

SUPREME COURT OF QUEENSLAND

CITATION: *R v Kowaliw* [2013] QCA 350

PARTIES: **R**
v
KOWALIW, Damien Alexander
(appellant/applicant)

FILE NO/S: CA No 365 of 2011
DC No 2250 of 2011

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 29 November 2013

DELIVERED AT: Brisbane

HEARING DATE: 6 August 2013

JUDGES: Muir and Fraser JJA and Philip McMurdo J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Application for leave to adduce evidence refused.**
2. Appeal dismissed.
3. Application for leave to appeal against sentence refused.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was found guilty of three counts of stealing as a servant – where the appellant worked as an attendant at a car park – where the prosecution alleged the appellant took sums of money from the payment machines – where the appellant did not give or call evidence at trial – where the appellant sought to adduce a forensic accounting report as fresh evidence in the appeal – where the appellant argued that the report demonstrated the conviction on count 1 involved a miscarriage of justice – where the appellant submitted the report demonstrated unreliability in evidence led at trial as to the difference between the car park’s records of money received by the payment machines and the money collected from the machines – whether the forensic accounting report should be admitted as fresh evidence – whether the conviction on count 1 involved a miscarriage of justice

Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Michaelides v The Queen (2013) 87 ALJR 456; [2013] HCA 9, cited
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, cited
R v Spina [\[2012\] QCA 179](#), cited

COUNSEL: M J Byrne QC, with C F Wilson, for the appellant/applicant
 G P Cash for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant/applicant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **MUIR JA:** For the reasons given by Fraser JA, I agree that the application for leave to adduce evidence in the appeal should be refused, that the appeal against conviction should be dismissed and that the application for leave to appeal against sentence should be refused.
- [2] **FRASER JA:** The appellant was found guilty by a jury of three counts of stealing as a servant. Count 1 charged that the appellant, being the servant of Wilson Parking Australia 1992 Pty Ltd (“Wilson Parking”), stole a sum of money the property of Wilson Parking on divers dates between 5 September 2007 and 4 April 2009. Counts 2 and 3 charged that the appellant committed the same offence on 25 March 2009 and 30 March 2009 respectively.
- [3] The appellant filed a notice of appeal against the convictions on the ground that they are unsafe or unsatisfactory and he also applied for leave to appeal against sentence. At the hearing of the appeal the appellant abandoned the application for leave to appeal against sentence. The appellant did not advance argument in support of the ground stated in the notice of appeal against the convictions. He argued instead that a “forensic accounting report” by an accountant, Ms Bundesen, which was not adduced in evidence at the trial, should be admitted in the appeal, and that it established that the conviction on count 1 involved a miscarriage of justice. The appellant sought orders setting aside the conviction and for a new trial on that count. The appellant’s outline of argument stated that the appeal was only against the conviction on count 1 and he did not argue either in that outline or orally that the convictions on counts 2 and 3 were unsafe or unsatisfactory but he did not formally abandon that ground of appeal in relation to any of the counts.

The evidence at the trial

- [4] Mr Perera, Wilson Parking’s state accountant for Queensland, and Mr Van Kelckhoven, Wilson Parking’s business manager of its operations in Queensland, gave evidence about the Royal Brisbane Hospital car park which Wilson Parking operated, records which were generated in the operation of that car park, and the employment of car park attendants including the appellant. The appellant was employed by Wilson Parking as a car park attendant at the Royal

Brisbane Hospital car park during the period stated in count 1 of the indictment. From 20 February 2009 the appellant was on leave and receiving WorkCover payments.

