IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

Redacted for Publication

BETWEEN:

No. S 313 of 2013

DO YOUNG (aka JASON) LEE
First Appellant

10 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
20 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
30 facts set out in the appellant's written submissions ("AWS"), the respondent takes issue

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with some of the assertions made therein. The statement of factual issues below supplements the facts set out by the appellant only to the extent necessary to address the appellant's legal argument

6. On 25 February 2009 at 12:30am the appellant was a passenger in a vehicle being driven by Jong Park, which was stopped by police for speeding. When the two men failed to produce identification they were asked to empty their pockets. The appellant produced a large amount of rolled notes and two mobile telephones. When the police searched the vehicle they located $95,000 cash, $175,000 worth of Star City Casino chips and a diamond worth $8,000 as well as small amounts of ecstasy and cocaine. The appellant participated in an electronically recorded interview in which he admitted ownership of the cash, the casino chips, the diamond and the prohibited drugs. As a result the appellant was charged with the offences set out at AWS [7].[1] Those charges have not yet proceeded to a hearing.

7. On 24 August 2009, the New South Wales Crime Commission ("NSWCC") commenced an investigation known as the "Swansea Reference" into the drug trafficking activities of the appellant, his son Seong Won Lee (the second appellant) and Brendon Pak.[2] There is no evidence that that inquiry was connected to the extant charges against the appellant.

8. [redacted]

9. On 7 December 2009 a search warrant was executed on the premises in Waterloo ("the Waterloo premises"), which comprised a two bedroom unit in a security building. At the commencement of the recording of the execution of the search warrant (a DVD of which was tendered at trial and became exhibit B), Detective Senior Constable Arnold states, "*We believe that the occupant who normally resides here is an individual by the name of Seong Lee*". No person was present at the time of the execution of the warrant, however

[1] Affidavit of Anna Wheeler sworn 21 August 2012, Annexure A (Appeal Book ("AB") Vol. 4, pp. 2104–2106).
[2] Affidavit of Timothy O'Connor sworn 21 August 2012, Annexures C and D (AB Vol. 4, pp. 1723–1727).
[3] Affidavit of Timothy O'Connor sworn 21 August 201, Annexure E (AB Vol. 4, p. 1729).

while the search was in progress the second appellant, Seong Lee, arrived and admitted to living at the unit. He told police that he occupied the smaller of the two bedrooms.

10. The main bedroom, the larger of the two bedrooms, had a lock on the door. This locked bedroom was fully furnished and contained clothing, documentation and other items. The Crown case at trial was that although the appellant no longer resided at the Waterloo premises, he had control of what was in the locked room and possession of its contents. The second appellant was never charged with the possession of items found in the locked bedroom.

11. Police searched the main bedroom and found in a corner next to the bedroom cupboard three white plastic bags full of white powder and a black garbage bag, which in turn contained a green washing powder box similar to those found in the laundry cupboard containing white powder.[4] Police then searched the cupboard in the main bedroom and located $723,800[5] in notes in heat sealed plastic bags inside a sports bag (Exhibit S). On top of the sports bag was a Panasonic camera box (Exhibit O), which contained a six chamber revolver: Exhibit Q.[6] A purple folder was also found in the cupboard containing items including a document entitled "*How to Cook Meth*" (Exhibit R) with the appellant's fingerprint on it (CCA at [219]), a personal letter from the appellant to his wife (see CCA at [220] (AB Vol. 5, p. 2315)) and $15,000 in loose $50 notes.[7] Police also found $408,200[8] in notes in small plastic bags inside another larger plastic bag under the mattress on the bed in the main bedroom. The total of these three separate findings of money was $1.147 million: CCA at [99(b)] (AB Vol. 5, p. 2270).

12. A Louis Vuitton box located at the foot of the bed in the main bedroom contained numerous documents connected with the appellant including a court document, a document written in Korean (exhibit W) found to have the appellant's fingerprint on it, a translation of which included the words "tablets", "vacuum", "compressor" and "detergent"; a document written in Korean (exhibit BX), a translation of which included

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[4] See exhibit B; Transcript, 31 January 2011 [erroneously date stamped "29/03/12"], p. 11, lines 25–36 (Crown opening) (AB Vol. 1, p. 84, lines 28–35); p. 38, lines 44–47 (AB Vol. 1, p. 141, lines 44–47).

[5] Transcript, 2 February 2011, p. 44, line 11 (AB Vol. 1, p. 147, line 19).

[6] Transcript, 31 January 2011 [erroneously date stamped "29/03/12"], p. 10, line 24 (AB Vol. 1, p. 83, line 30); Transcript, 1 February 2011, p. 39, lines 42–43 (AB Vol. 1, p. 142, lines 45–46) and p. 51, lines 24–40 (AB Vol. 1, p. 154, lines 29–40).

[7] Transcript, 2 February 2011, p. 52, lines 37–38 (AB Vol. 1, p. 155, line 40); p. 53, lines 12–20 (AB Vol. 1, p. 156, lines 20–27).

