IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 223 of 2018

BETWEEN:

JASON TROY McKELL
Appellant

and

THE QUEEN
Respondent

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RESPONDENT'S SUBMISSIONS

Part I – INTERNET PUBLICATION

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II – STATEMENT OF ISSUES

2. The issue which arises is whether the majority in the Court of Criminal Appeal erred in concluding that no miscarriage of justice occurred as a result of the summing up to the jury. The trial judge's summing up, when considered as a whole, did not result in a miscarriage of justice. No error has been established.

3. The entitlement of a trial judge to comment on the evidence, including facts in issue,
20 is well settled and there is no reason to depart from those established principles. The directions required will necessarily be determined by the nature and circumstances of the trial issues and the nature and extent of the comments made by the trial judge.[1]

Part III – NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT

4. No notice is required to be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV – FACTUAL BACKGROUND

5. The facts and Crown case are accurately and succinctly summarised in the judgment of Payne JA.[2] The majority (Payne JA, Fagan J agreeing) correctly described it as a very strong Crown case.[3] The Respondent agrees with the Appellant's summary in

[1] See the model directions in the NSW Criminal Trial Bench Book at [7-020].
[2] CAB 167-172, [4]-[29].
[3] CAB 195, [101].

Commonwealth Director of Public Prosecutions
Level 10, 175 Liverpool Street
Sydney NSW 2000

Telephone: (02) 93211100
Fax: (02) 9264 8241
Email: reem.shleef@cdpp.gov.au
Ref: SC13100395C/1

general, but submits that the issues on this appeal require greater consideration of the Appellant's case at trial and the evidence given by the Appellant, summarised as follows.

Defence case

6. The Appellant was the movements manager at Wymap, a company that provided under bond freight transport services at the airport. Wymap would collect uncleared airfreight consignments from a cargo terminal operator and transport them "*under bond*" to an approved under bond facility, pending customs clearance and subsequent collection or delivery to the intended consignee. Through his employment and experience, the Appellant was aware that the movement of goods under bond was a very regulated process, the integrity of that process was important, as was the fact that goods ought not be interfered with before they got to the freight forwarder and the ultimate consignee.[4]

7. Although he first met his co-accused, McGlone, in 2003 at work, he saw him by chance, at the Coles near his home in August 2012. After discussing the possibility of McGlone's son trialling with a rugby league team which the Appellant coached, the Appellant gave McGlone a telephone because McGlone said he did not have a phone to be able to contact the Appellant about his son's football trial.[5] The Appellant said he had won that telephone years earlier and had then put it into a pool of phones at work (to be used by others).[6] Despite the Appellant having a work telephone, he said he had commenced using this phone from the "pool" as his work phone.[7] When he gave the phone to McGlone, it had no SIM card, there was no discussion about how or when he would get the phone back and he did not give McGlone his contact number. Although he had the phone with him at the time, the Appellant was not at that time actually using it as either his work or personal phone.[8]

8. This telephone was seized by the police from the Appellant when he was arrested transporting consignment two and it contained numerous text messages dating back to August 2012 (which the Crown alleged were text messages between the Appellant and McGlone showing an ongoing relationship and regular contact between the pair

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[4] RFM 165:4 - RFM 166:43; RFM 179:43 - RFM 180:23.
[5] RFM 15:23 - RFM 17:22.
[6] RFM 17:19 - RFM 19:42; RFM 109:14 – RFM 112:2.
[7] RFM 19:49- RFM 20:28; RFM 112:7- RFM 113:32.
[8] RFM 20:39 – RFM 21:42; RFM 113:34 - RFM 117:47.

that was contrary to the Appellant's evidence and contained messages in code in respect to the consignments).[9]

9. The Appellant next met McGlone in January 2013, at the races,[10] when McGlone told him he had some clothing coming from overseas and asked if Wymap still transported airfreight. The Appellant suggested he contact DHL. He did not ask McGlone about his phone.[11] He next saw McGlone at the end of March 2013 when McGlone again raised the proposition of bringing in "some stuff" through Wymap. The Appellant again did not ask McGlone about his phone.[12]

10. The Appellant said he next saw McGlone in April 2013, again by chance, when McGlone asked to catch up. They met again about a week and a half before the Appellant was arrested transporting the second consignment. McGlone returned the phone and told the Appellant that he had stuff coming into the country through DHL and asked if Wymap could deliver it. McGlone told him that he would contact him with the details on the returned phone. McGlone gave him handwritten notes with three Airway Bill Numbers (which were the numbers for the three consignments).[13] On 11 May 2013, the Appellant said he received a text message from McGlone on the phone asking when they could meet.[14] The Appellant agreed in cross-examination that when he received the phone back there was now a SIM card in it,[15] and that between 11 and 20 May 2013 he used the phone to send and receive messages to and from McGlone, even though that meant carrying around two phones and was inconvenient.[16] He denied knowing the phone was subscribed in a false name.[17]

11. The pair met on 13 May 2013 and discussed the airway bill numbers for the first two consignments.[18] The Appellant then made enquiries with another Wymap employee about the approximate arrival times of the consignments. He tracked their arrival online and advised McGlone of the progress, including using the term "*trialing*" to