- [5] Cars entered the car park through a boom gate entry after obtaining a ticket. The driver could leave the car park through the boom gate exit by paying a car parking attendant at a booth. An attendant was rostered to work from 7.00 am till 6.00 pm. The attendant was required to put cash payments into a safe (identified in business records as "P84"). Alternatively, the driver could insert the car park ticket into one of two automatic payment machines ("APM1" and "APM2") next to each other on the third floor of the car park. The prosecution case was particularised as relying upon deficiencies attributable to the automatic payment machines. The machine would display the amount of the parking fee, the driver could pay in cash or by credit card and upon payment the ticket, with an encoded message recording the payment, would be returned. The driver could then leave the car park by presenting the ticket at the boom gate exit.
- [6] A company ("Armaguard") collected and banked the cash paid for parking fees from the hospital car park and from other car parks controlled by Wilson Parking. Armaguard kept records of its collections of the cash and regularly sent those records to Wilson Parking. Mr Perera gave evidence that Armaguard collected the cash between about 12.00 and 4.00 pm each Friday afternoon, at times which differed from week to week. An Armaguard staff member, in the presence of a Wilson Parking employee, removed from each automatic payment machine the canister containing the cash and applied a seal to the canister. Wilson Parking received from Armaguard regular "Settlement Reports" which stated the amount of cash Armaguard had collected and banked from Wilson Parking car parks in Queensland, including the hospital car park.
- [7] The car park attendants needed to be able to open the machines in order to assist Armaguard to remove the canisters containing the cash, and to carry out maintenance and have the change box refilled. The car park attendants had access to a key to open the machines and each of them was also given a personal code. An attendant who had a key and a code could open the cover of the machine, enter the code for a selected user name, remove the canister, open it, remove money, close the canister, replace it in the machine, and close the cover of the machine. Whilst it was important for management that the employees kept their usernames and codes to themselves, Mr Van Kelckhoven was aware of occasions where the information was shared between the employees.
- [8] When an automatic payment machine was opened, a panel prompted the selection of a username and entry of that user's code. If the correct code for the selected user was entered, the alarm system was disengaged. If not, an alarm would sound. Events, including the opening of a machine, faults, and items being removed from a machine, were automatically recorded. Those records were kept within Wilson Parking's system for three months. Records of the cash deposited into the machine since an internal counter was last reset could also be printed at a machine after it was opened. The counter was usually reset on Friday afternoon when the cash was collected.
- [9] The car park attendants were given a staff car parking pass which they could use for free parking at the car park. When the appellant went on leave on 20 February 2009 he retained his staff car parking pass together with his key to the office in the car

park, although there was no reason connected with the appellant's work why he might be required to attend at the hospital car park whilst he was on leave. The use of a staff car parking pass to enter or exit the car park generated a record, which was kept only for a short time. A "parking activity history" report for the appellant's staff car parking pass for the period when he was on leave was tendered in evidence in the Crown case: exhibit 3. There was video surveillance of vehicles entering and leaving the car park, at the office in the car park, and at APM1 and APM2. The video surveillance records were kept for a week.

- [10] As a result of events which occurred on 25 March 2009, of which Mr Perera became aware on 27 March 2009, he produced a document which set out a reconciliation of Wilson Parking's daily records of the parking fees received in cash at the hospital car park with Armaguard's Settlement Reports for March 2009 (exhibit 12). Mr Perera aggregated Wilson Parking's daily cash receipts for the seven days ending every Friday in order to compare them with the Armaguard figures of its weekly collections. The time at which Wilson Parking's figures were recorded did not coincide with the time at which Armaguard collected the cash, so some relatively minor discrepancies were to be expected.

Count 2

- [11] Video footage of the car park entrance showed the appellant's car entering the hospital car park at 5.21 am on 25 March 2009 after a casual ticket was printed for the driver. A "system events filter report" dated 28 March 2009 recording events at APM1 and APM2 for the period between 25 January and 28 March 2009 (exhibit 2) records that at 5.27 am on 25 March 2009 the door of APM1 was unlocked, at 5.27 am the code issued to Mr Boughton, another Wilson Parking employee, was entered, and the bank note container was removed. At 5.28 am the bank note container was installed and the door to the machine was locked. Video footage marked with similar times¹ on the same day showed someone entering the office and leaving it after a couple of minutes. Thereafter the appellant was seen to crouch down at APM1, apparently open that machine, enter a code, and remove the bank note container. It was accepted on behalf of the appellant that he was the person shown in the video footage concerning counts 2 and 3. Mr Boughton denied that he had opened the automatic payment machine at that time. In evidence-in-chief he said that he worked alongside the appellant for about a year and they had overlapping shifts. There were occasions when he entered his username and code into an automatic payment machine or the computer whilst he was with the appellant. In cross-examination he agreed that he did not share his code with other staff members.
- [12] Mr Perera gave evidence that in the course of normal operations there would be no reason at that time of the morning for any username or code to be entered in the machine, or for the bank note container to be removed and that no information was logged by the machine which would indicate any reason for those things to occur. Mr Perera gave evidence that he subsequently went to the machine with Mr Van Kelckhoven, opened it, removed the main bank note container, created a printout from the machine which recorded how much cash should have been in the machine at that point of time, and counted the cash. He found \$2,450 in cash in the container after it was last replaced before 25 March 2009, compared with \$7,520

¹ The clocks on two different video systems at the carpark differed by about five minutes: Perera at T2-47.

which the record printed by machine indicated should have been in the container. The deficiency was \$5,070.

