Fuller v The Queen [2013] NTCCA 10

PARTIES:	**FULLER, Tony John**
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 7 of 2012
DELIVERED:	15 August 2013
HEARING DATE:	27 May 2013
JUDGMENT OF:	RILEY CJ, BARR and HILEY JJ
APPEALED FROM:	BLOKLAND J and a jury of twelve in Proceeding SCC No 21110332

CATCHWORDS:

CRIMINAL LAW — Appeal against conviction — dangerous drugs — possession and supply — prosecution disclosure — splitting prosecution case — prosecution cross-examined accused regarding alleged transaction, evidence of which was not disclosed to defence — jury not discharged — any prejudicial effect removed by directions from trial judge — no substantial miscarriage of justice — *Criminal Code* (NT) s 411.

CRIMINAL LAW — Appeal against conviction — dangerous drugs — possession and supply — cross-examination of accused — prosecutor put that accused had bullets for firearm so he could ‘shoot somebody’ — question objected to and withdrawn — jury not discharged — any prejudicial effect removed by directions from trial judge — no substantial miscarriage of justice — *Criminal Code* (NT) s 411.

EVIDENCE — Expert evidence — forensic accountant — unexplained wealth — expert performed calculations on ledgers said to record drug transactions — expert gave evidence as to appellant's 'unsourced' income based on bank records and other similar information — calculations did not require special skill — not expert opinion evidence — no error in admitting evidence.

Crofts v The Queen (1996) 186 CLR 427; *R v O'Driscoll* (2003) 57 NSWLR 416*; Reza v Summerhill Orchards Ltd* [2013] VSCA 17, applied

R v Jesson (2009) 24 NTLR 86, followed

ASIC v Rich (2005) 190 FLR 242; *R v Chin* (1985) 157 CLR 671; *R v Dunwoody* (2004) 149 A Crim R 259; *Dupas v The Queen* (2010) 241 CLR 237; *R v Ferguson* 24 VR 531; *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68; *HG v The Queen* (1999) 197 CLR 414; *Killick v The Queen* (1981) 147 CLR 565; *Lawrence v The Queen* (1981) 38 ALR 1 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *R v Mokbel* (2009) 26 VR 618; *Nationwide News Pty Ltd v Farquharson* (2010) 28 VR 472; *Nguyen v R* (2007) 173 A Crim R 557; *Paric v John Holland (Construction) Pty Ltd* (1985) 62 ALR 85; *Ramsay v Watson* (1961) 108 CLR 642;*Shaw v The Queen* (1952) 85 CLR 365 *R v Soma* (2003) 212 CLR 299, referred to

Criminal Code (NT), s 411.

REPRESENTATION:

Counsel:

Appellant:	J C A Tippett QC
Respondent:	D Morters

Solicitors:

Appellant:	Ward Keller
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Fuller v The Queen [2013] NTCCA 10
No. CCA 7 of 2013

BETWEEN:

TONY JOHN FULLER
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, BARR and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 15 August 2013)

THE COURT:

Introduction

[1] The appellant has appealed against his convictions before the Supreme Court of the Northern Territory on 14 May 2012 on charges under the *Misuse of Drugs Act* (NT) of:

- one count of supplying a dangerous drug,
- six counts of possessing a dangerous drug,
- one count of possessing precursors for dangerous drugs,
- one count of possessing articles for the use in manufacturing or producing dangerous drugs or precursors, and
- one count of possessing tainted property, namely, $137,655 in cash.

[2] The convictions followed the unanimous findings of guilt by a jury after a 14-day trial. The offences occurred over a period extending from 20 June 2007 to 30 March 2011 ('the indictment period'). In short, the Crown case was that the appellant had been supplying methamphetamine during that period.

[3] On 29 March 2011, police executed a search warrant at the appellant's two properties in Wulagi and Wanguri. During those searches a number of items were seized, including 5 notebooks, various quantities of methamphetamines, $137,655 in cash, electronic scales, a .45 calibre handgun and a quantity of .45 calibre bullets. It was alleged that the $137,655 was the product either directly or indirectly of the supply of methamphetamines.

