IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 314 of 2013

BETWEEN:

SEONG WON LEE
Second Appellant

AND

THE QUEEN
Respondent

RESPONDENT'S ANNOTATED SUBMISSIONS

Part I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

Part II: CONCISE STATEMENT OF ISSUES

2. Does dissemination of an accused person's compulsory examination transcript to a prosecuting authority of itself give rise to a miscarriage of justice?

3. To establish that there was a miscarriage of justice within s. 6(1) of the ***Criminal Appeal Act* 1912** (NSW) ("***Criminal Appeal Act***"), is the appellant required to identify the forensic disadvantage or unfairness said to arise from the dissemination of the compulsory examination?

Part III: NOTICES UNDER S. 78B OF THE *JUDICIARY ACT* 1903 (CTH)

4. The respondent has considered whether any notice should be given in accordance with s. 78B of the ***Judiciary Act* 1903** (Cth). No such notice is required.

Part IV: STATEMENT OF CONTESTED MATERIAL FACTS

5. Although the respondent accepts, in general terms, the appellant's narrative statement of facts set out in the appellant's written submissions ("AWS"), the respondent takes issue with some of the assertions made therein. The statement of factual issues below

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supplements the facts as set out in the AWS only to the extent necessary to address the appellant's legal argument.

6. On 7 December 2009 police executed a search warrant on premises occupied by the appellant in Waterloo ("the Waterloo premises"). The premises comprised a two bedroom unit in a security building. When police officers searched the laundry cupboard located off the hallway in the unit they located a green box of washing powder which, when opened, revealed that the internal seal had been broken.[1] The box was labelled as having been imported by "Bpak International". Police also found two larger sealed brown boxes in the laundry cupboard each of which contained three more green boxes of what appeared to be washing powder all imported by "Bpak International".[2] These seven large boxes contained over 31 kg of white powder. Near these boxes was a bag containing a box (exhibit D) which when opened revealed an Optus contract in the name of Seong Lee (exhibit F).[3] Under that contract were a sub-machine gun (exhibit G), a silencer (exhibit K), two firearm magazines (exhibit H) and a brass catcher (exhibit J). A gun cleaning kit (exhibit K) was also found in the same cupboard. The box also contained what was described at trial as a "sex toy", on which DNA testing revealed a match to Y chromosomal DNA of the appellant amongst a mixture of DNA contributors: see Court of Criminal Appeal ("CCA") at [306] (Appeal Book ("AB") Vol. 5, p. 2344), [308] (AB Vol. 5, p. 2345).

7. There was no issue taken at trial that the appellant resided at the Waterloo premises. He was arrested that day and charged with possession of the weapons found in the laundry. He was not charged in relation to possession of the washing powder.

8. On 10 December 2009 the appellant was summonsed to be examined at the NSW Crime Commission ("NSWCC") [redacted] CCA at [152] (AB Vol. 5, p. 2288).

9. On 13 May 2010 the appellant was charged with the commercial supply of the white

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[1] Exhibit B (DVD recording of search warrant); Transcript, 1 February 2011, p. 19, line 11; Exhibit C (green box).
[2] Transcript, 1 February 2011, p. 21, lines 30–49 (AB Vol. 1, p. 124, lines 35–50).
[3] Transcript, 1 February 2011, p. 24, lines 20–26 (AB Vol. 1, p. 127, lines 24–31)
[4] Affidavit of Timothy O'Connor sworn 21 August 2012, annexure F (Appeal Book ("AB") Vol. 4, pp. 1733–1735).

powder found in the laundry cupboard, which by then had been analysed and found to contain 31.446 kg of pseudoephedrine. At no time after being charged in relation to the commercial supply of pseudoephedrine was the appellant ever compulsorily examined.

10. On 28 October 2010 the appellant's solicitors were served with a supplementary brief of evidence containing, inter alia, the examination transcripts of both appellants described as "Part 2" of the brief. On 23 November 2010, the appellant's trial counsel was present in court at a pre-trial hearing when the then Crown Prosecutor indicated that he was in possession of the appellant's examination transcript and confirmed that both of the appellants had been served with copies of the examination transcripts.[5] The transcript records Mr Sutherland SC (for the first appellant Jason Lee) expressing significant concern on being made aware of this fact: CCA [140]–[142] (AB Vol. 5, pp. 2283–2284).[6]

11. The joint trial against both appellants commenced on 17 January 2011. A different Crown Prosecutor – Michael Barr – was briefed to appear at trial. The appellant and his father were jointly indicted on four counts pertaining to the possession of the weapons found in the laundry and two counts were charged in the alternative pertaining to the 31.446 kg of pseudoephedrine located in the laundry. Count 6 on the indictment jointly charged the appellant and his father with possession of that pseudoephedrine for the purpose of supply; while count 7 charged the appellant alone with the alternate count of being knowingly concerned in the supply of the pseudoephedrine, the Crown case being that he had permitted his father to store the prohibited drugs in his laundry for the purpose of supply.