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[9] Exhibits 16, 17. RFM 354 - RFM 364.
[10] RFM 21:44 - RFM 22:44; RFM 117:50 - RFM 118:6.
[11] RFM 23:18- 48; RFM: 102:1-20.
[12] RFM 23:50 - RFM 26:10; RFM 102:22-27; RFM 118:50 - RFM 119:19.
[13] RFM 26:45 - RFM 29:10.
[14] RFM 30:1-20. See RFM 362; Exhibit 17 – SMS No.1.
[15] RFM 141:48 - RFM 142:15.
[16] RFM 144:34-50.
[17] RFM 145: 1-13.
[18] RFM 21:38 - RFM 32:17.

refer to the arrival of the consignments.[19] The Appellant denied the word "*trialing*" was being used as a code word to refer to the arrival of the consignments.[20]

12. The Appellant agreed in cross-examination that if McGlone was the legitimate consignee of the goods, there was no reason why he could not have picked them up himself.[21] He agreed the job was to be done through Wymap, yet he did not receive or ask for McGlone to make a written request, did not create any file, make any record of the job and did not discuss any payment for the job. He agreed that an ad hoc delivery would be quite expensive and Wymap usually would not do those jobs for the public as it cost too much. Ad hoc deliveries were usually only done for other freight business. Examples he gave of ad hoc deliveries done in the past were very different to the apparent ad hoc job for McGlone.[22] The Appellant denied that he did not create records because he wanted to keep the delivery "*off the grid*" at Wymap.[23]

13. The Appellant said that he and McGlone met the following morning, 14 May 2013, when the Appellant showed McGlone his iPad to see the tracking progress of the first consignment.[24] The Appellant continued to make enquiries, double checking on the airwaybill numbers to determine which cargo terminal operator they would come through.[25] After receiving an update from another employee, the Appellant sent a text message to McGlone, on 15 May 2013, again using the "*trialing*" terminology to advise him that the arrival details of the consignments were not yet known.[26]

14. The following morning, 16 May 2013, McGlone sent a text to the Appellant, advising that he would find out what was happening and that they would meet later. The Appellant thanked McGlone and again used the word "*trialing*" to ask him to find out further details about where each of the consignments were coming from.[27] In cross-examination, he agreed that he was using the term "*trialing*" to mean "*arriving*".[28]

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[19] RFM 32:14 - RFM 37:7; RFM 362- Exhibit 17– SMS no.13: "*Okay. 1 is scheduled for wed night thurs morning other 2 not sure when trialing - also 1 is a bit bigger than expected which is a concern.*": RFM 34:10-15.
[20] RFM 147:17-31.
[21] RFM 158:23 – RFM 159:15.
[22] RFM 135:24 - RFM 138:16; RFM 138:35 - RFM 141:30.
[23] RFM 138:19-23.
[24] RFM 36:9 - RFM 37:3.
[25] RFM 38:22 - RFM 41:16.
[26] RFM 41:31- RFM 42:14; RFM 363- Exhibit 17 – SMS no. 30: "*Not trialing yet not sure why. maybe u can ask when*".
[27] RFM 363- Exhibit 17 – SMS No.33: "*Thanks and also whats trialing from where*".
[28] RFM 152:5 -14 and see RFM 42:29-38.

15. They met that night and the Appellant said he showed McGlone the online tracking details for the first consignment and discussed the arrangements to meet the next morning in the underground carpark of the Appellant's apartment block to deliver the consignment.[29] Later that evening, McGlone sent a text to the Appellant, using the same "*trialing*" term to update him about the arrival of the consignments.[30] They exchanged further messages as the Appellant sought to clarify whether it was "*for both or just 22*" (i.e. both consignments two and three; or consignment two which comprised 22 boxes). Thereafter, the Appellant used his iPad to check the progress of the first two consignments online.[31]

16. The following morning after arranging to remove the first consignment from the Wymap delivery truck whilst it was in transit, and before it had been delivered to the authorised under bond facility, the Appellant said he met McGlone as arranged in the underground carpark and provided him with access to the first consignment boxes.

17. The Appellant said when he met McGlone he took the five boxes of that consignment out of his utility and stacked them next to the car. He saw McGlone open them but he was not with him the whole time. A few minutes later, the Appellant stated McGlone said: *"Can you return these boxes...This is not my shipment...this is not mine...The DVDs, discs aren't in there."* The Appellant saw *"...plastic, pressed shirts or some sort of clothing apparel on top"* and that all of the boxes had been opened. The Appellant used some brown tape to tape up the boxes and put them back in his utility. He arranged to return them to the Wymap truck, telling the driver: *"...they're not the right freight...please return them to DHL..."*. When the driver pointed out the tape around the boxes the Appellant told him: *"...I didn't even see that or check that...it doesn't matter...it's all good."* He later called the driver to tell him that he should just say that was how the boxes came out, so as to avoid any trouble about taking the wrong boxes.[32]

18. Before meeting the next morning, 18 May 2013, the Appellant used his iPad to track consignments two and three. He showed McGlone his iPad with the consignment two

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[29] RFM 44:1 - RFM 45:46, Exhibit 25.
[30] RFM 363 - Exhibit 17 – SMS No.41: "*My friend spoke to them out there today and they said what you said and tried to stalltrial should be next few days*".
[31] RFM 46:6-41.
[32] RFM 53:24 - RFM 61:25; RFM 102:29-43. He agreed as the movements manager he would be concerned about damaged boxes: RFM 185:45-49, and he should have been concerned about what happened: RFM 186:47 - RFM 187:16.