[4] The appellant was questioned by police on the following day and participated in a recorded interview. The questioning included questions about the firearm.

[5] The Crown case was based upon circumstantial evidence including the presence of the drugs and the other materials found at the appellant's home and workplace, DNA and fingerprint evidence in relation to the notebooks, and an analysis of the notebooks and other records of the appellant including bank statements and tax returns.

[6] Following the close of the Crown case, the appellant gave evidence and was cross-examined. He also called two other witnesses, Skevos Kazouri and Anastafis Poullos.

[7] The Crown case against the appellant was strong. The circumstantial evidence was compelling: unexplained wealth; drugs, scales, cutting agents, glassware, pseudoephedrine, cash amounting to $137,655, a firearm and ammunition found by police at the appellant's home; and handwritten records contained in five notebooks[1] also found at the appellant's home, which the Crown alleged were records related to drug transactions.

[8] The evidence of significant 'unexplained wealth' included evidence of the purchase of real property at Wanguri for $348,000 cash, redevelopment of that property at a cost exceeding $500,000, the purchase of a boat for $58,000 cash and the purchase of a car for $19,500 cash after trade in.

[9] The notebooks contained a number of entries referring to weights of drugs, types of drugs and calculations of projected profits from drug deals.

[10] Although the appellant initially denied having written any of the material in the notebooks or indeed having any connection with the notebooks, fingerprint and DNA evidence linked the appellant with the notebooks. Moreover, the handwriting expert, Black, was of the opinion that the writing in the notebooks was made by the same person who had written the sample

[1] .Exhibits P10, P11, P12, P21 and P22.

handwriting contained in a diary[2] provided to him for his examination. The appellant admitted in cross-examination that the diary was his and that he was the author of most of the writing in the diary.

[11] There was more than sufficient evidence for the jury to have been satisfied beyond reasonable doubt that the five notebooks were authored by the appellant and that they proved consistent drug selling over the period of the indictment.

Grounds of appeal

[12] The amended Notice of Appeal identifies the following grounds of appeal:

1. The learned trial judge erred in not discharging the jury following the Crown Prosecutor's cross-examination of the appellant as regards the firearm in the house, which was not the subject of any charges on the indictment. Further it was improper to put to the appellant that the firearm, which the appellant said was his father's and did not work, was 'a tool of the drug trade', and he had it 'so he could shoot people'.

2. The above improper puttage was compounded by the learned Crown Prosecutor suggesting to the appellant without leading evidence, his presence at the Lyons Housing Estate was in order to conduct a drug transaction, which was improper and took the appellant by surprise and led to significant prejudice.

3. The learned trial judge erred in allowing the police forensic evidence of Mr Wall's purported expert opinion in relation to values contained in the journals found at the appellant's premises.

4. The learned trial judge erred in allowing the evidence of Superintendent Noy purporting to be expert opinion evidence in relation to the notations contained in the journals.

[2] . Exhibit P28.

5. An aggregate of the above errors lead to a miscarriage of justice and the conviction should be set aside.

[13] The appellant filed a written outline of submissions, which was followed by written submissions by the respondent. On the day of the hearing, the appellant provided a further outline of submissions, and was granted leave to add an additional ground of appeal in the following terms:

> 'The learned trial judge erred in failing to direct the jury as to how they should approach and evaluate the expert evidence of Robert Wall and the exhibits that were used by Mr Wall so they could make an independent assessment of the opinion and its value'.

[14] The respondent filed further written submissions in relation to that additional ground (to which we shall refer as ground 6).

Grounds 1 and 2 — Failure to discharge the jury

[15] The appellant contended that the trial judge should have discharged the jury following the two identified areas of cross-examination, and that her Honour's failure to do so resulted in a mistrial.