Count 3

- [13] Wilson Parking recorded very similar events on 30 March 2009. The appellant's car is seen on video footage entering the car park at 5.34 am, someone is seen to enter the office, and the appellant is seen to open APM1 shortly after 5.41 am. Records of that machine's operations record that the note container was removed and the code issued to another Wilson Parking employee, Mr de Bie, was entered into the machine. Mr de Bie denied that he had entered his code at that time. His evidence that it was possible that he had shared the details of his code with the appellant was not challenged in cross-examination. Mr de Bie agreed with defence counsel's suggestion that, although his code was confidential and private, he might have revealed it to those who were within in a trusted group of employees to enable them to perform their duties. A record of the machine's operations recorded that \$4,310 had been received after the container was last replaced before 30 March 2009. Mr Perera counted \$2,440 cash in the container, revealing a deficiency of \$1,870.

Count 1

- [14] Exhibit 3 included records of the use of the appellant's staff car parking pass on six days in February and March 2009 falling within the period comprehended by count 1. That document recorded the use of the appellant's pass for entries into and exits out of the hospital car park outside work hours on six occasions when the appellant was on leave; 24 February (5.34 to 5.48 am), 3 March (6.40 to 6.53 pm), 4 March (4.46 to 4.59 am), 9 March (7.05 to 7.24 pm), 11 March (6.02 to 7.02 pm) and 12 March (5.35 to 5.43 am). A "System Events & Cash Flow Report" (exhibit 13) prepared by Mr Perera from Wilson Parking's records covered the period 1 January to 31 March 2009, although the records included dates and employee codes only for the last two months. Exhibit 13 recorded that on each of the six occasions the username and code issued to Mr de Bie or Mr Boughton was entered and the main bank note container was removed from APM1 or APM2 (and, on one occasion, both machines) at a time which fell between the entry and exit times recorded in exhibit 3. Mr de Bie and Mr Boughton gave evidence that they were not present in the car park and did not access the machines on any of those occasions. The prosecutor relied upon other evidence, including the video surveillance evidence of 25 and 30 March 2009, to support an inference that the appellant knew Mr Boughton's and Mr de Bie's usernames and codes.
- [15] Wilson Parking records indicated that on 18 March 2009 at 10.06 pm a casual car parking ticket for entry to the car park was issued. Mr Perera gave evidence that it was very unusual for someone to enter the car park at that time. Shortly afterwards, there is a record of Mr de Bie's username and code being used to open APM1 and the banknote container was removed. Mr de Bie denied that he did that.
- [16] Exhibit 13 included a column headed "Total Variance". Mr Perera gave evidence that in this column he inserted the difference between the total cash that was supposed to be in the machine according to Wilson Parking's daily cash reports, and the amount of money banked according to Armaguard's Settlement Reports. The recorded "variances" in this period were \$1,320 (27 February 2009), \$8,080 (4 March 2009), \$6,710 (12 March 2009), and \$9,120 (18 March 2009).

Armaguard's Queensland and Northern Territory Security Manager, Mr Hart, gave detailed evidence of measures taken by Armaguard to ensure that cash in the canisters taken by Armaguard from the automatic payment machines was kept securely, banked, and correctly accounted for to Wilson Parking. Cross-examination did not expose any flaw in those measures. It was not put to Mr Hart that any of the cash might have gone missing after the canister was taken by Armaguard from an automatic payment machine.