[8] Transcript, 3 February 2011, p. 89, line 23 (AB Vol. 1, p. 192, line 28).

the words "detergent" and "vinyl"; financial transaction documents in Korean, in the appellant's name and concerning amounts ranging from $10,000 to $100,000 (exhibit AA); an application for tenancy by the appellant nominating Brendon Pak as his referee and describing his relationship with him as "brother" (exhibit AC) and a document translated into English from Korean listing words associated with chemistry and drugs including pseudoephedrine and Sudafed (exhibit D).

13. A shoe box was located adjacent to the television set in the main bedroom containing a receipt from Bing Lee in the appellant's name for a Panasonic camera battery (exhibit AF). This camera battery was linked to the Panasonic camera box in which the weapon was found in the sports bag in the cupboard.[9] The shoe box also contained an AGL Energy Australia application form (exhibit AG). The form contained a reference to the appellant and another address in Chifley. This Chifley address became relevant in the trial as another green box of laundry powder was found there. There was also a television cabinet in the main bedroom that contained court documents in the appellant's name.[10]

14. The appellant was charged on 14 December 2009 with possession of the money and the weapon found in the locked room as well as the weapons found in the laundry cupboard. The appellant declined to be interviewed by police. His solicitor subsequently provided police with a letter asserting that at the time of the execution of the search warrant the appellant did not live at the Waterloo premises: exhibit AU.

15. At no time after the execution of the search warrant was the appellant ever questioned by the NSWCC.

16. On 13 May 2010, after testing was complete, the appellant was charged with two counts of supplying a commercial quantity of pseudoephedrine pertaining to the 31.446 kg of washing powder found in the laundry cupboard and the 13.566 kg found in the locked bedroom.

17. On 17 November 2010 the joint trial was listed for hearing. The Crown Prosecutor with carriage of the trials in November 2010 was not the Crown Prosecutor who ultimately conducted the trial. On that day the Court was advised that senior counsel for the appellant intended to make an application to sever counts on the indictment against his

[9] See Transcript, 3 February 2011, p. 99, line 45–p. 100, line 2 (AB Vol. 1, p. 202 line 50–p. 203, line 2); 2 February 2011, p. 47, line 29 – p. 48, line 4 (AB Vol. 1, p. 150, line 32–p. 151, line 12).
[10] See Exhibit B.

client[11] and there was a potential argument about the relevance and admissibility of the $1.147 million on the drugs charges.[12]

18. In the course of further pre trial proceedings on 23 November 2010 the then Crown Prosecutor made reference to the NSWCC examination transcripts of the appellants and the fact that he had read those documents.[13] This was when senior counsel appearing for the appellant first became aware that his instructing solicitor been served with the examination transcripts.[14] Before the appellant had formally made his application for the money laundering count to be severed from the indictment, foreshadowed on 17 November 2010, the trial judge ruled that the count ought to be severed. This was on the basis that the Crown wished to rely on evidence about funds in a company associated with the appellant and their bona fides or otherwise in that trial.[15]

19. Counsel for the appellant then sought to challenge the admissibility of the evidence of the finding of the $1.147 million in the bedroom at the appellant's trial on the drugs and firearms offences. The basis of the challenge was the probative value of the evidence was outweighed by the unfair prejudice that would arise in the mind of the jury. In the course of making that application, senior counsel for the appellant made reference to a proposed defence to the money laundering charge, [redacted].[16] The trial judge ruled that the probative value of the evidence outweighed the prejudicial effect and admitted the evidence.[17] The trial was stood over until January 2011.

20. The trial was due to commence on 20 January 2011 but could not as there was no available jury panel. On that day the new Crown Prosecutor, Michael Barr, in the context of a discussion of outstanding pre-trial issues, made reference to particular evidence. He said that he was not aware whether or not the appellant proposed to assert that the $1.147 million found in the bedroom had a legitimate explanation but if the appellant did intend

[11] Transcript, 17 November 2010, p. 1, lines 41–43; Indictment (AB 2–4).
[12] Transcript, 17 November 2010, p. 10, lines 40–41; p. 11, lines 30–31.
[13] Transcript, 23 November 2010, p. 2, lines 31–33 (AB Vol. 1, p. 30, lines 35–37).
[14] Transcript, 23 November 2010, p. 3, line 10 (AB Vol. 1, p. 31, lines 18–19).
[15] Transcript, 23 November 2010, p. 4, lines 24–39 (AB Vol. 1, p. 32, lines 29–40).
[16] Transcript, 23 November 2010, p. 12, lines 37–39 (AB Vol. 1, p. lines 39–41)
[17] Transcript, 23 November 2010, p.13, lines 47–50 (AB Vol. 1, p. 41, lines 47–50).

to lead evidence that the money was legitimate, the Crown had evidence to show that the appellant was engaged in false record keeping in that regard.[18]

21. The evidence that the Crown Prosecutor referred to was seven induced statements obtained in the course of the investigation into the appellant's activities ("the seven statements"). Those statements were taken from seven persons who each acknowledged that financial documents, purporting to be evidence of money transfers between the signatories and the appellant, were false. [redacted] It is agreed by the respondent that the copies of the Korean language documents annexed to the seven statements that were served as part of the Crown brief of evidence on 28 October 2010 were copies of the compelled documents: see CCA at [134] (AB Vol. 5, p. 2282). Relevantly identical documents were also located in the locked bedroom during the course of the search warrant and seized: see AWS at [11]; CCA at [136] (AB Vol. 5, p. 2282), [146] (AB Vol. 5, p. 2286); see also exhibit AA.