[16] **Ground 1** relates to the firearm. Before the commencement of the trial, the appellant had indicated that he would challenge the admissibility of evidence regarding the finding of the firearm and bullets by police when they executed the search warrant at the appellant's residence on 28 March 2011. The respondent provided the appellant's counsel with some decisions to the effect that evidence of the possession of firearms and or bullets by an accused in a trial alleging the possession of drugs for commercial purposes or supply of drugs is admissible, because possession of such items may be

indicia of drug supply activity. Following the provision of those authorities, the appellant withdrew his opposition to the admission of that evidence.

[17] At trial the Crown tendered evidence concerning the finding of the firearm and ammunition at the appellant's residence. The evidence was to the effect that the firearm, a .45 calibre handgun, was tucked behind the cushion of a couch in bedroom 2, and that it was in a holster and had a magazine fitted.

[18] The appellant was questioned by police about the firearm when he participated in a recorded interview following his arrest. He admitted placing it behind the cushion in the location it was found by police.

[19] The appellant gave evidence about the firearm during his evidence-in-chief. He said that it was given to him by his father and that he had never used it before.

[20] He was cross-examined about the firearm and ammunition. It was put to him that 'you had it there as part of your tools for your trade of drug dealing, didn't you?' He replied: 'No, I did not. That's preposterous to even say that'.

[21] He was then cross-examined further regarding his explanation that his father had given him the firearm, and it was put to him that: 'And it's quite clearly an instrument that you used in your business as a drug dealer?' The appellant replied: 'No. No, definitely not. … I wouldn't even know if … the gun fired. I wouldn't even know how to fire it'.

[22] He was then asked about the evidence of a police officer that the bullets were the same calibre as the gun, and it was put to him that: ‘And the reason you had bullets for the gun was so you could shoot somebody?’

[23] At this point counsel for the appellant objected. Counsel for the Crown then withdrew the question.

[24] Counsel for the appellant immediately applied to have the jury discharged. Counsel submitted that ‘the question gives rise to impermissible prejudice. It’s never been part of the prosecution case that this man wielded this weapon against anybody at any time for any purpose whatsoever’. Counsel then made a similar complaint about earlier cross-examination concerning an alleged drug deal, which is the subject of ground 2.

[25] **Ground 2** relates to the cross examination of the appellant about an occasion at about 11.50 pm on 1 February 2011 when he was stopped by police near 35 Matla Drive Lyons Estate, which is the address of Popye Kathopoulis.

[26] The cross-examination occurred after the appellant had been asked about some entries in the notebooks, where the words ‘Pop’, ‘Lollypop’ or ‘Popye’ appeared. The appellant agreed that he knew a lady by the name of Popye Kathopoulis and that she was a friend of his. He denied that those entries were in his writing, or that they were records of a drug transaction with Popye Kathopoulis.

[27] It was put to the appellant that he was stopped by police as he was leaving Popye Kathopoulis' house at 11.50 pm on 1 February 2011. He replied: 'No, I hadn't been at her house'. He agreed that he had been stopped by police at the Lyons Estate and that he had been in the company of Skevos Kazouri.

[28] The following question was then put to the appellant: 'And you'd just been engaging in a drug transaction, hadn't you?' The appellant answered: 'No, that's not correct at all'. It was then put to him that he had walked from Mr Kazouri's car to Ms Kathopoulis' house at 35 Matla Drive, Lyons Estate and he replied: 'No'.

[29] The effect of those questions and answers was that the appellant admitted that he was stopped by the police in the company of Skevos Kazouri, not far from 35 Matla Drive, and that he denied the assertion that he had just been engaging in a drug transaction.

[30] That was followed by cross-examination on other topics, including other entries in the notebooks, his relationship with Skevos Kazouri, writing and symbols in the notebooks, and the fact that two of the notebooks were located in the same room as the money, the handgun and ammunition.

[31] It was then that counsel for the appellant made the objections and submissions discussed above, in the absence of the jury.