12. In support of its case against the appellant on counts 6 and 7 the Crown relied upon the circumstances of the pseudoephedrine being found in the laundry cupboard, in close proximity to the weapons, an identifying document and a gun cleaning kit, as well as the appellant's admission during the execution of the search warrant that he resided in the Waterloo premises. The Crown also relied upon the evidence of Brendon Pak, a man who may reasonably have been suspected of being involved in the importation of the washing powder containing the pseudoephedrine. Brendon Pak gave evidence against the

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[5] Transcript, 23 November 2010, p. 1 (AB Vol. 1, p. 29), p. 27, lines 25–30 (AB Vol. 1, p. 55, lines 31–36).

[6] Transcript, 23 November 2010, p. 3, lines 9–12 (AB Vol. 1, p. 31, lines 17–20), p. 21, lines 33–43 (AB Vol. 1, p. 49, lines 35–45), p. 23, lines 5–50 (AB Vol. 1, p. 51, lines 12–50) and p. 24, lines 11–20 (AB Vol. 1, p. 52, lines 19–29).

appellant that there were occasions when the appellant would help him unload boxes of washing powder and when he did the appellant identified selected boxes: CCA at [229] (AB Vol. 5, p. 2318). The Crown relied upon the fact that it was the appellant, rather than Brendon Pak, who decided which boxes to take from Mr Pak to invite the inference that the appellant knew those boxes he selected contained a prohibited drug.

13. The appellant's defence at trial was threefold. First, the element of knowledge was challenged via an attack on the credibility of Brendon Pak. Second, the element of possession was put in issue, it being suggested that the condition of Waterloo premises left open that other people may have been living at the unit who possessed the items found in the laundry. Third, the Crown's reliance on the appellant's connection with the firearms found in the laundry was challenged: CCA at [230]–[232] (AB Vol. 5, pp. 2318–2319). In addition, the first appellant challenged the expert evidence that the white powder was in fact pseudoephedrine which formed part of the evidence in the trial: see CCA at [221]–[224] (AB Vol. 5, pp. 2315–2316).

14. In cross examination of Brendon Pak by the appellant's counsel, Mr Pak agreed that he was a "*self confessed liar*", "*a perjurer*", "*a welfare cheat*" and "*a fraudster*" who had given different versions of what he said occurred to the NSWCC.[7] Prior convictions for dishonesty were put to him and he was cross examined in detail as to the fact that when he initially spoke with the NSWCC, he denied any involvement of Jason Lee in his importation business; it was only after Detective Plummer exerted pressure on him that he changed his evidence and gave a version implicating Jason Lee and subsequently the appellant.[8] It was suggested to Mr Pak by the appellant's counsel "*on every occasion that Seong Lee took boxes he did not choose those boxes, you chose the boxes, correct*?" to which the witness replied "*No*".[9]

15. The main issues at trial on counts 6 and 7 were thus whether the Crown could prove that the appellant possessed the 31.446 kg of powder clearly labelled as being imported by "Bpak International" found in his laundry and whether he knew the powder contained a prohibited drug.

16. The jury was not ultimately satisfied beyond reasonable doubt that the appellant jointly

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[7] Transcript, 10 February 2011, p. 286 (AB Vol. 1, p. 387).
[8] Transcript, 10 February 2011, p. 273, line 21 (AB Vol. 1, p. 374, line 27)–p. 284, line 32 (AB Vol. 1, p. 385, line 36).
[9] Transcript, 10 February 2011, p. 280, lines 40–43 (AB Vol. 1, p. 381, lines 42–45).

possessed the drugs found in the laundry cupboard with his father; he was acquitted on count 6 and instead convicted on count 7. The jury also acquitted the first appellant of possession of the weapons found in the laundry (counts 1–4): CCA at [6], [7] (AB Vol. 5, pp. 2236–2237).

17. Michael Barr, Crown Prosecutor, swore an affidavit in the appeal to the CCA.[10] He deposed that he had been briefed to appear for the Crown at trial in December 2010 and "*it is my usual practice to read the entire brief and I believe that I did so in this case. This included reading the transcripts from the NSW Crime Commission.*" Mr Barr went to state:

> "*Whilst my memory is not clear ... I do not have a recollection of reading transcripts of the appellant Seong Won Lee although I may have. I recall thinking at the time that any transcripts of material from an accused would not have been admissible, so although I would have read them, I would not have given them a thorough reading and may have only skimmed through them. I do not have a recollection of what use, if any, I made of the transcripts*".[11]

Mr Barr was cross examined in the CCA by counsel for Jason Lee in relation to the transcripts of Jason Lee's examination at the NSWCC, as well as by the appellant's counsel. The first quote from Mr Barr's evidence extracted by the appellant (AWS at [18]) refers to questions asked about Jason Lee's examination transcript, not this appellant's.[12]

18. The transcript briefed to Mr Barr of the appellant's NSWCC examination on 16 December 2009 touched on the following matters, inter alia. [redacted]

[redacted]

[10] Affidavit of Michael Barr affirmed 18 September 2012 (AB Vol. 4, pp. 2108–2109).
[11] Affidavit of Michael Barr affirmed 18 September 2012 at [3]–[5] (AB Vol. 4, p. 2108).
[12] Transcript, 12 November 2012, p. 55, lines 6–19 (AB Vol. 3, p. 1170, lines 12–26).
[13] NSWCC Transcript, 16 December 2009, pp. 17–18 (AB Vol. 3, pp. 1205–1206).
[14] NSWCC Transcript, 16 December 2009, p. 18 (AB Vol. 3, p. 1206).
[15] NSWCC Transcript, 16 December 2009, p. 22 (AB Vol. 3, p. 1211, lines 32–37).
[16] NSWCC Transcript, 16 December 2009, p. 28 (AB Vol. 3, p. 1217, lines 10–11).
[17] NSWCC Transcript, 16 December 2009, p. 29 (AB Vol. 3, p. 1218, lines 26–28).