tracking details.[33] The Appellant said McGlone apologized for the first consignment, telling him *"...the manufacturers, whoever overseas have stuffed it up..."*.[34]

19. On 20 May 2013, the day consignment two arrived, they met in the morning to discuss consignments two and three.[35] The Appellant said he had tracked the consignments online before meeting.[36] In relation to consignment three, McGlone said: *"You reckon we got the wrong number"* and the Appellant responded: *"I reckon, that's what I'm saying, double check the number."* In relation to consignment two, the Appellant told McGlone that the consignment was recorded as arriving, saying: *"It's reported five minutes ago"* and in response McGlone said: *"...I don't know, your call mate."*[37]

20. After that meeting, McGlone purchased packing boxes and rolls of clear plastic tape. The Appellant sent McGlone the text: *"Don't forget to tape trial."*[38] When asked about the circumstances in which he had sent that text message in his evidence in chief, he stated: *"I have no idea, I have no idea. I don't know why. I'm talking horses, like I don't know why I sent that."*[39] In cross-examination the Appellant said that he could not recall what the text message meant, did not know what it referred to and stated *"...I can't give an exact explanation on it."* He denied the proposition that he was telling McGlone to not forget to tape the boxes and that "*trial*" was being used as a code word, as he knew that McGlone was going to substitute the boxes.[40]

21. Later that day, the Appellant met the Wymap delivery driver whilst the consignment was in transit. As with the first consignment, the Appellant told the driver not to put the collection of the consignment in his PDA. When the driver told him that he had already recorded the consignment, the Appellant told him to cancel it. In cross-examination he was unable to say why he had asked the driver to cancel the record but denied that it was because he did not want a record of Wymap being involved.[41]

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[33] RFM 62:1-45.
[34] RFM 62:47 - RFM 63:15.
[35] This meeting was captured on a listening device. See Exhibit 29 at RFM 365 - RFM 366.
[36] RFM 63:17 - RFM 64:13.
[37] RFM 197:11 – RFM 199:16; Exhibit 29 at RFM 365 - RFM 366.
[38] RFM 364 Exhibit 17 – SMS No. 59.
[39] RFM 100:3-8.
[40] RFM 199:27 - RFM 200:28; RFM 206:15-44.
[41] RFM 202:39 - RFM 205:23.

22. The evidence was the boxes contained 75 white plastic pails filled with a white powder, confirmed to contain pseudoephedrine. There were no clothes or DVDs in the boxes.

23. The Appellant placed the 22 boxes in his utility and drove a short distance before he was intercepted and arrested.[42] The Appellant said when he collected consignment two he saw that some of the boxes were open and that he could see some type of shirts pressed in plastic inside.[43] When police asked him about the contents of the boxes, he told them that there were DVDs in the boxes and he believed that the boxes must have had pirated DVDs inside.[44] In cross-examination, he agreed that he had told police that McGlone had told him that there were DVDs in the consignment and that if they found out he was importing DVDs he would get into trouble. He reiterated that he had seen shirts in some of the open boxes and denied that he was lying to police when he had said that he thought there were DVDs in the consignment.[45] The Crown relied upon the statements to police as evidence of lies revealing a consciousness of guilt.[46]

24. Police used the Appellant's telephone to arrange for McGlone to come to the carpark to collect the consignment. When McGlone arrived, he had with him 22 boxes containing substitute pails filled with an inert white powder. When asked by police what was in the boxes, he volunteered that it was "*substitute*". The Crown case was that McGlone intended to swap the 22 boxes with his own substitute boxes and the Appellant would then return the substitute boxes to the delivery driver, as he had done with the first consignment.

25. In relation to the $400,150 that was alleged to be proceeds of crime, the Appellant's case was that the money was accumulated cash winnings from gambling since 2006.[47] In relation to the online gambling records tendered in the Crown case, the Appellant said that the records were for his online gambling accounts where he had placed more exotic "*multi*" bets, hoping to chase a "*big kill*".[48] In cross-examination, he agreed that he did not have receipts for his cash winnings at the race track. He said his winnings from bookies had all been less than $10,000, except for the very first bet, and that

[42] Exhibit 32 - RFM 367 - RFM 375.
[43] RFM 70:23-44; RFM 103:31-35.
[44] RFM 72:23 - RFM 75:5, RFM 107:11-35; Exhibit 32: Transcript of recorded conversation RFM 367 - RFM 375.
[45] RFM 208: 22 – RFM 209:16 and see RFM 209:50 - RFM 210:3.
[46] CAB 61:52-65:39.
[47] RFM 77:9 – RFM 78:25.
[48] RFM 78:27 - RFM 79:6.

there was no requirement for a record to be made of any payouts of his winnings.[49] He said that when he bet at the race track he would only ever take $2,000 and if he lost that money he would not bet any further cash but would bet online through his phone. He agreed that the online accounts reflected his losses over time. He agreed that the TAB Corp account[50] showed a loss of about $117,000 over a period of about 18 months, that the William Hill/Sporting bet account[51] showed a loss of about $136,000 between December 2006 and May 2013 and that the two accounts showed combined losses between 2006 and 2013 of about $250,000.[52] To the suggestion that the only independent evidence of his gambling (the online account records) showed losses of about $250,000, he claimed that the accounts showed wins and a *"fair bit of success"*. He said that the results in the online accounts were an anomaly in his otherwise successful gambling and were not a true reflection of his gambling activity.[53]

26. The jury returned its verdict after four days of deliberation.

PART V – SUMMARY OF ARGUMENT

27. There was no dispute below as to the applicable principles relevant to the complaints raised by the Appellant.[54] The question was whether, in light of the accepted principles, the summing up as a whole gave rise to a miscarriage of justice. The conclusion of the majority was open and in accordance with the application of established and settled principles. No error has been established.