[32] When the jury returned the trial judge gave the following direction:

> '… you've seen a lot of questioning of witnesses, and in this instance of Mr Fuller. I just want to say ladies and gentlemen, the questions are not evidence and obviously the answers given if any relate to the question.
>
> So that last question which the prosecutor withdrew to the effect that Mr Fuller had a gun and may shoot someone, you are to disregard that completely, there is no foundation in the evidence for that question.
>
> Similarly, questions in relation to Mr Fuller being engaged in a drug transaction on 1 February 2011, similarly that has no foundation in the evidence and you are as a matter of law, I direct you to disregard the questions in relation to that'

[33] In the summing up the trial judge also gave a further direction that questions put to a witness are not evidence and it is the answers that are evidence. The appellant did not seek further directions on these points. Counsel for the appellant contends that a further direction would have reminded the jury of the allegations and would not have removed the prejudice that had already been created.

Consideration

[34] The appellant contends that the prosecution case was entirely circumstantial, relying as it did on a range of pieces of evidence, including the discovery of various drugs at the appellant's home and workplace, DNA and fingerprint evidence attached to the notebooks and an analysis of the contents of the notebooks. The prosecution case did not seek to rely on any actual event of drug dealing, or on any actual event of violence or use of any firearm by the appellant such as might indicate drug dealing.

[35] We will first deal with **ground 2**. Before the cross examination in relation to the alleged drug transaction on 1 February 2011, no evidence had been led about this event, and no particulars of the event had been provided by the prosecution to the defence. Accordingly, the defence was deprived of the ability to obtain instructions to meet the allegation and to cross-examine persons said to have observed the transaction.

[36] The appellant contends that this amounted to the Crown impermissibly splitting its case on the central issue in the trial.

[37] It is well established that 'as a general rule, the prosecution must offer all its proofs during the progress of its case'[3] and that the 'the evidence for the prosecution must be presented before an accused is called upon.'[4]

[38] Counsel for the respondent contended that it was only after the defence case had begun that he became aware that Skevos Kazouri, a well known drug dealer, was likely to give evidence in the defence case and of the alleged drug deal involving him, the appellant and Popye Kathopoulis. This evidence would further link Popye Kathopoulis with the entries 'Pop' and 'Popye' in the notebooks seized from the appellant.

[39] Although the respondent only became aware of this material after the defence case had commenced, we consider that counsel for the appellant

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[3] *R v Soma* (2003) 212 CLR 299 at 311 [36] per Gleeson CJ, Gummow, Kirby and Hayne JJ, noting similar observations in *Shaw v The Queen* (1952) 85 CLR 365 at 380, *Killick v The Queen* (1981) 147 CLR 565, *Lawrence v The Queen* (1981) 38 ALR 1 and *R v Chin* (1985) 157 CLR 671.

[4] *R v Soma* (2003) 212 CLR 299 at 317 [58] per McHugh J, quoting and approving this statement of the court below. See too *R v Dunwoody* (2004) 149 A Crim R 259 at 278 [59] per McMurdo P.

should have been informed of that material immediately, and that it should not have been put for the first time by way of cross examination without first giving counsel the opportunity to consider the material and to object to that line of questioning before it was embarked upon.

[40] However, we do not consider that the failure on the part of the prosecution was such as to require the jury to be discharged. This is particularly so in light of the clear direction by the trial judge, given immediately following the adjournment after counsel had taken objection to the questions.

[41] We respectfully agree with the observations of Kyrou AJA in *Reza v Summerhill Orchards Ltd* [2013] VSCA 17 at [50]:

> 'It must be borne in mind that, in both criminal and jury trials, juries are assumed to understand and comply with directions from the trial judge.[5] The capacity of a jury to decide a case in accordance with the law and the directions of the trial judge should not be underestimated.[6] The experience and wisdom of the law is that, almost universally, jurors approach their tasks conscientiously.[7] It is assumed that, when they are properly directed by trial judges to decide cases in accordance with the law — that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations — juries comply.[8] The capacity of juries to do so is critical to ensuring that proceedings are fair.[9]'

[42] We therefore do not consider that the jury should have been discharged as contended for in ground 2.