[redacted]

19. No affidavit was ever filed by the appellant's trial counsel, Sean Grant, in the CCA proceedings but an affidavit was filed by senior counsel for Jason Lee.[19] Mr Sutherland confirmed matters which appear on the transcript of pre-trial proceedings on 23 November 2010 including that he was not aware he had been served with a copy of his client's NSWCC examination transcript until 23 November 2010. He states: "*I know that I did not think that the Crime Commission transcripts had been legitimately disseminated to the prosecution. This will be apparent from my reaction on the transcript.*"[20]

20. The appellant contends (AWS at [29]) that Basten JA (Hall and Beech-Jones JJ agreeing: his Honour's judgment is referred to as that of "the CCA")) did not correctly describe the appellants' argument when he stated that the appellants did not seek to establish any "*demonstrable element of unfairness*": CCA at [19] (AB Vol. 5, p. 2240). The respondent accepts that the appellant relied upon the affidavit of Philip Stewart in the proceedings below to establish unfairness but notes that this was an alternate argument to the primary submission that the appellant did not need to demonstrate any unfairness. The transcript of senior counsel for the appellant's submissions to the CCA does not suggest otherwise.[21] The CCA accurately noted that ground 1(b) for both appellants alleging "use" of the interviews "*in fact raised little more than their availability in the prosecutor's brief*": at [14] (AB Vol. 5, p. 2239).

Part V: APPLICABLE LEGISLATIVE PROVISIONS

21. The respondent agrees with the appellant's list of applicable legislation.

Part VI: STATEMENT OF ARGUMENT

22. There was no issue that the appellant lived in the Waterloo premises where the drugs and weapons were found. The Crown relied on evidence of finding other items belonging to the appellant in the laundry cupboard with the drugs and weapons to establish his

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[18] NSWCC Transcript, 16 December 2009, pp. 28–29 (AB Vol. 3, p. 1217, line 47–p. 1218, line 15).
[19] Affidavit of Robert Sutherland SC, sworn 17 October 2012 (AB Vol. 3, pp. 1238–1241).
[20] Affidavit of Robert Sutherland SC, sworn 17 October 2012, at [5] (AB Vol. 3, pp. 1239–1240).
[21] See Transcript, 12 November 2012, p. 76, lines 14–45 (AB Vol. 5, p. 2149, line 20–47); p. 84, lines 24–34 (AB Vol. 5, p. 2157, lines 29–38); p. 87, lines 10–28 (AB Vol. 5, p. 2160, lines 17–33) and p. 89, lines 16–26 (AB Vol. 5, p. 2162, lines 23–31).

possession of the drugs and weapons. The other items were a sex toy with a DNA match and an Optus contract in his name. The appellant disputed that the items in the laundry cupboard belonged to him.

23. These matters were not raised at the NSWCC examination. The appellant was not asked about the weapons, the sex toy, or the Optus contract. The questioning, [redacted] concerned the matters set out above at [18]. Against this background the respondent submits, in summary:

(a) The CCA did not err in the test it applied to the question of whether the appellant had established a miscarriage of justice such that the third limb in s. 6(1) of the ***Criminal Appeal Act*** was engaged. It stated this test as being an objective one as to whether there is a possibility of unfairness established in the particular circumstances of the case: at [157], [158] (AB Vol. 5, pp. 2289–2290). The references to there being no "*practical unfairness*" (at [149] (AB Vol. 5, p. 2287), [164] (AB Vol. 5, p. 2291)) were not an attempt to describe a new legal test for determining miscarriage within the third limb of s. 6(1) of the ***Criminal Appeal Act***, but rather a factual finding that no possibility of unfairness had been proved to the satisfaction of the CCA on the facts of this case.

(b) The appellant has not identified any way in which his defence was constrained as a result of the improper dissemination in this matter. Nor has the appellant established that the prosecutor gained any forensic advantage not otherwise open to it such that this Court would find a possibility of unfairness is established in the particular circumstances of the case. There is no evidence that the Crown prosecutor considered the examination transcript in any way nor prepared for trial in light of it.