28. Just as the summing up as a whole must be considered in its entirety and in context, so too must the judgment of Payne JA. There is no basis for the Appellant's assertion that Payne JA considered the trial judge's remarks out of sequence and therefore seriously underrepresented the extent of the prejudice to the Appellant occasioned by the comments made by the trial judge in relation to the text message (AS [29]). The majority dealt with the individual complaints in the order in which they were dealt with in the argument in the Appellant's written submission in the Court below.

29. The majority made plain that the Appellant's complaints were determined by considering the summing up as a whole and not simply by reference to the particular

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[49] RFM 228:25 - RFM 229:45.
[50] Exhibit 71 – AFM 36.
[51] Exhibit 72 – AFM 37.
[52] RFM 230:4 - RFM 231:12.
[53] RFM 232:19 - RFM 233:3.
[54] CAB 173-176 [32], [33]; 208 [141].

passages relied upon. However, particular passages were relied upon by the Appellant and did require specific consideration. The argument (AS [28]) that Payne JA's analysis was narrower than required is untenable. His Honour had regard to the individual matters of specific complaint but also the overall cumulative effect of the directions given, comments made and language and style used by the trial judge.[55]

30. The majority did not err in concluding that the impugned passages of the summing up and comments made by the trial judge did not individually, or collectively, result in a miscarriage of justice and that the summing up, when considered as a whole, did not result in a miscarriage of justice.[56]

31. There is also no error in the majority concluding that there was a very strong Crown case (AS [43]). This ground is determined assessing the summing up having regard to the issues, evidence and conduct of the trial. The issue is whether it has been established that the jury would have been overawed by the comments. The reference to the strength of the case[57] explained the context and nature of the comments that had been made by the judge and why a balanced summing up nevertheless revealed a very strong case for the Crown and a weak and implausible case for the Appellant. It also is relevant to the effect of comments on the jury. There was no basis to conclude that members of the jury were overawed by the trial judge's comments to the extent that they must necessarily have disregarded their duty to independently consider the evidence and decide the facts.[58]

32. That Beech-Jones J reached a different conclusion, and cited different aspects of the summing up to demonstrate that conclusion does not mean that the majority failed to properly consider the summing up as a whole in accordance with applicable principles. The Appellant's complaint is with the result rather than the method by which the majority reached that result.

33. It is now appropriate to consider in more detail the relevant legal principles and assess the Appellant's complaints in that context.

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[55] CAB 195, [100].
[56] CAB 194, 195, 208, [95], [100]-[101], [141].
[57] CAB 195, 208, [101], [141].
[58] *B v The Queen* (1992) 175 CLR 599 at 605-606.

Relevant legal principles – Summing Up

34. The duties of a trial judge in summing up in a criminal trial are uncontroversial. Amongst other things, a trial judge must identify the real issues in the case and instruct the jury what those issues are and so much of the law as the jury needs to know to decide those issues.[59] A summing up is to be fair, balanced and impartial. A trial judge is required to put the cases of the Crown and the accused accurately and fairly.[60]

35. When a complaint is made that a summing up was not fair, balanced or impartial and a miscarriage of justice has resulted, the question on appeal is whether the trial judge has put the case for the accused in such a way as to allow the jury to properly consider the issues raised on the accused's behalf.[61]

36. In discharging his or her duty, a trial judge is not obliged to structure a summing up in any particular way. There is no fixed format or mandatory requirement to rehearse all the evidence or address all the issues that have arisen during the trial. Nor is there a requirement to compartmentalise the summing-up by separately identifying and summarising the defence case. On occasions, the most effective way to fairly put the defence case is in the course of summarising the issues for their determination.[62] How a judge structures a summing-up, and the extent he or she reminds the jury of the evidence, are matters for individual judgment to be exercised according to a number of factors, including the complexity of the issues, the length of the trial and the conduct of the respective cases by the parties.[63]

37. Whether a party's case has been adequately put is not measured by the length of time devoted to it, the number of words spoken or by a comparison with the attention given to the case of the opposing party.[64] Whether a summing up is fair and balanced can only be determined by a consideration of the summing up as a whole and in the context of the trial.[65]

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[59] *Alford v Magee* (1952) 85 CLR 437 at 466; *Fingleton v The Queen* (2005) 227 CLR 166 at [77]-[83]; *RPS v The Queen* (2000) 190 CLR 620 at [41], [42]; *Hargraves v The Queen; Stoten v The Queen* (2011) 245 CLR 257 at [42]; *Majok v R* [2015] NSWCCA 160 at [26]-[31] (and the various authorities cited therein).
[60] *Domican v The Queen* (1992) 173 CLR 555 at 560-561.
[61] *Aravena v R* (2015) 91 NSWLR 258 at [109].
[62] *AP v R* [2013] NSWCCA 189 at [24].
[63] *Castle v The Queen* (2016) 259 CLR 449 at [51]; *Odisho v R* [2018] NSWCCA 19 at [106].
[64] *Aravena v R* (supra) at [105]-[106]; *R v Meher* [2004] NSWCCA 355 at [86]; cf: CAB 200, 201, 207 [118], [119], [121], [136] per Beech-Jones.
[65] *R v Courtney-Smith* (1990) 48 A Crim R 49 at 56.