- [17] The "System Event" for each of the dates between 2 January 2009 and 30 March 2009 in exhibit 13 is "Main Bank Note Container Removed". Consistently with Mr Perera's evidence that Armaguard attended at the hospital car park each Friday at varying times in the afternoon and removed and replaced that canister, exhibit 13 records that event occurring for each of APM1 and APM2 every Friday afternoon at varying times between about 12.00 and 4.00 pm. Another pattern emerges from exhibit 13, to which Mr Perera referred in evidence. Putting aside those regular events, on almost every day between 2 January and 20 February 2009 the appellant's username and code are recorded when the main banknote container was removed from APM1 or APM2, or both machines; and in the period when the appellant was on leave (from 20 February to 30 March 2009) the main banknote container was removed only on the occasions charged in counts 2 and 3, the seven occasions within count 1 which are identified in [14] and [15] of these reasons, and on 27 March 2009 when the username "WTS Jason" was entered and the main banknote container was removed from APM1 and APM2 at 8.33 and 8.34 am respectively. Mr Palanigeson Monohern gave evidence that he was known as Jason Monohern. He worked for "Wilson Technologies", a company which provided maintenance services for the equipment, including the automatic payment machines, at Wilson Parking car parks. Mr Monohern gave evidence that when he created his code for access to the machines the appellant was present with him at the office in the hospital car park. Mr Monohern's job was to service the equipment. He said that he would not have been able to service the automatic payment machines on 27 March 2009 within the times shown on the records and he did not service two machines at the same time.
- [18] There was evidence that the appellant had incurred very substantial gambling losses which he could not have paid out of his salary. Mr Bennett, a financial analyst and investigator employed by the Director of Public Prosecutions, gave evidence that he compared the appellant's salary and family benefits with withdrawals from ATMs at casinos recorded in the appellant's bank statement. Mr Bennett produced a table of the appellant's income and withdrawals at casinos on a fortnightly basis between the end of August 2007 and 7 April 2009 (exhibit 18). The table records total income of \$47,651.82 and total withdrawals at casinos of \$35,190.² From the casinos' records (exhibit 15) for the period from 8 September 2007 to 2 April 2009 Mr Bennett prepared a table recording the amounts won and lost by the appellant on a daily basis at the two casinos (exhibit 19). The total loss was \$348,621.38.
- [19] That figure may be compared with the total cash deficiency (or "variance") of \$242,622.35 for a similar period shown on exhibit 14. Exhibit 14 was prepared by Mr Bennett and verified by Mr Perera. It compared Wilson Parking's records of the

² Bennett at T4-13 to T4-16. Mr Bennett excluded from the document two deposits of \$10,000 each into the appellant's account on 10 February 2009 and withdrawals from casino ATMs in the fortnightly period up to those deposits because it was not possible to tell if the withdrawals were of salary or of money from another source.

daily cash takings from the automatic payment machines with the “Settlement Reports” recording Armaguard’s weekly collections between 1 September 2007 and 20 March 2009. For each day within that period exhibit 14 specifies the cash received in the car park booth and each of the automatic payment machines. For each Friday within that period, exhibit 14 specifies the weekly total of those daily cash amounts and compares it with the amount of cash collected from the booth and each machine. The cash which Armaguard sometimes supplied to provide change in the machines was also included in the table.

- [20] The respondent drew attention to a correlation between the total of the appellant’s gambling losses at the casinos on 3 and 4 March 2009 (\$8,210) and the cash deficiency in the amount banked by Armaguard in the period to 4 March 2009 (\$8,080). The relationship between the casino losses and each of the other relevant cash deficiencies in February and March 2009 is as follows: 27 February 2009 (casino loss \$2,230.43 as against “variance” of \$1,320), 12 March 2009 (casino loss of about \$8,700 between 7 and 12 March as against a “variance” on 12 March of \$6,710), 18 March 2009 (casino loss of \$1,085, although the appellant had net winnings of \$980 on 16 March 2009, as against a “variance” on 18 March of \$9,120), 25 March 2009 (casino losses between 19 and 25 March 2009 totalling about \$3,300 as against a “variance” on 25 March of \$5,070), and 30 March 2009 (casino losses between 26 and 30 March 2009 totalling about \$2,800 as against a “variance” on 30 March 2009 of \$1,870).
- [21] The prosecution relied upon similar evidence of numerous “variances” shown in exhibit 14 in the preceding, much longer period which was also comprehended by count 1.
- [22] The appellant did not give or call evidence.

Ms Bundesen’s report

- [23] The report by Ms Bundesen which the appellant sought leave to adduce in evidence in the appeal concerns the reliability of the evidence of “variances” recorded in exhibit 14. Defence counsel challenged the reliability of some of the records. The trial judge directed the jury that the interpretation of the records, and the view which the jury took about reliability of the records, was a matter for the jury to consider “taking into account all of the evidence that has been placed before you from the various witnesses that touched upon whatever the evidence is that you are considering relevant to that issue.”³ The appellant did not criticise that direction but the appellant submitted that it was a large task for the jury and that it was complicated by the fact that there appeared to have been no specific reference at the trial to the source documents.
- [24] The sources of information for Ms Bundesen’s opinions were listed in her report as being “Armaguard Detailed Settlement Reports” (exhibit 6) and spreadsheet titled “Comparison of Cash Reports and Armaguard Settlements” (exhibit 14). Ms Bundesen expressed the following opinions:
- “(1) APM1 had two Customer Reference Numbers in the Armaguard Detailed Settlement Reports during the period reviewed being 4W67041 and 4W67054. The number 4W67041 was also used for another parking machine / booth located at Mary Street. The Customer Reference Number

³ Summing up at 4-8.