24. The respondent conceded below that the appellant's compulsory examination transcript should not have been disseminated to him prior to the appellant's trial for the purpose of assisting the prosecution in discovering what his defence might be. The concession involved an acknowledgment that at the time of dissemination, the question of whether the appellant's trial "*might be prejudiced*" within s. 13(9) of the ***NSW Crime Commission Act* 1985** (NSW) ("***NSWCC Act***") was able to be answered in the affirmative. As the CCA noted (at [53]), there is a low threshold generally associated with the word "might". Whilst there was no order pursuant to s. 13(9) of the ***NSWCC***

Act made in relation to the appellant's examination, the respondent did not rely on that omission to defend the propriety of the dissemination: CCA at [25] (AB Vol. 5, pp. 2242–2243), [124] (AB Vol. 5, pp. 2278–2279). The respondent accepted below that in view of the stated purpose of the request and the terms of s. 13(9), the transcript should not have been disseminated at that time: CCA at [123] (AB Vol. 5, p. 2278); see also at [146] (AB Vol. 5, p. 2286).

25. Given that the respondent's concession was accepted by the CCA (at [123] (AB Vol. 5, p. 2278)), no issue of the construction of s. 13(9) arises on this appeal. The respondent accepts as a general proposition that if a person has been compulsorily examined about the subject matter of existing charges and the prosecutor and defence counsel are aware of the contents of the examination, that knowledge *may* affect the conduct of a subsequent trial, but the appellant has not established such an effect here. The question of how the Crown Prosecutor came to be in possession of the inadmissible material in the first place is not relevant to the question of whether the appellant can now establish that the trial miscarried. That question is answered affirmatively only if the appellant can establish, contrary to the findings of the CCA, that the dissemination actually resulted in a risk of unfairness in the conduct of the trial. General principles as to the accusatorial system of trial discussed in ***X7 v Australian Crime Commission*** (2013) 248 CLR 92 and ***Lee v New South Wales Crime Commission*** (2013) 87 ALJR 1082 do not answer the question of what the appellant had to show, on the facts of this case, in order to establish that his trial had miscarried within s. 6(1) of the ***Criminal Appeal Act***.

No error in test for miscarriage of justice

26. The CCA considered case law concerning the third limb of s. 6(1) of the ***Criminal Appeal Act*** (at [29]–[37] (AB Vol. 5, pp. 2244–2246)) and then went on to determine whether there had been any possibility of unfairness on the facts of this case in the context of the recent decision of the CCA in ***R v Seller; R v McCarthy*** (2013) 273 FLR 155 at 183–184 [104] per Bathurst CJ. The CCA accepted, consistent with ***R v Seller; R v McCarthy***, that providing a prosecutor with compulsorily obtained material which "*discloses defences or explanations of transactions by the accused which he or she may raise at trial ... could compromise a fair trial*". The CCA went on to correctly state the test (at [157] (AB Vol. 5, p. 2289)) as being whether the dissemination after charge *"has jeopardised a fair trial in the particular circumstances of the case*", requiring an objective consideration of the "*possibility of unfairness*": at [158] (AB Vol. 5, pp. 2289–2290). Further, "*[t]he*

possibility of unfairness should be determined objectively. It is appropriate for that purpose to refer to the content of the interview released to the prosecution and the conduct of the trial. If that inquiry reveals a risk of unfairness, that may constitute a miscarriage of justice": at [158] (AB Vol. 5, pp. 2289–2290).

27. The CCA did not impose a legal test of "*practical unfairness*" that differed from the relevant authorities pertaining to a miscarriage of justice and in doing so "*put[] the matter too highly*": cf AWS at [40]. Justice Basten recognised that ground 1 of the appeal engaged the third limb of s. 6(1) and considered circumstances in which the third limb will be made out: CCA at [29]–[37] (AB Vol. 5, pp. 2244–2246). He noted the authority in this Court to the effect that the words "*on any other ground*" in the third limb "*simply require that 'something occurred or did not occur' in the trial*": at [34] (AB Vol. 5, p. 2245), quoting ***TKWJ v The Queen*** (2002) 212 CLR 124 at [30] per Gaudron J. Furthermore, he acknowledged that the act or omission referred to need not have occurred "*in the trial*" in order to render a trial unfair: instead, "*it is the effect of the act or omission on the trial ... which is critical*": at [34] (AB Vol. 5, p. 2245). His Honour's discussion of the applicable principles made no mention of any additional test of "*practical unfairness*". Justice Basten's observation (at [164] (AB Vol. 5, p. 2291)) that the applicant had not sought to demonstrate any such unfairness was a description of the way in which the applicant put his primary case at trial. It cannot fairly be characterised as imposing an additional test for miscarriage of justice.

28. Accepting that the concept of miscarriage of justice is wide, including failures of process as well as of outcome (***Nudd v The Queen*** (2006) 80 ALJR 614 at 617 [3], 618 [6]), the respondent nevertheless submits that the appellant failed to establish any departure from the requirements of a trial according to law, in that the improper dissemination of the appellant's NSWCC transcript did not ultimately result in any risk of unfairness on the facts of this case.

29. Justice Basten noted that the usual manner of dealing with improper or unlawful conduct by investigating authorities is the exclusion of evidence: at [35] (AB Vol. 5, p. 2245–2246). His Honour's observation is consistent with the appellant's failure to identify a case in which a miscarriage of justice has been established on the basis of the improper or unlawful disclosure of documents to investigating or prosecuting authorities, in circumstances where those documents have been disclosed to the defence but not adduced in evidence: cf AWS [37].