22. On 24 January 2011, before the first trial (which was aborted) commenced, senior counsel for the appellant told the trial judge that the only issue in the trial was possession.[19] On 31 January 2011, the appellant's trial counsel opened to the jury on the basis that although the appellant did not dispute a previous connection with the room and that some of his documents were still there, the Crown could not prove "*the relevant nexus, connection, ability to take control and possession of that unit in December 2009*".[20] The seven witnesses were never called to give evidence in the trial. No further reference was made to them.

23. The appellant's initial ground 1 in his appeal to the CCA was "*[t]he Trial miscarried by virtue of an irregularity going to the root of the proceedings, namely the illegal release of the appellant's compulsory examination before the NSW Crime Commission to the DPP and its use by the prosecutor in the trial*". Ground 1 below was subsequently amended to become amended ground 1(a) and a further ground was added which became amended ground 1(b) and was in these terms: "*there was a miscarriage of justice in the appellant's trial, occasioned by the use of the documents and evidence compelled from the appellant*

[18] Transcript 20 January 2011, p. 9, lines 29–30 (AB Vol. 1, p. 67, lines 33–34).
[19] Transcript, 24 January 2011, p. 8, lines 47–50.
[20] Transcript 1 February 2011, page 17, lines 24–32 (AB vol 1, p. 114, lines 30–37).

on or about 26 November 2009 and 1 December 2009 in the brief of evidence and the trial of the appellant on charges of supply prohibited drugs and possession of a revolver": see CCA at [9] (AB Vol. 5, p. 2237).

24. On 12 November 2012 the CCA heard evidence directed to grounds 1(a) and (b). The affidavit evidence of Michael Barr, Crown Prosecutor, was that he had a recollection of reading the transcripts of the appellant Jason Lee but no recollection of reading the transcripts of the examination of the second appellant.[21]

25. When cross examined about whether he had read the transcript of any pre trial applications Mr Barr said he would have done so if they formed part of his brief but he could not recall reading any on this occasion.[22] He agreed that the Crown case at trial was that the money, drugs and weapons were interlinked and the money was evidence in support of the drug charges.[23] Mr Barr gave evidence he did not intend to tender or otherwise refer to the Crime Commission material during cross-examination.[24] He also stated that it was "*interesting*" to have the material and "*informative*".[25]

Alleged misstatement of appellant's argument below

26. The respondent does not accept that the CCA misstated the appellant's argument in any material way (at [19] (AB Vol. 5, p. 2240)): see below at [34]. The CCA correctly described the appellant's argument in relation to the compulsorily produced documents as asserting that the release to the prosecutor of the statements annexing the compelled documents gave rise to a miscarriage of justice: at [28] (AB Vol. 5, p. 2243). Such a contention is consistent with the appellant's argument in this Court. As to the CCA's comment (at [57] (AB Vol. 5, p. 2257)), "*it was accepted that neither s 18B, nor any other provision of the NSW Crime Commission Act, provided what is commonly described as 'derivative use immunity'...*" it is true that this applicant did not accept that construction of the ***NSW Crime Commission Act* 1985** (NSW) ("***NSWCC Act***"). But this remark (at CCA [57] (AB Vol. 5, p. 2257)) was in the context of setting out the statutory scheme for examinations and was not returned to when considering the question of whether there had been a miscarriage of justice in relation to the compulsorily obtained documents. As the CCA found: "*The documents evidencing 'reverse money transfers'*

[21] Affidavit of Michael Barr sworn 18 September 2012 at [2] (AB Vol. 4, p. 2108).
[22] Transcript, 12 November 2012, p. 47, lines 35–50 (AB Vol. 3, p. 1162, lines 38–51).
[23] Transcript, 12 November 2012, p. 47, lines 35–45 (AB Vol. 3, p. 1163, lines 32–45).
[24] Transcript, 12 November 2012, p. 52, lines 5–18 (AB Vol. 3, p. 1167, lines 11–25).
[25] Transcript, 12 November 2012, p. 55, lines 14–19 (AB Vol. 3, p. 1170, lines 21–25).

were found in the Waterloo apartment and were in any event available to be tendered": at [146] (AB Vol. 5, p. 2286).