38. It is well established that a trial judge may comment, and even comment strongly, on factual issues. This has been repeatedly recognised and reiterated by this Court.[66]

39. Where a trial judge does comment on factual issues, any comment must be accompanied by a clear direction that it is the jury's function to decide the facts and the jury's duty to disregard any view, expressed or apparent, if it does not accord with their own independent assessment of the facts.[67] A trial judge is not prohibited from making observations which are favourable to one side, or making comments about the strength or weaknesses of certain evidence provided it is made clear that it is for the jury to decide the facts.[68] Whilst a judge has a broad discretion in commenting and in choosing the strength of the language employed, any comment must stop short of overawing the jury and must exhibit a judicial balance so that the jury is not deprived of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence.[69] Nonetheless, a balanced summing up may inevitably reflect the strength of the one, and the weakness of the other.[70]

40. This Court has identified the limits of expression by a trial judge of his or her opinion about factual matters in the context of contemporary criminal trials.[71] Whether those limits have been exceeded involves an evaluation of the exercise of the trial judge's broad discretion in the context of the trial issues and the summing up as a whole.

The Summing Up

41. Before addressing the specific complaints, there are a number of general observations to be made about the summing up.

42. First, his Honour on three occasions (at different stages) instructed the jury in clear terms that they were solely responsible for determining the facts in the case and were to disregard any opinions that he may have expressed.[72] This included a direction at the beginning of the summing up, and at the conclusion of his summing up (after the impugned passages).[73] The directions given were clear, appropriate and in plain terms.

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[66] *RPS v The Queen* at [41]-[42], citing *Tsigos v The Queen* (1965) 39 ALJR 76 (n); *Azzopardi v The Queen* (2001) 205 CLR 50 at [49]-[50]; *Doggett v The Queen* (2001) 208 CLR 343 at [115]; *Mahmood v Western Australia* (2008) 232 CLR 397 at [16]-[17]; *Castle v The Queen* (supra) at [61]; *B v The Queen* (supra) at 605.
[67] *R v Zorad* (supra).
[68] *Mule v The Queen* (2005) 79 ALJR 1573 at [6]
[69] *B v The Queen* (supra) at 605; *Hargraves v The Queen; Stoten v The Queen* (supra) at [42].
[70] *R v Ali* (1981) 6 A Crim R 161 at 165.
[71] *Castle v The Queen* (supra) at [61]; *Mule v The Queen* (supra) at [6]; *B v The Queen* (supra) at 605.
[72] CAB 10:53-12:13; 75:21-34; 90:59-91:11.
[73] CAB 90:59-91:11.

The directions given were in accordance with the established principles. There is no basis to suppose the jury did other than follow those directions.

43. Second, his Honour's approach to the structure of the summing up and summarising the respective cases was open to him. It was a sensible and appropriate one in the circumstances. As his Honour explained, because there were very detailed addresses he did not intend to repeat everything for to do so would mean "*we would be here for quite a number of days more before I completed the summing-up if I endeavoured to do that. But I will, however, provide some commentary in relation to the addresses of counsel.*"[74] That approach is uncontroversial, and was not challenged at trial.

10 44. The prosecutor's address was lengthy and detailed,[75] during which dozens of facts and circumstances were identified and relied upon. In that context, his Honour explained that he would provide a "*common sense overview*" of the Crown case as he "*...did not propose to spend a day repeating the Crown's case...*".[76] Consequently the jury were not reminded of many of the Crown's arguments.

45. His Honour's approach to summarising the cases for the accused was more focused as he repeated each of the precise points made by counsel in their closing addresses. Counsel for the Appellant had identified 10 points.[77] As his Honour was entitled to do, for some but not all of the points, he referred to the evidence on the topic or the Crown case on the point in question. In relation to eight of the points there was no
20 reference to the Crown argument. There was no requirement to compartmentalise the defence case. His Honour was entitled to, and indeed bound to, remind the jury of the evidence on the points in question. Further, as his Honour provided only a broad overview of the Crown case, there was nothing inappropriate or unfair in reminding the jury of the Crown case on the points in question. The fact that his Honour adopted that approach did not cause the summing up to be unfair or unbalanced and did not result in a miscarriage of justice.

46. Third, posing rhetorical questions in a summing up is not, of itself, an inappropriate method to test submissions made by defence counsel.[78] At several points during the summing up his Honour used a rhetorical style (similar to that which the Appellant

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[74] CAB 12:17-33.
[75] Delivered over two days and occupying 79 pages of transcript: RFM 234 – RFM 308:28.
[76] CAB 44:34-50.
[77] RFM 309:10 - RFM 319:3; RFM 320:5 - RFM 330:24; RFM 332:11 - RFM 353:12.
[78] *R v Bachra* [2010] SASCFC 42 at [63].

complains of in respect to one topic) to summarise the points made on behalf of the Appellant and to draw the jury's attention to important aspects of the evidence.[79] Those other occasions were not the subject of complaint at trial.