30. The question below was whether there was a miscarriage of justice. The immediate task before the CCA was not, as in ***X7***, to determine whether an examiner is statutorily authorised to require a person charged with an indictable offence to answer questions about the subject matter of the charged offence. Nor was the CCA charged with assessing prospectively the risk of prejudice to future criminal proceedings were a trial not to be stayed, as in ***R v CB; MP v R*** [2011] NSWCCA 264 and ***R v Seller; R v McCarthy***. The respondent accepts that where an accused person seeks a temporary stay of proceedings in reliance on possession by a Crown Prosecutor of unlawfully disseminated material, evidence that the Crown Prosecutor had read and considered the material and used it to prepare for trial may, on a prospective assessment, depending on the nature of the material and the issues in the trial, raise the possibility of prejudice the remedy for which may be a temporary stay until the trial is re-briefed to a prosecutor who had not read the examination transcript: see AWS [34], citing ***R v Seller; R v McCarthy*** at 183–184 [104]. That was not a question the CCA was required to consider.

31. As Mason CJ and Toohey J noted in ***R v Glennon*** (1992) 173 CLR 592 at 605–606 (in a passage that all seven judges in ***Dupas v The Queen*** (2010) 241 CLR 237 at 245 [18] described as "*an authoritative statement of principle*" on the question of permanent stay), by contrast to the position of a trial judge asked to order a permanent stay due to prejudicial pre-trial publicity, a court of criminal appeal asked to set aside a conviction on the basis of a miscarriage of justice must satisfy itself of the existence of a "*serious risk that the pre-trial publicity has deprived the accused of a fair trial*" but will determine that risk in light of both the evidence as it stood at the time of the trial and the way in which the trial was conducted. The Court in ***Dupas v The Queen*** was of the view that the distinction drawn in ***R v Glennon*** between a purely prospective assessment of prejudice and one conducted by an appellate court was "*of present relevance*". A similar point is apposite here. The CCA was able to determine the question of miscarriage raised by ground 1 below by reference to the way in which the trial was conducted, having regard to the contents of the examination transcript and affidavit evidence relied upon.

<u>No possibility of unfairness in this case</u>

32. Applying this objective test to the facts before the CCA, no possibility of unfairness was established. In addition to the trial transcript and the contents of the examination transcript, the CCA also had before it the affidavit evidence of the Crown Prosecutor and the appellant's instructing solicitor. Although the respondent accepts that it will not

always be possible for evidence from trial counsel to be adduced on appeal without waiving client legal privilege, in this case affidavits were filed by both appellants in order to establish ground 1(b), which in the appellant's case involved a factual assertion that there had been "*use of the evidence compelled from the appellant ... in the brief of evidence and the trial of the appellant*": CCA at [10] (AB Vol. 5, p 2238). Given that it is a central proposition of the appellant's argument in this Court that the CCA failed to make factual findings in relation to actual "use" of the examination transcript (or that it discounted such "use" in considering unfairness: see AWS at [36]), the respondent submits that regard should be had to all of the material before the CCA on ground 1, including the evidence of the legal representatives below, in assessing this question. The respondent submits that a consideration of that material reveals no possibility of unfairness arose such as could establish that the trial miscarried.

33. The evidence of Michael Barr fell short of establishing that he had ever actually read the transcript of this appellant's compulsory examination, let alone "considered" it in any way: cf AWS [18], [30(g)], [34], [40]. The CCA made no express finding that Mr Barr had read the appellant's NSWCC transcript, although the reference to there being three ways in which the material *could* have assisted the prosecution (at [159] (AB Vol. 5, p. 2290)) is based on an assumption that the document had been read. Mr Barr stated that although it was his usual practice to read his brief, he had no specific recollection of ever reading the appellant's examination transcript, by contrast to Jason Lee's transcripts, which he did recall having read. The appellant's submission on this issue conflates answers given by Mr Barr in cross examination by senior counsel for Jason Lee about the first appellant's examination transcript, which he remembers reading, with Mr Barr's evidence about this appellant's examination transcript, which he did not recall reading. Mr Barr's comments about the examination transcripts being "interesting" and "informative" are answers to questions by Jason Lee's counsel about that appellant's examination transcript: cf AWS [18].

34. The only evidence adduced by the appellant to establish unfairness in support of ground 1(b) was the affidavit of the appellant's instructing solicitor at the trial.[22] Although the affidavit sets out Mr Stewart's thoughts about whether or not the appellant would give evidence at the trial, there was no evidence that the appellant's solicitor communicated any of his opinions on this issue to counsel who conducted the trial. Senior counsel for

[22] Affidavit of Philip Stewart, sworn 16 October 2012, at [17]–[18] (AB Vol. 3, p. 1187).