27. The CCA correctly stated the appellant's argument (at [134] (AB Vol. 5, p. 2282)) as being that the miscarriage relied upon arose from the disclosure of the compelled material to the prosecutor. The reference to the appellant not objecting to the examinations and production of documents in that paragraph is a reference to not challenging or refusing to comply with them. No misstatement of argument is contained in [137] (AB Vol. 5, p. 2282–2283), which is dealing with a statement of law concerning s. 18B of the ***NSWCC Act*** and the fact that if the appellant had objected to the tender of the compelled documents at trial they would not have been admissible.

Part VI: RESPONDENT'S ARGUMENT

28. In summary, the respondent submits:

(a) The CCA did not err when it found:

I. The appellant was not examined on extant charges or matters the subject of the trial: CCA at [70], [85], [86] (AB Vol. 5, pp. 2261–2262; 2267); and

II. The content of the disseminated material was irrelevant to the trial as it ran: CCA at [147] (AB Vol. 5, p. 2286).

(b) The appellant has not established any link between the disclosure of the compulsorily obtained material and the Crown's reliance upon the money found in the locked bedroom at the Waterloo premises at trial. Nor is there any indication that the appellant determined to conduct his defence in the manner he did as a result of the disclosure of the transcripts or compulsorily produced documents to the prosecution. The facts surrounding the discovery by police on 7 December 2009 of the drugs, gun and money together in the locked room dictated the conduct of both the defence and prosecution. That conduct was not affected by either the fact or content of the disclosure. Nor has the appellant established any other possibility of unfairness.

(c) 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 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, p. 2289–2290). The term "*practical unfairness*" was not

an attempt by the CCA to describe a legal test for determining miscarriage within the third limb of s. 6(1) of the ***Criminal Appeal Act***, but rather a factual finding as to the lack of any possibility of unfairness proved to the satisfaction of the CCA.

No examination as to the subject matter of the trial

29. No issue as to whether a miscarriage of justice was occasioned in this matter arises because the compulsory examinations of the appellant on 26 November 2009 and 1 December 2009 did not touch upon the subject of any drugs or weapons later found in the Waterloo premises on 7 December 2009, being the only charges upon which the appellant was indicted and convicted and which convictions he now appeals against. Nor were the appellant's extant charges as at the time of the examination directed at his cash reserves: cf AWS [45]. Rather, they were charges pertaining to him being pulled over in a car and found to be in possession of certain property, including money: see above at [7]. There was no evidence that that had anything to do with the Swansea reference. The contrary assertion (at AWS [9]) that the examinations "*touch[ed] upon the matters with which he was about to be charged*" is based on an opinion expressed by Timothy O'Connor in cross examination in the CCA on 12 November 2012 concerning events in May 2010. Senior counsel for the co-appellant had earlier asked Mr O'Connor whether the drug charges against both appellants were imminent at the time of the request by police on 4 May 2010 for copies of the examination transcripts.[26] In this context, when asked whether the appellant's examination "*touched on the matters about which he was about to be charged*", being the drug charges the appellants were charged with on 13 and 17 May respectively, Mr O'Connor agreed.[27] This could not be correct on the available timeline. The CCA correctly found that the appellant was not examined on extant charges or matters the subject of the trial: CCA at [70], [85], [86] (AB Vol. 5, pp. 2261–2262; 2267).

30. The compulsorily obtained material did not disclose a defence to the charges that a commercial quantity of pseudoephedrine and a gun had been located in the locked room at the Waterloo premises nor to the charges against the appellant pertaining to what was located in the laundry cupboard. It was not demonstrated that the Crown Prosecutor gained any forensic advantage that was not otherwise available to him from the documents seized during the execution of the search warrant. In the circumstances it

[26] Transcript, 12 November 2012, p. 20, lines 35–42 (AB Vol. 3, p. 1134, lines 38–45).
[27] Transcript 12 November 2012, p. 22, line 40 (AB Vol. 3, p. 1136, line 42).

could not be said that there had been a "*fundamental alteration to the process of criminal justice*" on the facts in this case: ***X7 v Australian Crime Commission*** (2013) 248 CLR 92 at 140 [118], per Hayne and Bell JJ.

31. The respondent conceded in the proceedings below that the appellant's NSWCC examination transcripts were not lawfully disseminated to the prosecution, the dissemination seemingly not having been for a proper purpose: see CCA at [146] (AB Vol. 5, p. 2286). The concession involved an acknowledgment that the dissemination of the appellants' transcripts breached a non-publication order made pursuant to s. 13(9) of the ***NSWCC Act***: see CCA at [124] (AB Vol. 5, pp. 2278–2279). The respondent made no concession in relation to the [redacted]

The respondent submits that at the time of the dissemination, any risk of prejudice was to the pending money laundering charge, which at that stage was to be run as part of a joint trial on all counts. The respondent repeats his submissions in the second appellant's case at [24]–[25] as to the significance of the concession.