4W67054 was used from 9 May 2008 which is also when cash started to be recorded as being received for APM1.

- (2) From 13 June 2008, when comparing receipt numbers from the Armaguard Detailed Settlement Reports for APM1, APM2 and P84, the middle receipt number is missing for 25 weeks. An approximate total for these 25 weeks is \$138,823.10.
- (3) Up to and including 16 May 2008, when APM1 had a reference of 4W67041 or the two numbers were both being used, 13 receipt numbers may also be missing from the Armaguard Detailed Settlement Reports currently available. An approximate total for these 13 weeks is \$94,948.40.”

- [25] The appellant submitted that Ms Bundesen’s report demonstrated unreliability in important aspects of exhibit 14 with reference to Armaguard’s Settlement Reports. The appellant relied upon the following page of the Settlement Reports, which is typical of many pages, by way of example:⁴

Armaguard
Detailed Settlement Report by Major Client
WILSON PARKING

Page: 14 of 14
Generated:23/06/08 at 9:12

Division: WILSON PARKING
Location State: Queensland
Transaction Date: 20/06/08

Settlement Date: 23/06/08
Settlement No: 625312
EFT Batch No: 004169

Loc ID	Cust. No	Receipt	Payee Name	Receipt Amount	Adjustment Amount	Less Supplied Amount	Net Client Settlement Date
APM2	4W67067	448679	Wilson Parking RBH Level 3 APM 2	4777.00			4777.00
P46	4W68309	448680	Wilson Parking Ann St P46 Pkt 3 not received	1467.00	467.00-		1000.00
P61	4W66880	448997	Wilson Parking Camalco Place P61 Pkt 13 list error	2113.00	100.00		2213.00
P62	4W66893	448998	Wilson Parking Eagle St Pier P62	527.00			527.00
P65	4W66903	448999	W/Parking Waterfront P65 Summ add error	906.00	9.00-		897.00
P68	4W66929	449000	Wilson Parking Watkins Medical P68	10660.00			10660.00
P73	4W68325	449001	W/Parking Park Road P73	1954.00			1954.00
P75	4W65564	448675	W/Parking Eagle St Pier APM	9133.90		3000.00	6133.90
P75	4W65580	448676	W/Parking Watson Bld (Margaret St)	2569.00			2569.00
P84	4W67038	448677	Wilson Parking-Royal Bris Hospital C/P	5523.50			5523.50

- [26] The appellant submitted that the description “Page: 14 of 14” and the fact that the preceding page is described as “Page: 1 of 4” revealed that many pages were missing from the Settlement Reports. That is not so. As the respondent pointed out, each of the preceding 13 pages is included in exhibit 6. The page order merely differed from the page descriptions.
- [27] The appellant also submitted that it was not appreciated by defence counsel at trial that, as Ms Bundesen suggested in her report, a comparison between the receipt numbers for APM2 and P84 indicated that there were “missing receipts” for APM1. For the “Transaction Date” of 20 June 2008, for example, it may be inferred that the “missing receipt” should have been numbered 448678, the number falling between the receipt number for P84 and the receipt number for APM2. The appellant submitted that the “missing receipts” for APM1 might evidence the collection of money from APM1 which was credited to a machine at a Wilson car parking station

⁴

I have omitted a column which is not relevant to the submission and added the emphasis.

at Mary Street, which was also designated “APM1” and, before 9 May 2008, was associated with the same reference number (4W67041).