the appellant acknowledged as much to the CCA.[23] No affidavit from the appellant's trial counsel was filed in the CCA asserting that his conduct of the appellant's defence was constrained in any way. Nor does Mr Stewart identify any constraint on the way in which Brendon Pak was cross examined as a result of the appellant's knowledge that the prosecution was in possession of his NSWCC transcript. The only constraint identified by Mr Stewart is that knowledge on his part that the Crown Prosecutor was in possession of the appellant's NSWCC transcript led him to move from a position that it was "unlikely" that the appellant would give evidence at trial (although still a possibility) to deciding not to call him.[24] This decision was based on concerns that the Crown Prosecutor would use the transcript "*as a tool in cross examination*" and that if the appellant gave evidence deviating from the contents of the transcript he would potentially expose himself to perjury charges.[25]

35. Section 18B(2) of the ***NSWCC Act*** prevented the Crown Prosecutor using the transcript in cross-examination of the appellant. Asking questions about the transcript or seeking to elicit a prior inconsistent statement based on it would have been contrary to that subsection. Mr Barr repeatedly confirmed that he was aware of this when he was cross examined by senior counsel for Jason Lee about that appellant's examination transcript.[26] In these circumstances, any tactical decision made by the appellant's solicitor based on a misplaced speculation that the Crown Prosecutor might do something that he was not permitted by statute to do (and which Mr Barr gave evidence he was aware he was not permitted to do) is insufficient to establish the possibility of unfairness. If Mr Stewart had raised any such concerns at the time, Mr Barr could no doubt have allayed them. This did not occur.

36. To the extent that Mr Stewart was concerned that if the appellant gave evidence he would expose himself to perjury charges if he "*deviated from the contents of the transcript*",[27] this presumes that an accused person has a right to perjure himself at trial that was affected by the Crown Prosecutor's possession of the transcript. In order to be liable for perjury, a person must be proven to have made a false statement on oath on a material matter in or in connection with judicial proceedings knowing the statement to be false or

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[23] Transcript, 12 November 2012, p. 76, lines 36–45 (AB Vol. 5, p. 2149, lines 39–47).
[24] Affidavit of Philip Stewart, sworn 16 October 2012, at [17] (AB Vol. 3, p. 1187).
[25] Affidavit of Philip Stewart, sworn 16 October 2012, at [18] (AB Vol. 3, p. 1187).
[26] Transcript, 12 November 2012, p. 51, lines 16–25 (AB Vol. 3, p. 1166, lines 23–31); p. 52, lines 14–18 (AB Vol. 3, p. 1167, lines 21–25).
[27] Affidavit of Philip Stewart sworn 16 October 2012 at [18], AB Vol. 3, p. 1187.

not believing it to be true: s. 327(1) of the ***Crimes Act* 1900** (NSW). To the extent that knowledge that the Crown Prosecutor was in possession of the appellant's NSWCC transcript led to a concern on the appellant's part that the Crown could form a view that the appellant had lied on oath, no prejudice flows from this. There is no right afforded to an accused person to commit perjury as part of the trial process.

37. That this is so is reflected in the observations by Keane and Gageler JJ in ***Lee v NSW Crime Commission*** at 1155 [323]:

> *"[w]e are unable to regard as the deprivation of a legitimate forensic choice a practical constraint on the legal representatives of the person leading evidence or cross-examining or making submissions in the criminal proceedings to suggest a version of the facts which contradicted that given by their client on oath in the examination. The legal representatives would, of course, be prevented from setting up an affirmative case inconsistent with the evidence but they would not be prevented from ensuring that the prosecution is put to proof or from arguing that the evidence as a whole does not prove guilt".*

In any event, Mr Stewart identified no such constraint in his affidavit.

38. As was appropriate, the CCA had regard to the trial transcript in addition to the evidence of Mr Barr and Mr Stewart in considering the possibility of unfairness: CCA at [158] (AB Vol. 5, p. 2289–2290). The transcript shows that the appellant put his case through cross-examination of Brendon Pak, namely, he contended that Brendon Pak was lying when he claimed that the appellant had selected boxes of washing powder to take away. A concerted attack was made on the credibility of Mr Pak during cross-examination. The transcript does not reveal any constraint on the way Mr Pak was cross-examined. [redacted] There was thus nothing to prevent the appellant's counsel putting to Mr Pak squarely that he was lying when he gave that evidence, as counsel did repeatedly.[28]

39. Nor does a comparison of the trial transcript with the appellant's NSWCC transcript disclose any other constraint on the appellant's conduct of his trial. In his closing address, the appellant's counsel mounted an unqualified attack on Brendon Pak's credibility, submitting that "*this case is all about Brendon Pak*",[29] who was "*a liar, a*

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[28] Transcript, 10 February 2011, p. 280, lines 40–42 (AB Vol. 1, p. 381, lines 42–45); p. 283, lines 11–32 (AB Vol. 1, p. 384, lines 18–36); p. 287, lines 8–10 (AB Vol. 1, p. 388, lines 17–19).
[29] Transcript, 9 March 2011, p. 1097, line 11 (AB Vol. 2, p. 783, line 19).

perjurer, a welfare cheat, a tax cheat a fraudster, dishonest, cunning, calculating",[30] who had told "*whopper after whopper after whopper ... whoppers of lies*",[31] and that the jury could not rely on "*the different versions you'd get from Brendon Pak of lies*",[32] a person who would "*do or say anything*"[33] to protect himself. Besides the evidence of Mr Pak, the Crown case relied on the finding of the prohibited items and the circumstances in which they were found. In his NSWCC examination, the appellant [redacted]. In these circumstances, he was free to conduct his defence in any way he chose, which he did: by disputing all elements of the Crown case.

