were photographed at Notch Point. However, it does not seem that the jury was sufficiently convinced of the proposition to convict on count 3. The direction in the circumstances was proper but inconsequential, and, in any event, irrelevant to count 2.

[55] The appellant pointed to the evidence that positive swabs had been taken for methylamphetamine from the light fittings at Millington's property. That result should be taken as the benchmark, it was said, for what could be expected at Notch Point, where it was alleged there were a number of productions. But the light fitting under the house at Notch Point had not produced any positive result. The only positive swabs were from four of the eight panels at the back of the old chicken pen shed. The fact that the positive results came from the edge of the iron panels, it was argued, indicated that it was the result of someone's handling the sheets of iron, rather than of production taking place there. The person who had handled the iron was Corey Dangerfield.

[56] Corey Dangerfield's evidence was uncertain as to where the first production took place. He had agreed in cross-examination that he had not seen the appellant in possession of methylamphetamine, selling or packaging it. The absence of further findings in relation to production at Notch Point, Mr Ma having said there was no indication of it when he visited there, should have led the jury to the conclusion that there was no production at Notch Point and that Corey Dangerfield was responsible for contamination of the panels in the shed.

[57] But Mr Ma had made it clear, in his evidence, that whether methylamphetamine would be left in deposits on the light fittings depended on variables such as whether the area was left open at the time, and whether there was a breeze. The statement that he saw no evidence of methylamphetamine production at Notch Point or Ilbilbie plainly enough was not meant to extend beyond saying that at the time he was at the properties there was no sign of active production, because he had in fact found evidence of methylamphetamine on the corrugated iron panels at Notch Point and on the table at Ilbilbie. The jury might well have thought, given the warning telephone call that the appellant received on 16 September 2003 about O'Brien's apprehension, and his perception that "this thing could escalate", that he would have acted to ensure that there was nothing inculpatory left lying about the property.

[58] The notion that the jury should have entertained a reasonable doubt because of a possibility that Corey Dangerfield had contaminated the edge of the panels on

which positive results were found, a possibility not put to Corey Dangerfield and not suggested in any form at trial, was simply fanciful. Indeed, the defence case at trial was that "cooks" might have occurred at Notch Point and Ilbilbie, but the appellant was not involved in them. Corey Dangerfield's concessions that he had not seen the appellant in possession of methylamphetamine, selling it or packaging it, did not amount to a recantation of his evidence of having seen the appellant producing the substance for O'Brien to take, package, and sell.

[59] The jury had received strong instructions from the learned judge as to the caution to be exercised in considering the Dangerfields' evidence. Nonetheless, they may simply have found Ms Dangerfield credible in relation to count 2. In relation to count 4, which also concerned a production in the chicken pen shed at Notch Point, the jury may well have accepted Corey Dangerfield's account because they drew support from Mr Ma's evidence about methylamphetamine traces found on the panels and, in addition, from his account that there was an oily substance on the panels, corroborating Dangerfield's description of being instructed to oil the side of the shed to hide any evidence of production. In contrast, counts 3 and 5 concerned alleged productions under the house at Notch Point, where no traces of methylamphetamine were found.

The trafficking count

[60] The appellant argued that there was insufficient evidence of trafficking in cannabis because the evidence that Corey Dangerfield was supplied marijuana in ounce quantities would only be sufficient to support a count of supply, not trafficking. And, in any case, Dangerfield had admitted that he was obtaining substantial amounts of the drug from O'Brien, so it was, it followed, unnecessary for him to be obtaining smaller amounts from the appellant.

[61] But the fact that O'Brien may have provided a second source of cannabis to Corey Dangerfield did not disprove his evidence as to the appellant's role. Dangerfield's evidence received some minor support from the telephone call from "Dave", who enquired whether the appellant had any "dope"; and from Mr Ma's testing of the table at Ilbilbie. As to whether the transactions were sufficient to constitute trafficking, Dangerfield said that he had bought cannabis from the appellant at the rate of three or four ounces a week for the entire period he was in his employ, about 18 months to two years. The jury was entitled to act on that evidence and to regard the regularity and number of transactions he described as constituting trafficking.

[62] The appellant made the various arguments already dealt with, about the deficiencies in the Dangerfields' evidence, in relation to the trafficking count generally. But while there were concessions made by both Dangerfield as to the quality of their recollections, there was nothing which rendered their evidence as to production and the possession of cash unacceptable. In considering the trafficking count, the jury was entitled to act on the evidence of the two productions at Notch Point of which they were satisfied, and on Corey Dangerfield's evidence of a production at Millington's property, for which there was support in the forensic evidence and in the appellant's evident knowledge of it in his telephone conversation with Millington. Further support for the Dangerfields' accounts could be found in the appellant's responses in other telephone conversations, suggesting involvement in production and knowledge of O'Brien's activities. The jury could reasonably have accepted the Dangerfields' evidence as to the large amounts of cash to which the

appellant had access, particularly given the photo taken at Notch Point of O'Brien with an impressive stack of banknotes. In addition, the financial evidence, depending on the view taken of it, established a very large amount of unexplained income over the relevant three years.

Conclusion

[63] It was open to the jury to convict on each of the three counts, and the verdicts are not shown to be unreasonable. I would dismiss the appeal against conviction. Since no argument was made in support of the application for leave to appeal against sentence, other than that the sentence should be varied if the appeal against conviction were to succeed on some counts only, there is no basis to allow that application. It too should be dismissed.

[64] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and the orders proposed by her Honour.