- [28] It should be noted that the absence of any receipt number for APM1 in the records described by Ms Bundesen was apparent on the face of those records. The corresponding absence of any cash in the APM1 “Armaguard Cash Banked” column for Friday 20 June 2008 was also apparent in the relevant section of exhibit 14:

Transaction Date	Car Park Booth Cus # 4W67038			APM 1 Cus # 4W67054			APM 2 Cus # 4W67067			Cash Supplied	Total Revenue Report & Armaguard Banking		
	MAU Cash	Total Cash Received	Armaguard Cash Banked	MAU Cash	Total Cash Received	Armaguard Cash Banked	MAU Cash	Total Cash Received	Armaguard Cash Banked	Armaguard	MAU Cash	Armaguard Cash Banked	Cash Variance
Friday, 13 June 2008	945.00	4,536.50	5,183.00	897.70	7,507.20		440.00	5,147.60	10,077.10	(3,500.00)	17,191.30	15,260.10	1,931.20
Saturday, 14 June 2008				471.00			120.00						
Sunday, 15 June 2008				270.00			237.00						
Monday, 16 June 2008	1,090.50			1,008.00			392.20						
Tuesday, 17 June 2008	1,151.00			761.50			687.20						
Wednesday, 18 June 2008	1,405.99			1,174.30			165.00						
Thursday, 19 June 2008	1,135.99			926.50			482.70						
Friday, 20 June 2008	604.00	5,387.48	5,523.50	919.50	5,530.80		836.50	2,920.60	4,777.00		13,838.88	10,300.50	3,538.38

- [29] The entry for Friday 20 June 2008 shows that the amount in the APM2 “Armaguard Cash Banked” column substantially exceeded the APM2 “Total Cash Received” column, although the amount banked was substantially less than the total cash received in APM1 and APM2. That is consistent with the money collected from APM1 being included in the “Armaguard Cash Banked” for APM2. (The figures for the car park booth (P84) are not consistent with the additional amount banked for APM2 being derived from the car park booth.)

- [30] This pattern occurred regularly in exhibit 14. Other examples are given in a table of what Ms Bundesen described as “missing receipt numbers”, upon which the appellant relied as raising a doubt whether Armaguard properly accounted for amounts it collected from APM1 at the hospital car park. For example, the section of the table relating to Friday 3 October 2008 provides:

Car Park Booth Cus # 4W67038				APM 1 Cus # 4W67054				APM 2 Cus # 4W67067			
MAU Cash	Total Cash Received	Armaguard Cash Banked	Rec No	MAU Cash	Total Cash Received	Armaguard Cash Banked	Rec No	MAU Cash	Total Cash Received	Armaguard Cash Banked	Rec No
925.00	4,187.00	4,245.70	19662	541.00	4,181.40	0.00	196621	507.40	3,420.50	7,989.30	196622

- [31] Again, the “missing” receipt number 196621 for APM1 falls between the receipt number for the car park booth (196620) and the receipt number for APM2 (196622). Again, the arithmetic suggests that the “Armaguard Cash Banked” for APM2 includes money collected from APM1: although only \$3,420.50 is recorded as having been received from APM2 in the week ending Friday, 3 October 2008, \$7,989.30 is recorded as having been collected by Armaguard from APM 2. Again, that was not explicable by any surplus in the car park booth.
- [32] A schedule prepared by the respondent demonstrates that the same pattern occurred in a substantial majority of the occasions cited by Ms Bundesen in which there was no receipt for APM1. Whilst the thesis advanced by the appellant in reliance upon Ms Bundesen’s report is arithmetically possible in relation to the other occasions, there is no evidence that this thesis is correct.
- [33] This issue did not go unnoticed at the trial. The Crown case was that where there was no entry in the “Armaguard Cash Banked” column for APM1 (such as for Friday 20 June 2008), the amount collected by Armaguard from APM1 was aggregated with the amount collected from APM2 and included in the receipt for APM2; it therefore appeared in the “Armaguard Cash Banked” column for APM2. (This was starkly illustrated by the subtotals on the last page of exhibit 14: \$556,884.70 was banked from APM2 although the total cash recorded as having been received from APM2 was only \$349,384.) Mr Perera gave evidence-in-chief that “when Armaguard banks money, sometimes they give the details of which machine it’s been picked up, but sometimes they just bank it as one lump sum to whatever the reference that comes on the Armaguard settlement report so APM1 got ... for example, the first page of the document or two pages into that, all the money has been banked as APM2 – money from APM2 even though they have been collecting money from APM1 as well”. Mr Perera maintained this evidence in further cross-examination. He denied that Wilson Parking’s computer information was unreliable. For those reasons, Mr Perera ascertained the deficiency in the monies banked as against the monies taken in the machines by comparing the total of the cash recorded as received in APM1 and APM2 against the total of the money recorded as having been banked by Armaguard for both machines, the difference being \$242,622.35.
- [34] Defence counsel understood this to be the prosecution case and did not challenge it. So much was clear from the cross-examination of Mr Perera, in which defence counsel secured agreement that, for a long time from September 2007, no amount was attributed to APM1 and that Armaguard “banked all the cash from both machines and called it cash as coming from APM 2”. The appellant referred to the evidence of Mr Hart, Armaguard’s security manager for Queensland and Northern Territory, that it was Armaguard’s policy to record cash banking against each individual machine, and that had always been its policy as far as he was aware. However, Mr Hart also said that he did not know whether it was the case that Armaguard recorded the amounts banked from the hospital car park machines against only one of the machines.
- [35] The pattern described in [29] – [32] of these reasons is consistent with Mr Perera’s evidence. The appellant’s hypothesis that the recorded deficiencies might be attributable to Armaguard crediting cash collected from the hospital car park APM1 to the Mary Street car park is not readily reconcilable with that evidence. Furthermore, although Ms Bundesen’s report identifies examples of the use of the number 4W67041 for “APM1” both at Mary Street and at “Wilson Parking Royal