32. The seven statements [redacted] and which showed the appellant was falsifying his sources of income had no bearing on the issues at trial. Although the appellant's counsel indicated to the court on 23 November 2010 that his client admitted he owned the money found in the locked room,[28] it was never suggested that such an admission would be made at the trial. If such an admission was made at the trial the appellant's defence would have involved him admitting possession of the money in the black sports bag but not the weapon found in the same bag, admitting possession of the money inside the purple folder in the cupboard but not the document headed "*How to Cook Meth*" with his fingerprint on it in the same folder and possession of the money under the bed but not to the commercial quantity of pseudoephedrine found nearby, some of which was found in a green washing powder box imported by Brendon Pak, a man he had a close connection with as evidenced by another document found in the locked room. In the circumstances it is not surprising that the appellant does not suggest that the conduct of his defence was constrained in any way by his decision not to admit ownership of the money at the trial.

[28] Transcript, 23 November 2010, p. 9, lines 38–43 (AB Vol. 1, p. 37, lines 40–45).

33. The factual record before the CCA does not suggest that the appellant's defence was constrained by the prosecution's possession of the appellant's examination transcripts. [redacted] his case at trial was that the Crown could not prove he was in possession of the items in the locked room as at 7 December 2009: see above at [22]. Had the applicant admitted possession of the money found in the locked room [redacted] the Crown would have relied upon that admission to invite the jury to infer that the applicant possessed *all* of the items in the room.

34. The CCA's observation (at [14] (AB Vol. 5, p. 2239)) that Ground 1(b) "*in fact raised little more than [the compelled material's] availability in the prosecutor's brief*" correctly describes the argument made on behalf of the appellant in the CCA, which focussed on the possession by the Crown Prosecutor of the seven statements.[29] The CCA's remark (at [147] (AB Vol. 5, p. 2286)) that "*it was no part of the appellant's case that the content of the documents released in fact precluded a forensic strategy available to the defence*" also reflected both the oral argument and evidence before the CCA that no specific use of the documents need be identified. The appellant now seeks to develop its assertion to the CCA that there was a possibility that the Crown Prosecutor "*had an unfair advantage of knowing material that it ought not to have in either preparation or conduct of its case*"[30]. In so doing the appellant submits that the Crown Prosecutor "used" the disclosed material in a number of ways enumerated at AWS [35].

No connection between dissemination and respondent's reliance on money found at Waterloo

35. Underpinning the appellant's submissions as to the respondent's "use" of the compelled material at trial is a suggestion that there was some relationship between the Crown Prosecutor's reliance upon the $1.147 million found in the locked bedroom at the Waterloo premises and the dissemination of the Crime Commission transcripts. There is no evidence to infer this and the physical evidence suggests otherwise.

36. The $1.147 million in cash was found in three separate locations in the locked bedroom at the Waterloo premises: see above at [11]. The central issue at trial on count 8 (concerning

[29] See transcript, 13 November 2012, p. 3, lines 30–31 (AB Vol. 5, p. 2177, lines 35–36); p. 6, lines 3–13 (AB Vol. 5, p. 2180, lines 11–23); p. 11, lines 10–11 (AB Vol. 5, p. 2185, lines 18–19).
[30] CCA transcript, 13 November 2012, p. 6, lines 3–5 (AB Vol. 5, p. 2180, lines 11–13).

the drugs found in the locked bedroom) was whether the Crown could prove beyond reasonable doubt that it was the appellant who alone (or together with a person acting jointly with him) had access to the room and hence possessed the items within as at 7 December 2009. That was sought to be established by the fact that a number of documents and personal effects belonging to the appellant were found in the locked room together with the drugs and gun: see [11]–[13] above. The appellant's defence was that the Crown could not prove possession of the drugs and gun as at 7 December 2009. In doing so the appellant relied upon matters such as the state of the unit which suggested other people were living there, that there was evidence that he lived elsewhere, that there was no evidence he had a key to the bedroom – or indeed to the Waterloo premises – and that there was DNA from unidentified persons on the papers and toothbrushes in the locked bedroom.[31] These facts were relied upon on the appeal to the CCA in support of ground 3, namely that the verdicts against the appellant were unreasonable: see CCA at [218] (AB Vol. 5, pp. 2314–2315).

37. It is unsurprising that a prosecutor in such a case would resist an application to exclude evidence that over a million dollars in cash was found in sealed plastic bags in the vicinity of a commercial quantity of a prohibited drug because, together with the finding of the gun and the document "*How to Cook Meth*", it was such strong evidence of supply: see CCA at [220] (AB Vol. 5, p. 2315). No possible prejudice from the dissemination of the compulsory examination transcripts arose in relation to the finding of the $1.147 million, because that money had not been found at the time of the compulsory examination and was unrelated to the examination. The prosecution's approach to the trial bore no relationship to the trial prosecutor's possession of the NSWCC transcripts and there is no evidence to support this assertion: cf AWS at [35]. The suggestion that Mr Barr relied upon the money in the locked bedroom [redacted] was never put to Mr Barr in cross examination, nor does it arise as an available inference from the trial transcript. The objection to the evidence was on the basis of unfair prejudice,[32] but the trial judge ruled that the $1.147 million had probative value as indicia of supply or a 'circumstance' in the Crown case and

[31] Transcript, 9 March 2011, p. 1115, lines 3–5; 16–26 (AB Vol. 2, p. 802, lines 12–15, 25–32); 10 March 2011, p. 1168, lines 32–46 (AB Vol. 2, p. 855, lines 37–49), p. 1169, lines 3–28 (AB Vol. 2, p. 856, lines 12–35), p. 1176, lines 23–38 (AB Vol. 2, p. 863, lines 29–42); p. 1184, line 12–p. 1185, line 4 (AB Vol. 2, p. 871, line 20–p. 872, line 12).