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5 Citing *R v Mokbel* (2009) 26 VR 618 at 638 [90].
6 Citing *Dupas v The Queen* (2010) 241 CLR 237 at 247 [22], 248–9 [29] and 251 [38].
7 Citing *Dupas v The Queen* (2010) 241 CLR 237 at 247 [26], *Nationwide News Pty Ltd v Farquharson* (2010) 28 VR 472 at 477 [15] and *R v Mokbel* (2009) 26 VR 618 at 638 [90].
8 Citing *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68 at 84 [54] and *Dupas v The Queen* (2010) 241 CLR 237 at 248-9 [28]–[29].
9 Citing *Dupas v The Queen* (2010) 241 CLR 237 at 248–9 [29].

[43] Turning to **ground 1**, we note that questions in cross-examination regarding the appellant's reasons for having the gun and the ammunition did not involve additional information or material held (and withheld) by the Crown, as was the case in relation to ground 2. Accordingly the only proper reason for objecting to such questions would have been on account of the prejudicial nature of the questions, and not on the basis of the Crown seeking to adduce fresh evidence and thus splitting its case.

[44] The suggestion that the appellant had the gun as part of his tools of trade of drug dealing was not objected to and was probably unobjectionable anyway, having regard to the authorities referred to above which the respondent had provided to the defence before trial leading counsel for the appellant to allow evidence of the finding of the gun and ammunition to be tendered as part of the Crown case.

[45] The question ultimately objected to, that 'the reason you had bullets for the gun was so you could shoot somebody', was, as the appellant replied 'a little bit rough'. That question was withdrawn as soon as it was objected to.

[46] Then followed the appellant's application for her Honour to discharge the jury, her Honour's refusal to do so, and her direction that we have quoted above.

[47] We consider that any potential for the jury to have any regard to those questions in a way that would have been prejudicial to the appellant was removed by her Honour's clear directions, given after the objection was

taken and before the cross-examination continued. Ground 1 is therefore not made out.

[48] Further, we do not consider that the result of the refusal to discharge the jury occasioned a risk of a substantial miscarriage of justice.[10] The other evidence led by the Crown as part of its case was overwhelming, and was such that the convictions were inevitable.[11] We do not consider that there was any likelihood of the jury having decided differently, because of the questions having been put at the time and in the manner that they were.

[49] Accordingly we do not consider that the jury should have been discharged as contended for grounds 1 or 2.

Grounds 3 and 6 – Evidence of Mr Wall

[50] Both of these grounds relate to what is said to have been expert opinion. However, for the most part, Mr Wall's evidence comprised what was essentially a mathematical exercise. It involved him referring to data and similar material that was in evidence and making certain assumptions before applying basic mathematics and reaching dollar figures at the end of the exercise, an exercise that does not require any particular expertise.

[51] Mr Wall performed two such exercises. One was to reach a figure of $976,200 as being the net profit that would have been derived by the appellant on the assumptions that 4881 units of drugs were sold during the indictment period at an assumed price of $1000 per unit and that the

[10] *Crofts v The Queen* (1996) 186 CLR 427 at 441.
[11] Ibid.

appellant would have received $200 per gram/unit profit. We shall refer to this as the net profit exercise.

[52] The other exercise was to identify expenditure by the appellant during the indictment period, which Mr Wall could not readily identify as having a legitimate source. We shall refer to this as the unsourced funds exercise. In the course of performing that exercise he examined bank records, credit card statements, tax returns and working papers in relation to the tax returns of the appellant and his wife (all of which were in evidence) and he looked for any record therein that identified the source of funds used for a number of purchases. Mr Wall identified a number of purchases or other forms of expenditure for which he could not find a source and added the figures for those items to reach a total figure of $847,108.21. That did not include another $207,517.61 in cash deposits for which he could not find any source.

[53] In relation to ground 3 the appellant contended that Mr Wall's evidence was 'entirely misleading, and ought not to have gone before the jury' and 'the fact that it did caused the trial to miscarry.'