47. In this case the use of the phrase "*you might think*" was not inappropriate. By using that phrase, the trial judge was doing no more than commenting on the evidence in a permissible way designed to draw pertinent issues to the jury's attention, whilst making plain that the ultimate questions of fact were for the jury. As the majority correctly concluded, in the context of the directions given, the use of the phrase is a clear indication that the fact finding was for the jury.[80] The phrase is not exclusively the language of a Crown Prosecutor.[81] Moreover, a Crown Prosecutor may employ such a phrase when addressing a jury for the same reason that the trial judge used the phrase in this case, to ensure that no expression of personal opinion is conveyed to the jury and that the decision is for them. Contrary to the conclusions of Beech-Jones J[82] the phrase was not used by the judge to emphatically suggest to the jury what they should think and what they should find and it did not demonstrate that he had "*donned the mantle*" of Crown Prosecutor. The use of the phrase did not suggest to the jury there was nothing for them to decide.[83]

48. Fourth, in so far as his Honour did comment on the facts, he was entitled to do so. Consistent with the division of functions in a criminal trial, a trial judge may tell the jury that they may attach particular significance to a fact or suggest that certain evidence may carry greater weight.[84] The capacity of a jury to retain its independence and not simply defer to comments or expressions of opinion by a judge should not be underestimated. That is particularly so where, as here, clear and repeated directions were given to a jury instructing them as to their task and role as sole judges of the facts, and it is to be assumed that juries follow the directions which they are given.[85]

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[79] CAB 50:60 – 51:26; 57:30-43.
[80] CAB 194 [93].
[81] See for example: *R v Bachra* (supra) at [63] per Gray J, and see [42]-[44] per Doyle CJ, White J agreeing; *R v Heron* [2000] NSWCCA 312 at [72]-[84] per Priestley JA, Simpson and Foster AJA agreeing.
[82] CAB 202-205, [123], [126], [130].
[83] *B v The Queen* (supra) at 606.
[84] *Mahmood v Western Australia* (supra) at [17].
[85] *R v Glennon* (1992) 173 CLR 592 at 614; *R v Gilbert* (2000) 201 CLR 414 at [31].

Specific complaints

49. Of the three specific complaints, one concerned the summary of the Crown case and two concerned the summary of the defence case (relating to points 8 and 10).

50. The summing up as a whole, including the specific complaints considered in the context of this summing up and the issues at trial, did not result in a miscarriage of justice. It was open to the majority to reject the argument.

First consignment and "sophistication of organisation"

51. The learned trial judge did not suggest to the jury that there were drugs in the first consignment. Indeed, his Honour told the jury that there was no evidence that the consignment contained drugs.[86]

52. The trial judge's summary properly read, was consistent with the pre-trial ruling. The trial judge made plain that there was no evidence of any drugs in the first consignment, but nevertheless the evidence was relied upon by the Crown as evidence of an organised and planned system that had been devised for the interception of the drug contained in the second consignment and therefore as evidence from which it may be inferred, when viewed together with all the other evidence adduced in the Crown case, that the Appellant was a willing and knowing participant in that enterprise.

53. Any lingering suggestion that may have remained was removed by the further directions given after the complaint had been made by defence counsel. [87] Those complaints wrongly suggested that his Honour told the jury that there were, or may have been, drugs in the first consignment. His Honour took appropriate steps to correct and rectify any wrong impression that the jury may have had in that regard.[88]

54. The further directions and correction were given at the first available opportunity (cf: AS [32]). It should be assumed that the jury adhered to the directions they were given.[89] The Appellant's assertion (AS [32]) that by the time the correction was made that an impression of such strength had been created, fails to acknowledge that the summing up was not complete at that stage and that the entire summing up must be considered as a whole. The submission is speculation.

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[86] CAB 45:37.
[87] CAB 71-73. T 65-67.
[88] CAB 75.
[89] *R v Glennon* (supra) at 614; *R v Gilbert* (supra) at [31].

55. Contrary to the Appellant's contention (AS [33]), the trial judge's comments about the first consignment did not indicate "*strongly*" the trial judge's opinion that drugs may have been inside the consignment and did not introduce the possibility of the jury employing impermissible tendency reasoning. The remarks were made in the context of the trial judge summarising the Crown's argument about a system that was utilised by those involved with the importations, including the Appellant and McGlone.

56. The Appellant's complaint (AS [34]), that the trial judge only referred once during this summary to it being the Crown's argument, somehow suggesting that there was a need to repeatedly state that it was so, is without foundation. The use of the phrase "*you might think*" (AS [34]), given the structure of the summing up described above, does not alter that. His Honour made plain at the start of the summary,[90] during the summary[91] and at the end of the summary[92] that he was referring to the Crown case. The jury did not need constant reminding of that fact at each point. The jury could not reasonably have understood otherwise.

57. The majority correctly concluded that the trial judge did not specifically raise the possibility that there were drugs in that consignment[93] and that the suggestion that "*something*" was in the consignment was corrected[94] shortly after the remarks were made and was an emphatic withdrawal of the inappropriate implication.[95] They concluded[96] that the judge's comments were consistent with the pre-trial ruling and the way the Crown case had been put with respect to the relevance of the first consignment. In those circumstances, the impugned remarks did not, and could not, cause a miscarriage of justice. Beech-Jones J agreed[97] that the harm occasioned by the judge's remarks had been addressed "*to an extent*" by the trial judge's redirection.