[32] Transcript, 23 November 2010, p. 12, lines 24–33 (AB Vol. 1, p. 40, lines 28–37).

admitted it.[33] The trial judge did not make a finding on 23 November 2010 that the evidence of the money found in the locked room was admissible in the trial "*even if this meant raising a defence disclosed under compulsion*": cf AWS [34].

38. A further alleged use by the Crown Prosecutor of the compelled material was to "*influence the decision by the appellant as to whether or not to give evidence in his trial*": see AWS at [35], [48]. If the appellant had ever proposed to give evidence (a fact about which there was no evidence before the CCA and no finding below) nothing in the NSWCC material disseminated to the Crown Prosecutor was relevant to the question of who possessed the items in the locked room. There is no evidence to draw an inference, contrary to Mr Barr's evidence,[34] that he used the compelled documents to "*influence that decision*": cf AWS [21]. The fact remains, as the CCA held (at [147] (AB Vol. 5, p. 2286)), that the compelled material was irrelevant to any issue at trial. The evidence concerning the compelled documents (the seven statements) could only have been relevant if the appellant had admitted possession of some of the items in the room from the outset, such as his documents and money, but not the drugs and weapon, in circumstances where the gun was found on top of the same sports bag as some of the money.

39. Contrary to the appellant's submission (AWS at [35]–[36]), Mr Barr's evidence under cross-examination does not establish that the trial prosecutor relied on the NSWCC transcripts in any way to develop a "trial strategy". The transcript of trial indicates that the Crown's "trial strategy" was a simple one, based on the fact that the search warrant carried out by police revealed the drugs, money and a gun all in close proximity in a locked room, which also contained personal documents of the appellant. Mr Barr's evidence was that he had read the transcript of the appellant's examination but he "*would not have given them a thorough reading and may have only skimmed through them*".[35] The reason for the superficial reading was because of his awareness that they were not admissible. During cross examination the Crown Prosecutor said, inter alia, "*we weren't intending to use any of that material*"; "*I knew we couldn't use it*"; and "*we weren't in a position to use the Crime Commission material.*"[36]

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[33] Transcript, 23 November 2010, p. 13, lines 13–17 (AB Vol. 1, p. 41, lines 20–24).
[34] Transcript, 12 November 2012, p. 55, line 12 (AB Vol. 3, p. 1170, line 20).
[35] Affidavit of Michael Barr affirmed 18 September 2012 at [4] (AB Vol. 4, p. 2108).
[36] Transcript, 12 November 2012, p. 51, line 9 (AB Vol. 3, p. 1166, line 18), p. 51, line 17 (AB Vol. 3, p. 1166, lines 23–24), p. 52, lines 11–12 (AB Vol. 3, p. 1167, lines 18–19).

40. The appellant further contends that [redacted] were used to obtain the seven statements: AWS at [35]. This was the focus of the argument on ground 1(b) in the CCA, as Basten JA noted during the hearing.[37] The CCA did not err in finding that [redacted] were available to be tendered at the trial as copies had been found in the Waterloo premises during the search warrant, nor that it was difficult to articulate any practical unfairness deriving from the disclosure of the NSWCC transcripts to the prosecutor because nothing in them was relevant to the trial as it in fact ran: at [146], [147] (AB Vol. 5, p. 2286).

41. The fact that it was investigators at the NSWCC who obtained the seven statements [redacted] rather than investigating police does not answer the question of whether the appellant's trial miscarried: cf AWS at [48]. As the CCA found (at [136] (AB Vol. 5, p. 2282); see also at [146] (AB Vol. 5, p. 2286)), police not associated with the NSWCC could have carried out precisely the same investigations and inquiries using the documents obtained during the search of the Waterloo premises. There is nothing to suggest that those police could not have made the same inquiries as did the NSWCC about the nature and purpose of the documents found in the locked bedroom, by questioning the persons whose names appeared on the documents quite separately from any knowledge of the contents of the appellant's examination transcripts. In these circumstances it could not be said that the prosecution received "*advantages which the rules of procedure would otherwise deny*": ***Lee v NSW Crime Commission*** (2013) 87 ALJR 1082 at 1155 [322] per Gageler and Keane JJ.