Brisbane Brisbane”, none of those examples involve the collection of cash from the machine at the hospital car park. Rather, they are examples of the supply of cash to the machine at the hospital car park. And exhibit 6 records that Armaguard regularly collected from the Mary Street car park on Tuesdays, whereas Mr Perera’s evidence, which was consistent with the “Transaction Dates” in the Settlement Reports, was that the collections from the hospital car park regularly occurred on Fridays.

- [36] Senior counsel for the appellant described his principal point as being that “the Mary Street booth, which was the crossover of the customer identification number, was never identified and the records were not disclosed.” There was a doubling up of the customer identification numbers for APM1 at Mary Street and at the hospital for part of the period covered by count 1, but that was disclosed. The appellant did not identify any record which was in existence and not disclosed, save for the hypothesised “missing receipts”. The appellant’s senior counsel disclaimed any suggestion of a breach of the duty of disclosure by the prosecution.
- [37] In the result, it is difficult to see that Ms Bundesen’s report amounts to anything other than an argument based upon evidence in the Crown case which might have been put to the jury but was not. For the reasons I have given, it is not a strong argument for any period within count 1. It is a weak argument at best in relation to the period after the expiry of the 25 week period mentioned in Ms Bundesen’s second opinion.
- [38] After that period, the Settlement Reports include a customer number for APM1 at the hospital (4W67054) which differs from the customer number for APM1 at Mary Street (4W67041). Separate, sequentially numbered, receipts were then given for P84, APM1 and APM2 at the hospital and the Settlement Reports identified the “receipt amount” for each of them. This is so, for example, in relation to each of the Friday “transaction dates” in the Settlement Reports which are referrable to the deficiencies identified in exhibit 13 for the events in February and March 2009 falling within count 1 which are identified in [14] and [15] of these reasons.

Conclusions and proposed orders

- [39] The ground of appeal that the verdicts are unsafe and unsatisfactory requires resolution of the question whether, on the relevant evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.⁵ In my opinion that was reasonably open on the whole of the evidence relating to count 1, and particularly the evidence summarised in [14] – [20] and [38] of these reasons. The evidence was even more compelling on counts 2 and 3, including as it did video recordings of the appellant opening the machines at times when Wilson Parking’s records revealed that other employees’ user names and codes were entered in the machines and the bank note containers were removed.
- [40] For the reasons given in [23] – [38], nothing in Ms Bundesen’s report suggests that any of the convictions involved a miscarriage of justice. Accordingly, if the report otherwise might be admissible, it should not be admitted in the appeal either as “fresh evidence” or as “new evidence”.⁶

⁵ *M v The Queen* (1994) 181 CLR 487 at 494-495; *MFA v The Queen* (2002) 213 CLR 606 at 614-615; *Michaelides v The Queen* [2013] HCA 9 at [3] – [4].

⁶ See *R v Spina* [2012] QCA 179 at [32]-[34], referring to *Gallagher v The Queen* (1986) 160 CLR 392 and *Mickelberg v The Queen* (1989) 167 CLR 259.

- [41] I would refuse the application for leave to adduce evidence in the appeal and I would dismiss the appeal. The application for leave to appeal against sentence should be refused.
- [42] **PHILIP McMURDO J:** I agree with Fraser JA.