58. The majority also correctly rejected the complaint[98] with respect to the trial judge advancing an argument about the "*sophisticated organisation*" that had not been put by the Crown. As the majority found[99] the remarks were a summary of the case the

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[90] CAB 44:34-50.
[91] CAB 45:12 and 30.
[92] CAB 50:1-13.
[93] CAB 188, 208, [75], [141].
[94] CAB 75: 20-60.
[95] CAB 189, 191, 208, [77], [84]-[85], [141].
[96] CAB 190, 208, [81], [141].
[97] CAB 196-197, 204, [106], [129].
[98] CAB 189, 208, [79], [141].
[99] CAB 190-191, 208, [81]-[84], [141].

Crown had clearly presented from start to finish. The judge did not impermissibly introduce an argument that had not been put by the Crown. Beech-Jones J also agreed[100] that the point that was made largely reflected an argument that had been raised by the Crown Prosecutor in her closing address.

59. If the summary of the Crown case undermined the Appellant's case that he was a dupe (AS [35]), it is simply a product of the relevant strengths of the case and the inherent improbability of the evidence of the Appellant. That does not render the summing up unbalanced or unfair.

The "tape trial" text message

60. In summing up, the learned trial judge referred to the text message in the context of addressing the Appellant's argument that he had been co-operative with police when they arrested him and he had told them he was simply doing a job for McGlone.[101] This was the eighth of the ten points identified relied on by the Appellant. His Honour reminded the jury of the relevant evidence and, by his comments, encouraged the jury to think critically about the evidence and the Appellant's case on this point.[102]

61. On any scenario, the "*tape trial*" text was an important piece of evidence which the trial judge was entitled to refer to.

62. In her closing address, the Crown Prosecutor put an argument in relation to that text.[103] His Honour, when summarising the Crown case, did not refer to any of the Crown's arguments concerning the text messages, but dealt with the Crown case in a more generalised way, leaving aspects of the Crown case to be dealt with when summing up the Appellant's case, at a point where they could be juxtaposed with the Appellant's evidence and contentions, thus assisting the jury to identify the central issues within the evidence requiring their closer consideration and determination.

63. The judge's comments about the text highlighted the Appellant's evidence about the text and other pertinent evidence and reiterated matters put to the Appellant by the Crown Prosecutor in cross-examination. His references to the text being "*revealing*" or "*very revealing*" served to convey the trial judge's view that the text message was

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[100] CAB 197, [107].
[101] CAB 59:10-61:50.
[102] CAB 60-61.
[103] RFM 272:5-39. Nb. It is apparent that there are number of transcription errors in this portion of the transcript as the text message is incorrectly transcribed as *"Don't forget to take the trial."*

an important piece of evidence that the jury should consider in context. The comments did no more than posit what was already obvious to the jury (particularly given the timing and content of the text, including the word "*trial*" which had been used in texts relating to the consignments). It was "*obvious*" that the text message was not about horses or racing and therefore must necessarily have been about something else. It was permissible for the trial judge to refer to the absence of his explanation and to prompt the jury to consider what the message might refer to, in the context of the trial issues (that he was a "*dupe*" being used by McGlone).

64. The comments did not suggest that the jury should conclude that the Crown's argument was correct or that his Honour had formed that opinion. His Honour repeatedly used the phrase "*you might think*" to make plain to the jury that the conclusions to be reached about the text message were matters for the jury. This was also in the context where there were repeated and clear directions that they were the sole deciders of the facts.

65. That the Appellant did not have an explanation for this obviously important piece of evidence does not make the comments unfair or inappropriate. Nor does it make it inappropriate for the judge to remind the jury of the text and the related evidence. The Appellant's counsel did not put any argument about the text message in closing.

66. The criticism by Beech-Jones J[104] in this, and other aspects of the summing up, that the trial judge did not pose any alternative modes of thinking is misplaced. The jury were reminded of the Appellant's evidence. There were no alternative modes of thinking, as the Appellant had no explanation.

67. Again, if the summing up was adverse to the Appellant (AS [38]), it is no more than a reflection of the strength of the evidence and the absence of any explanation.

68. The majority did not err in concluding the remarks about the "*tape trial*" comprised no more than a "*...typical and permissible comment by a trial judge about a finding of fact that he carefully explained was a matter for the jury*".[105] The majority did not endorse the language used. Nonetheless, the comment was appropriately so described because it was the type that might legitimately be made by a trial judge to highlight to

[104] CAB 201, [123].
[105] CAB 195, 208, [99], [141].

the jury an important aspect of the evidence that would be central to their fact-finding role.

Submissions on gambling evidence

69. It is clear that the Appellant's counsel in his closing address sought to use the online betting records as evidence that the Appellant was a successful gambler,[106] when the records showed the contrary.[107]

70. In the passage complained of his Honour corrected the inaccuracy.[108] His Honour's analysis and comments were not inappropriate in the circumstances.[109] The records plainly showed that the Appellant had lost more than a quarter of a million dollars through his online gambling. The comments were directed to alerting the jury to a misstatement about the effect of the evidence which, had the matter not been brought to the jury's attention, may have left the jury with the inaccurate impression that the records did in fact support the proposition that the Appellant was a successful gambler, when they showed the opposite.