[54] The appellant also contended that the respondent relied upon the similarity of the two figures derived from the net profit exercise and the unsourced funds exercise so as to wrongly put to the jury that 'it was reasonable to assume therefore that the unsourced funds were the product of drug sales'.

[55] In relation to the unsourced funds exercise the appellant contended that Mr Wall's evidence was internally inconsistent and misleading because he

had excluded from his calculations certain amounts that should have been included, such as the $137,000 in cash found at the house, a figure of $47,190 which he classified as discretionary spending, bank deposits of $207,517 and another sum of $141,000, without giving a reason for excluding those amounts. The appellant contended that Mr Wall did not seek to source or investigate monies received from any place other than 'employment payments', which other moneys may have had a legitimate source. The appellant pointed out that Mr Wall did not take any account of any money that had come into the appellant's possession before the indictment period. Accordingly, it was contended that Mr Wall wrongly designated potentially sourced money as unsourced money, and then went on to associate that (supposedly) unsourced money with the notebooks and by further association characterised the appellant as carrying on the business of a drug supplier.

[56] In this regard, it was also said that Mr Wall was unable to exclude all reasonable hypotheses consistent with innocence, that there was no proper or rational basis proposed for leaving certain figures out while others were included, that his evidence was 'the product of sleight of hand' and that because of the lack of evidence of methodology the jury was deprived of reaching any meaningful or appropriate conclusion relating to the money said to be unsourced. The appellant referred to the well-known comments in *Makita v Sprowles*[12] regarding the need for an expert to clearly identify his

[12] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

methodology, his reasoning and the factual bases underlying his conclusions.

[57] The appellant submitted:

> 'If Wall had not given misleading evidence the connection sought to be derived from the financial material with the sum representing profit from drug sales could not have been made and a significant component of the prosecution case would fail. Because the evidence could not be used in the way the prosecution asserted the trial miscarried and the verdicts should be set aside.[13] The opinion of Mr Wall could not be established by the evidence and therefore should not have been before the jury.'

[58] It is difficult to discern what if any of Mr Wall's evidence was truly expert evidence. Counsel for the appellant contended that Mr Wall's opinions as to what moneys were 'unsourced' were in the nature of expert opinions. However, the term 'unsourced' is not a term of art and was simply a term used by Mr Wall, and others, to describe expenditure that appeared to come from funds that had no discernible source.

[59] Much (if not all) of the work performed by Mr Wall and which was the subject of his evidence was work that a lay person could have performed, if presented with the same materials and assumptions. He was in effect helping the jury perform a function that they could have carried out themselves.[14] It is not uncommon for an accountant to be called as a witness

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[13] Citing *Ramsay v Watson* (1961) 108 CLR 642 at 649, *Paric v John Holland (Construction) Pty Ltd* (1985) 62 ALR 85, and *HG v The Queen* (1999) 197 CLR 414 at 429 [44] per Gaudron J.

[14] Cf *R v Ferguson* (2009) 24 VR 531 at 546 [51].

for the purpose of summarising the effect of books and records that have been produced.[15]

[60] Before trial the prosecution had provided the appellant with a statement and supporting documentation, which disclosed the evidence that Mr Wall would give in relation to unexplained wealth. Further, in its opening, the Crown indicated that it would be leading two types of evidence from Mr Wall: first, explanatory information as to the contents of the notebooks, and second, evidence of the analysis Mr Wall had undertaken of the financial material that had been provided to him in relation to the unexplained wealth of the appellant.

[61] In his evidence, Mr Wall demonstrated his methodology, including by identifying the particular records he had regard to, his assumptions and the calculations he made.

[62] Counsel for the appellant was able to cross examine Mr Wall concerning his assumptions and to challenge the basis for his conclusions concerning unsourced funds. Indeed, counsel did cross examine Mr Wall on one aspect and obtained his concession that the appellant could have sourced funds from periods outside the indictment period. Counsel urged the jury to reject Mr Wall's conclusions because of this.