40. The CCA identified (at [159] (AB Vol. 5, p. 2290)) three possible uses that could have been made of the transcript: as a basis for further inquiries and investigations; to clarify aspects of Mr Pak's evidence or forewarn him of possible lines of cross-examination; and to prepare for the cross-examination of the appellant. The appellant contends that Basten JA must have discounted the "*actual use*" made of the transcript by the Crown Prosecutor when considering these possible "uses": AWS at [36]. Far from discounting the evidence of Mr Barr and Mr Stewart, Basten JA's three hypothetical "uses" each assume that the prosecutor had read and considered the transcript (which, as noted above, was not shown to be the case on Mr Barr's evidence in relation to the appellant's transcript). In considering these hypotheticals (and concluding they would not give rise to a miscarriage of justice), the CCA was not limiting the word "use" to that of some "*actual deployment*" of the Crime Commission transcript, such as by admission of evidence contrary to s. 18B(2) of the ***NSWCC Act***: cf AWS [42].

41. The questioning of the appellant on 16 December 2009 at the NSWCC touched upon the subject matter of the drug charges subsequently laid. This was the basis for the concession made as to the impropriety of the dissemination. Nevertheless, possession by the respondent of the appellant's examination transcript did not prevent him from challenging all elements of the drug offences with which he was charged, namely whether he possessed the powder, whether he knew it was a prohibited drug or whether it was in

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[30] Transcript, 8 March 2011, p. 1070, lines 41–42 (AB Vol. 2, p. 760, lines 43–44).
[31] Transcript, 8 March 2011, p. 1068, lines 11–12 (AB Vol. 2, p. 758, lines 19–20).
[32] Transcript, 8 March 2011, p. 1072, lines 15–16 (AB Vol. 2, p. 762, lines 23–24).
[33] Transcript, 8 March 2011, p. 1078, lines 34–35 (AB Vol. 2, p. 768, lines 38–39).
[34] NSWCC Transcript, 16 December 2009, p. 29 (AB Vol. 3, p. 1218).

fact a prohibited drug. Those matters were each put in issue, the last one via the challenge to the expert evidence mounted by Jason Lee.[35]

42. As to possession of the drugs, despite the nature of the request for the transcript, it is not established that the trial prosecutor thereby knew of the appellant's case at trial in respect of the washing powder. [redacted]. At trial, the cross examination of the officer in charge, Detective Senior Constable Plummer, by the appellant's counsel was directed towards establishing that the only source of available
10 washing powder in the Waterloo unit was the open green box (see above at [6]), and not any other powder bought elsewhere.[38] The appellant's counsel then made a submission inviting the jury to reason that this situation was inconsistent with the appellant having knowledge that the powder in the laundry cupboard contained a prohibited drug. "*So if Seong Lee is the paramount drug trafficker, do you think he would be washing his clothes in pseudoephedrine, a valuable commodity?*"[39] Thus the appellant was not constrained in his approach to the question of possession of the boxes in the laundry cupboard by reason of the contents of the NSWCC transcripts.

43. The appellant contends (at AWS [39]) that no application or objection could have been made at trial as he was not made aware of the circumstances of the dissemination until 23
20 August 2012, a fact the CCA accepted: at [140] (AB Vol. 5, p. 2283). But the CCA also held that the appellants were aware of the NSWCC examinations having taking place and the content of the interviews, a fact not in dispute: at [163] (AB Vol. 5, p. 2291). In light of this the CCA concluded that the failure to object to the trial proceeding was "*consistent either with the conclusion that no unfairness had arisen or was anticipated*": at [163] (AB Vol. 5, p. 2291). The CCA was not thereby invoking the operation of rule 4 of the ***Criminal Appeal Rules*** (NSW) but rather relying upon evidence of a failure to complain about unfairness at the time as being consistent with no risk of unfairness arising in this

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[35] See Transcript, 9 March 2011, pp. 1118–1121 (AB Vol. 2, pp. 805–808), 1124–1135 (AB Vol. 2, pp. 811–822), 1140–1149 (AB Vol. 2, pp. 827–836); Transcript, 10 March 2011, pp. 1156–1163 (AB Vol. 2, pp. 843–850) (closing address of Robert Sutherland SC for the first appellant); Transcript, 9 March 2011, p. 1096, lines 7–8 (AB Vol. 2, p. 782, lines 14–15) (closing address of Sean Grant for the appellant).
[36] NSWCC Transcript, 16 December 2009, pp. 28, 29 (AB Vol. 3, p. 1217, 1218).
[37] NSWCC Transcript, 16 December 2009, p. 28 (AB Vol. 3, p. 1217).
[38] Transcript, 3 February 2011, pp. 109–110 (AB Vol. 1, pp. 212–213).
[39] Transcript, 9 March 2011, p. 1096 lines 32–39 (AB Vol. 2, p. 782, lines 36–43).

case. The CCA was correct in so finding. The trial transcript records that the appellant's counsel was present for the pre-trial hearing on 23 November 2010 at which the Crown's possession of the NSWCC transcripts came to his attention (see above at [10]),[40] but no application for a temporary stay or any other application on the basis of that possession was made at any time from 23 November 2010 until the trial commenced on 31 January 2011. The fact that no application was made during the two month adjournment when there had been time for the appellant to reflect on whether there was any question of unfairness arising is consistent with no risk of unfairness being perceived by the appellant.