42. No "use" of any compulsorily obtained material by the Crown Prosecutor, or indeed any other person associated with the prosecution at trial, has been established. Nor has any constraint on the manner in which the appellant conducted his trial be inferred from the facts in this case. The Crown case against the appellant on counts 5 and 8 relied upon what was found in the locked room at the Waterloo premises. The record of the trial shows that the appellant was not precluded from strenuously contesting every aspect of the Crown case on counts 5 (the weapon) and 8 (the pseudoephedrine) being the two counts pertaining to what was found in the locked room.

[37] Transcript, 13 November 2012, p. 11, lines 10–11 (AB Vol. 5, p. 2185, lines 18–19).

No error in test for miscarriage of justice

43. It was the failure on the appellant's part to meet the evidentiary onus of establishing any possibility of unfairness to the conduct of his trial that led to the appeal being dismissed by the CCA. The reference by Basten JA to the appellant being unable to show any "*practical unfairness*" was a finding that no possibility of unfairness was established on the facts such that the third limb in s. 6(1) of the ***Criminal Appeal Act*** was engaged at all. On the facts in this case, and with the benefit of being able to examine how the trial proceeded (as opposed to speculating about a pending trial for the purposes of a stay application), the CCA was not satisfied that the trial had miscarried.

10 44. The concept of miscarriage within the third limb of s. 6(1) is wide, covering as it does a miscarriage of justice on "*any other ground whatsoever*" beside an unreasonable verdict or a wrong decision of any question of law. It includes failures of process as well as of outcome (***Nudd v The Queen*** (2006) 80 ALJR 614 at 617 [3], 618 [6]). The CCA's judgment reflects a proper application of these principles, which are summarised at [29]–[37] (AB Vol. 5, pp. 2244–2246).

45. Later in the CCA judgment (at [157] (AB Vol. 5, p. 2289)), Basten JA considered a submission of the co-appellant that the "*prosector's possession of the appellant's compulsory interview was in breach of the protective prohibition contained in the New South Wales Crime Commission Act ... and consequently denied the appellant's right to a* 20 *fair trial*". His Honour correctly acknowledged, as held in ***R v Seller; R v McCarthy*** (2013) 273 FLR 155 at 183–184 [104] per Bathurst CJ, 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*" [emphasis added by Basten JA] but that the question is whether the disclosure has in fact jeopardised the fair trial in the particular circumstances of the case.

46. The CCA went on to articulate the application of this test (at [158] (AB Vol. 5, p. 2289–2290)): "*The 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* 30 *miscarriage of justice*". The CCA applied this test and concluded that the appellant had not established any "*practical unfairness*": CCA [147], [163], [164] (AB Vol. 5, pp. 2286, 2291). Viewed in the context of the authorities earlier cited and the reliance on ***Seller***

(at [157]), the use of this phrase is no more than a conclusion that, in this particular case, no possibility of unfairness was demonstrated such that the appellant's trial was compromised.

47. In requiring the appellant to demonstrate that something actually happened or didn't happen as a result of the dissemination that was capable of prejudicing his fair trial the CCA did not postulate a new or different test for miscarriage: cf AWS [42], [43]. The requirement when asserting a miscarriage based on a failure of process for an appellant to point to something that did or didn't occur which was capable of affecting the conduct of the trial is consistent with the authorities cited earlier in the judgment: CCA at [32]–[35] (AB Vol. 5, pp. 2244–2246). As Hayne, Crennan and Kiefel JJ observed in ***Cesan v The Queen*** (2008) 236 CLR 358, it did not answer the question of whether a miscarriage of justice was established in that matter to simply assert that the judge was sleeping, "*attention should focus upon the consequences of the trial judge falling asleep*": at 391 [112]. Similarly, to establish a miscarriage based on a claim of counsel's incompetence it is insufficient to merely assert that counsel was incompetent, consideration must be had to what did or did not occur at trial: ***Nudd v The Queen*** at 622 [24] per Gummow and Hayne JJ, citing ***TKWJ v The Queen*** (2002) 212 CLR 124. Consistent with these authorities the CCA held that it was not sufficient for the appellant to merely rely upon the unlawful dissemination to establish a miscarriage within the third limb of s. 6(1) of the ***Criminal Appeal Act***, instead it focussed on the consequences of the dissemination for the conduct of the trial and found that no possibility of unfairness had been demonstrated. This finding also reflected the way the argument proceeded in the CCA: see at [14], [146] (AB Vol. 5, pp. 2239, 2286).

48. It was open to the CCA to find that the fact that no complaint of unfairness was made prior to the commencement of the trial supported the finding that no unfairness had in fact arisen or was anticipated: CCA at [163] (under the heading "*Seong Won Lee's case*" (AB Vol. 5, p. 2291)). The transcript of the proceedings in the District Court show that senior counsel for the appellant was aware, two months before the trial commenced, that the Crown was in possession of the examination transcripts but no application was ever made in relation to that fact. The appellant submits that there was insufficient evidence to support such a conclusion and in so finding the CCA failed to take account of the affidavit evidence of Mr Sutherland (at [6] (AB Vol. 3, p. 1241)) and Mr Miralis (at [88]–[100] (AB Vol. 3, pp. 1257–1260): AWS at [47].