71. Contrary to the Appellant's contention (AS [41]) the fact that the Crown Prosecutor had made a strong argument on the issue of whether the Appellant was a successful gambler did not preclude the judge from making the comments that he did. Nor did it lessen the need for a correction. Similarly, the fact that the Crown Prosecutor could have sought leave to make further submissions to the jury in reply[110] did not mean that the trial judge was prevented from making the comments he did.

72. The majority correctly concluded[111] that the comment about the Appellant's gambling winnings, was not only permissible, but necessary, to correct an erroneous and potentially misleading argument that had been put on behalf of the Appellant. Although the majority agreed that it would have been preferable if the judge had not engaged in the rhetorical flourish used, their Honours correctly concluded[112] that the remarks did not give rise to a miscarriage of justice.

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[106] RFM 347:35- RFM 348:5.
[107] Exhibits 71 and 72 AFM 36 – AFM 37.
[108] CAB 65:40-67:40.
[109] CAB 65:40-69:43.
[110] Pursuant to s 160(2) *Criminal Procedure Act* 1986 (NSW).
[111] CAB 191-193, 208, [86]-[87], [91], [141].
[112] CAB 193, 208, [92], [141].

Conclusion

73. While many judges may not have made the comments in the manner that the trial judge did, a trial judge is given considerable latitude in determining how best to assist the jury. The jury were correctly and repeatedly directed as to their function. There is no basis to suggest they did other than follow those directions. While it may have been preferable, as noted by the majority, that some of the language was not used[113] that has not resulted in a miscarriage of justice. Nothing put by the trial judge prevented the jury from properly understanding and considering the issues raised on the Appellant's behalf. That juxtaposing defence arguments with the evidence and the Crown case reflects the strength of the Crown case (and the weakness of the other) does not alter that. It is not suggested that the Appellant's case was not put to the jury and no further directions were sought.[114]

74. The majority of the CCA was correct to conclude that no miscarriage of justice occurred. No error is established.

Reconsideration of the principles

75. There is nothing about this matter, the contemporary jury trial or the state of the authorities, which calls for any reconsideration of the accepted principles, the correctness of which were reiterated by this Court relatively recently in *Castle v The Queen*.

76. Far from being an historical anachronism in the modern criminal trial, many Australian jurisdictions have enacted statutory provisions that expressly permit a judge to comment on the evidence.[115]

77. The principles have been consistently applied throughout Australia. The division in the CCA does not demonstrate any uncertainty of the parameters of the existing rule of practice (AS [29]). The cases referred to by the Appellant (AS [52]) do not demonstrate that the principles are not settled. On the contrary, the statements made in each of those cases are *obiter dicta* and/or no more than formulations of aspects of the

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[113] CAB 193 [92].
[114] *Castle v The Queen* (supra) at [63].
[115] See s 364 of the *Criminal Code* (NT); s 620 of the *Criminal Code* (Qld); s 371(j) of the *Criminal Code* (Tas); s 112 of the *Criminal Procedure Act 2004* (WA). In addition, in Victoria, where, pursuant to s 65(c) of the *Jury Directions Act 2015* (Vic) the judge *"must identify so much of the evidence as is necessary to assist the jury to determine the issues in the trial"* and in New South Wales where aspects of a trial judge's duty and function to sum up are referred to s 161 of the *Criminal Procedure Act 1986* (NSW), no restriction is placed upon a trial judge's right to comment upon the facts or evidence.

accepted principles concerning the limits of judicial comment expressed in words apt to the facts and circumstances of the particular cases.

78. A judge's entitlement to comment on facts, including disputed facts, remains an appropriate feature of judicial function in the contemporary criminal trial. Such comment is made within the exercise of the judge's functions, which include identifying issues in dispute, summarising the rival contentions and relating the law to the facts that the jury may find. The entitlement to make comment does not intrude upon, or obscure, the jury's function. There is no inconsistency involved when, on the one hand, the trial judge expresses an opinion on the facts but, on the other hand, directs the jury that they must ignore that comment (unless it accords with their own view) and that they are the sole arbiters of the facts.

79. The practices and jurisprudence in other jurisdictions cited by the Appellant are not necessarily inconsistent with the position in Australia and in any event, do not support the contention that the principles that apply in this country should be discarded.[116]

Part VI – NOTICE OF CONTENTION

80. Not relevant.

Part VII – TIME ESTIMATE

81. The Respondent estimates that the presentation of the Respondent's oral argument will take approximately 1.5 hours.

Dated: 2 November 2018

Wendy Abraham QC
12th Floor Wentworth Selborne Chambers
Telephone: 02 80296319
Email: wendy.abraham@12thfloor.com.au

Lincoln Crowley
8 Petrie Terrace Chambers
07 33683234
lcrowley@8pt.com.au

[116] The discussion in the recent decision of *DPP Reference No 1 of 2017* [2018] VSCA 69 at [247] explains why, for historical and political reasons that do not pertain to Australia, judicial comment is not allowed in the United States. Recent New Zealand authority reflects that the position is the same as in Australia: *T v R* [2017] NZCA 595 at [44] citing *Nathan v R* [2011] NZCA 578 at [18]-[19]; similarly, the position in the UK, Archbold, Criminal Pleading Evidence and Practice 2017 edition [4-440] p. 556.