[63] Her Honour reminded the jury of the limitation that the appellant's counsel had identified during his cross-examination concerning Mr Wall's failure to

[15] See, eg, *ASIC v Rich* (2005) 190 FLR 242 at 315 [309]–[311].

take account of funds derived from periods outside the indictment period, and told them that this is 'a matter you need to take into account whether you accept or reject his opinion.' She also told them that if they 'accept that the opinion is not based on proper assumptions, if it causes you doubt, you may of course reject it.'

[64] In any event, the evidence of cash and similar payments was substantial and compelling and was the kind of evidence that the jury was entitled to take into account in determining whether the appellant had significant unexplained wealth[16], irrespective of Mr Wall's evidence. Her Honour reminded the jury of this evidence in her summing up.

[65] The appellant's case on appeal relied in part on what was said to be the Crown's 'theory' that 'the 'unsourced funds' of $847,208.21 equated neatly with the figure for net profit and it was reasonable to assume therefore that the unsourced funds were the product of drug sales'.

[66] However, no such 'theory' was asserted by Mr Wall, or otherwise by the Crown. The closest the Crown came to suggesting a link between the two was in summing up when counsel told the jury that Mr Wall's conclusion that the appellant's net profit would have been about $975,000 (assuming 20% profit on the sale of about $4.8M worth of drugs) 'seems to sit pretty well with the sort of expenditure that we see from the information that's been provided to you by the prosecution about financial activities of the

[16] Cf *R v O'Driscoll* (2003) 57 NSWLR 416 at 42 [79] per Spigelman CJ.

accused over that period.' Counsel then added that he forgot to include the $140,000 that was found at the appellant's house, and that 'if you disregard the proposition that it was money that Mr Poullos gave him – I think you can pretty easily do that - that's another $140,000 of unexplained wealth that you've got to add to the amount of resources that the accused had over that period.'

[67] We do not consider that there was any error in allowing this evidence to be given. Ground 3 must fail.

[68] So too must ground 6. Even if some of Mr Wall's evidence could be properly classified as expert evidence, which we doubt, her Honour gave extensive directions as to the way in which the jury should assess and treat expert evidence, including Mr Wall's evidence. At several points her Honour pointed out that the jury could reject the opinions of an expert where not satisfied of underlying facts or assumptions.

Ground 4 — Evidence of Superintendent Noy

[69] Apart from the contention in the appellant's written outline of submissions that Superintendent Noy 'did not display the requisite expertise to give the evidence he did' and that 'the evidence of Wall gained nothing from the evidence of Noy' no further submissions were made in support of this ground.

[70] Counsel for the appellant did not take any objection to the admissibility of Superintendent Noy's extensive evidence, including his considerable

experience in drug investigations. Moreover, the particular evidence complained of was elicited by counsel for the appellant in his cross examination.

[71] Evidence regarding drug terminology and the meaning of symbols and words of the kind found in the notebooks seized from the appellant's residence has been held to be admissible, where adduced from a witness sufficiently experienced in drug investigations.[17]

[72] We do not consider that this ground has been made out.

Ground 5 — Aggregate of errors

[73] In his written outline of submissions the appellant contends that 'in the event that no single error persuades the court that a miscarriage of justice has taken place, once the above errors are aggregated, a miscarriage of justice has arisen and the convictions should be set aside.'

[74] With the exception of our conclusion that the prosecution should have provided prior notice of its information concerning the alleged drug transaction on 1 February 2011, we have not found any errors of the kind asserted in the grounds of appeal. In relation to that error, we concluded that there was no miscarriage of justice, partly in light of her Honour's direction, and partly because, putting aside the evidence of that alleged drug transaction, there was an abundance of evidence upon which the jury could safely rely to reach their verdict.

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[17] Cf *R v Jesson* (2009) 24 NTLR 86 at 111 [109] – [111]. See also *Nguyen v R* (2007) 173 A Crim R 557.

[75] The prosecution case was overwhelming. We do not consider that a miscarriage of justice has been demonstrated.

Disposition

[76] As none of the grounds have been made out, we dismiss the appeal.