49. The transcript of the pre-trial proceedings on 23 November 2010 records Mr Sutherland expressing significant concern on being made aware of the Crown's possession of the transcripts.[38] In his affidavit Mr Sutherland confirmed this fact when he stated: "*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.*"[39] Mr Sutherland also stated that it didn't cross his mind at any time to make a stay application and that there was "*no forensic reason to not make a stay application*".[40] Senior counsel for the appellant in the CCA submitted that Mr Sutherland's affidavit had been filed as a "defensive manoeuvre" regarding rule 4 of the ***Criminal Appeal Rules***.[41] As Basten JA observed (at [139] (AB Vol. 5, p. 2283)), there was no suggestion that any conduct of Mr Sutherland led to the miscarriage nor was his competence impugned: the "contemporaneous" transcript was sufficient to ascertain what occurred. The CCA was entitled to infer that no unfairness was perceived. As Basten JA observed (at [145] (AB Vol. 5, pp. 2285–2286)) "*nothing further was said about the disclosure of information to the prosecutor from 23 November 2010 until the notice of appeal was given on 18 April 2012, some four months after the appellants had been sentenced*".

No application of the proviso by the CCA

50. The appellant seems to accept that the CCA correctly stated the relevant test for miscarriage (at [157], [158] (AB Vol. 5, pp. 2289–2290): see AWS at [42]) but contends that this test was not applied (AWS [42], [43]) and that instead the CCA applied a "*much higher and different test*". The appellant's contention that the CCA did not apply the test it set out (at [157], [158] (AB Vol. 5, pp. 2289–2290)) is based, in part, on the proposition that the appellant had established various forms of use of the compelled material about which the CCA did not make findings. The respondent submits that the appellant did not establish such use. Nor has the appellant established the second basis for asserting that the CCA applied a wrong test – that by using the language of "*practical unfairness*" the CCA appears to have equated the test for assessing miscarriage within the third limb with the application of the proviso: AWS at [50].

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[38] 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); CCA [140]–[142].
[39] Affidavit of Robert Sutherland sworn 17 October 2012, at [5] (AB Vol. 3, p. 1240).
[40] Affidavit of Robert Sutherland sworn 17 October 2012, at [6] (AB Vol. 3, p. 1241).
[41] Transcript, 12 November 2012, p. 91, line 40 (AB Vol. 5, p. 2164, line 42).

51. 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 on this ground. His Honour did not address himself to the negative proposition in ***Weiss v The Queen*** (2005) 224 CLR 300 at 317 [44]. Further, given that ground 3 of the appeal was that the verdicts in relation to the appellant were unreasonable, the CCA was required to consider the strength of the Crown case for the purpose of that ground and did so: at [211]–[225] (AB Vol. 5, pp. 2312–2317). Such an exercise would have been unnecessary had the CCA already undertaken this task as part of its consideration of ground 1.

10 52. Although Gageler J's remarks in ***Baini v The Queen*** (2012) 246 CLR 469 at 489–490 [54] are cited by the CCA (at [30] (AB Vol. 5, p. 2244)) as part of a summary of relevant decisions dealing with "miscarriage", there are no further references to that decision anywhere in the judgment on ground 1 nor to considerations of causation between irregularity and the guilt or otherwise of the appellant, the reasons for finding no miscarriage in the appellant's case being confined to the threshold issue of a lack of evidence of any irregularity or unfairness: see CCA at [150]–[165] (AB Vol. 5, pp. 2287–2292).

53. Although Basten JA used the words "*substantial miscarriage*" in passing in his discussion of cases involving stays of proceedings (at [63]), that is the only time that the word
20 "substantial" appears in his Honour's judgment on ground 1. The word is not used again when setting out the test to be applied: at [157], [158] (AB Vol. 5, pp. 2289–2290). Similarly, his Honour's reference to the notion of losing a "possibility of acquittal" (at [164] (AB Vol. 5, p. 2291)) directly follows a finding that "*[t]he high point of the case on ground 1 was that the prosecution had obtained, at their own request, the transcripts of interviews which should not properly have been provided by the Commission*". Given Basten JA's earlier conclusion that a "*possibility of unfairness*" had to be objectively established (at [157], [158] (AB Vol. 5, pp. 2289–2290)) and that something had to have "*occurred or did not occur*" in order to establish a miscarriage (at [34] (AB Vol. 5, p. 2245)), the finding that the appellant had not established anything beyond improper
30 provision of the material to the prosecutor indicates that his Honour was not satisfied of any irregularity in the trial. In the context of this threshold not having been reached, the reference to not having lost a possibility of acquittal would appear to be nothing more than a comment that other tests concerning miscarriages of justice, referred to earlier

(at [32]–[34] (AB Vol. 5, pp. 2244–2245)), also could not apply. In any event, the result did not ultimately turn on any test for the proviso's application

Part VIII: ESTIMATE OF LENGTH OF ORAL ARGUMENT

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

Dated: 28 February 2014

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