44. In the absence of any application or objection, the trial judge was not afforded the opportunity to manage any potential unfairness prior to or during the trial. The transcript of pre-trial proceedings on 23 November 2010 discloses that although Solomon DCJ was aware that the then Crown Prosecutor was in possession of the transcripts of both the appellant's and Jason Lee's compulsory examinations, he was not made aware of any perceived risk of unfairness that flowed from that fact. As French CJ and Crennan J (dissenting) stated in ***X7 v Australian Crime Commission*** at 126 [65] (in relation to a point which the majority held did not arise): "*The right to a fair trial is protected by a trial judge's discretion in relation to the admissibility of evidence and by a court's institutional powers to punish for contempt, including enjoining a threatened contempt, and to deal with an abuse of process*". If any application had been made to the trial judge, the circumstances of the dissemination would no doubt have emerged. In any event, Solomon DCJ could have assessed the question of prospective unfairness and taken the necessary steps to reduce it, including by ordering a temporary stay until such time as the matter was re-briefed to a Crown Prosecutor who had not had access to the material: see ***R v Seller; R v McCarthy*** (2013) 273 FLR 155 at 185 [114]–186 [116].

45. In the circumstances, there was no risk of the prosecution gaining an "*unfair forensic advantage*" of the type referred to by French CJ and Crennan J in *X7* at 122–123 [53].

Application of the proviso

46. Given that the CCA was not satisfied of any possibility of unfairness affecting the appellant's trial, the CCA did not dismiss the appeal on the basis of any missing "*causal connection*" between such an irregularity and a conviction. This is consistent with the

[40] See also Affidavit of Philip Stewart sworn 16 October 2012 at [13] (AB Vol. 3, p. 1186).

fact that there is no reference anywhere in the judgment on ground 1 to considerations such as the guilt or otherwise of the appellant, as well as there being no further reference to Gageler J's remarks in ***Baini v The Queen*** (2012) 246 CLR 469 at 489–490 [54] or to causation in the CCA's reasons for finding no miscarriage to be established in the appellant's case (at [150]–[165] (AB Vol. 5, pp. 2287–2292)), the reasons being confined to the threshold issue of a lack of evidence of any irregularity or unfairness.

47. Nor did the CCA seek to address any alleged miscarriage within the third limb of s. 6(1) by application of the proviso in s. 6(1) of the ***Criminal Appeal Act***: cf AWS at [43]. Justice Basten was of the view that the appellant had failed to establish a miscarriage of justice on ground 1 within the third limb of s. 6(1), thus the court did not need to address the application of the proviso. The operation of the proviso did not arise at any point. As the appellant notes (AWS at [45]), his Honour did not address himself to the negative proposition in ***Weiss v The Queen*** (2005) 224 CLR 300 at 317 [44]. Although he used the word "substantial" to refer to potential miscarriages in the context of cases involving stays of proceedings (at [63] (AB Vol. 5, p. 2259)), that is the only time that that word appears in his Honour's judgment; the focus being on whether any risk of unfairness had been established so as to reach the threshold of miscarriage. Justice Basten's reference to the fact that the appellants had not lost a chance of acquittal (CCA at [164] (AB Vol. 5, p. 2291)) was consistent with his earlier consideration of third limb miscarriage cases (at [29]–[37] (AB Vol. 5, pp. 2244–2247), but the result did not ultimately turn on any test for the proviso's application. In order for the proviso to have applied, Basten JA would have had to be satisfied that the appellant had established a miscarriage in the first place.

48. Further, given that the CCA considered a ground of appeal that the verdicts in relation to the appellant were unreasonable, it was required to consider the strength of the Crown case in relation to that ground and did so: at [305]–[316] (AB Vol. 5, pp. 2344–2347). Such an exercise would have been unnecessary had the CCA already undertaken this task as part of its consideration of ground 1.

49. The Crown case against the appellant relied principally on items found in the premises in which the appellant admitted he resided. The appellant was able to, and did, strenuously contest possession and knowledge on the drugs counts, including by denying the truth of direct evidence led in the Crown's case regarding his knowledge of the drugs. Together with his father's attack on whether the washing powder contained pseudoephedrine, all

elements of the Crown case were thus challenged in the appellant's trial. In these circumstances, there was no irregularity affecting the trial and no miscarriage of justice within the meaning of s. 6(1) of the ***Criminal Appeal Act***.

50. **Part VIII: ESTIMATE OF LENGTH OF ORAL ARGUMENT**

51. The respondent estimates that he will require one hour to present his argument.

Dated: 28 February 2014

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