HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND GORDON JJ

PAUL JOSEPH RODI APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Rodi v Western Australia
[2018] HCA 44
10 October 2018
P24/2018

ORDER

1. *Appeal allowed.*

2. *Set aside orders 5 and 6 of the orders of the Court of Appeal of the Supreme Court of Western Australia made on 21 April 2017 and, in their place, order that:*

   (a) the appellant's application for an extension of time to appeal be granted;

   (b) the appeal be treated as instituted and heard instanter and allowed;

   (c) the appellant's conviction be quashed; and

   (d) a new trial be had.

On appeal from the Supreme Court of Western Australia

Representation

M D Howard SC and R R Joseph for the appellant (instructed by Norton Rose Fulbright Australia)

A L Forrester SC with L M Fox for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Rodi v Western Australia

Criminal law – Prohibited drug – Appeal against conviction – Fresh evidence – Miscarriage of justice – Where appellant convicted of possession of prohibited drug with intent to sell or supply it to another – Where expert witness gave evidence at trial casting doubt on credibility of appellant's testimony – Where expert witness gave evidence in earlier proceedings inconsistent with evidence given in appellant's proceedings – Where earlier inconsistent evidence not disclosed to appellant at trial – Where Court of Appeal of Supreme Court of Western Australia admitted expert witness's earlier inconsistent evidence as fresh evidence but determined that no miscarriage of justice had occurred – Whether miscarriage of justice occurred.

Words and phrases – "credible and cogent", "fresh evidence", "miscarriage of justice", "new evidence", "onus of proof", "significant possibility of acquittal", "yield".

Misuse of Drugs Act 1981 (WA), ss 6(1)(a), 11(a).

1 KIEFEL CJ, BELL, KEANE, NETTLE AND GORDON JJ. On 14 April 2012, police officers executed a search of the appellant's home. They located a total of 925.19 g of cannabis in the house. Subsequently, the appellant was charged on indictment in the District Court of Western Australia with one count of possession of a prohibited drug, namely cannabis, with intent to sell or supply it to another, contrary to s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA).

The trial

2 At the beginning of the trial, the appellant formally admitted that he was in possession of the cannabis found by the police[1]. Because of the quantity of cannabis found in the appellant's possession, he was deemed by s 11(a) of the *Misuse of Drugs Act* to have had the cannabis in his possession with intent to sell or supply it to another "unless the contrary [was] proved" by him.

3 The prosecution tendered evidence that the police, in searching the appellant's home on 14 April 2012, found a cardboard box and plastic shopping bags in the shower recess of the bathroom containing approximately 531 g of cannabis head. A set of electronic scales and scissors were also located in the shower recess. A box of clip seal bags was also found in the bathroom. About 364 g of cannabis head was found drying on a clothes rack set up on a bed in one of the bedrooms. A little more than 29 g of cannabis, clip seal bags containing cannabis seeds, and smoking implements were found in the laundry. Three cannabis plants, in poor condition, were found at the rear of the premises[2].

4 The appellant gave evidence that the cannabis was entirely for his personal use and not intended for sale. He said that all of the cannabis found in his house was harvested from two of the plants located at his home[3]. He said that he had grown the plants from seeds in pots, and that he used the cannabis to relieve pain in his back caused by injuries suffered at work and in a minor motor car accident[4].

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1 *Rodi v Western Australia* (2017) 51 WAR 96 at 100-101 [18]-[19].

2 *Rodi v Western Australia* (2017) 51 WAR 96 at 125 [164].

3 *Rodi v Western Australia* (2017) 51 WAR 96 at 106 [57], 129 [184].

4 *Rodi v Western Australia* (2017) 51 WAR 96 at 105 [55].

5 In cross-examination, the appellant said that he did not use the electronic scales or the clip seal bags to weigh and package cannabis for sale. He said that he intended to pack quantities of about 50 g of head material into 12 bags to be stored in his freezer after discarding about 35 per cent of the cannabis which was leaf material. He intended to use this stored material to ease his back pain over the next 12 months[5]. He said that the plants had taken nine months to grow to maturity[6].

6 As a result of the cross-examination of a prosecution witness by the appellant's counsel, the prosecutor, anticipating that the appellant would give evidence that all of the cannabis in his possession came from two of the plants found on his premises, called evidence from Detective Coen that it was his experience that[7]:

- mature naturally grown female cannabis plants typically yield between 100 g and 400 g of cannabis head material;
- it was rare to see a cannabis plant produce 300 g to 400 g of head material; and
- he would expect the yield from the two plants located at the rear of the appellant's house to be at the lower end of the 100 g to 400 g scale.

7 The appellant's counsel did not object to Detective Coen's evidence, or seek to cross-examine Detective Coen in respect of this evidence[8].

8 The jury returned a verdict of guilty. The appellant was sentenced to 12 months' imprisonment.

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5 *Rodi v Western Australia* (2017) 51 WAR 96 at 106 [57].

6 *Rodi v Western Australia* (2017) 51 WAR 96 at 106 [58].

7 *Rodi v Western Australia* (2017) 51 WAR 96 at 104-105 [47]-[48], 124 [159], 136-137 [224]-[225].

8 *Rodi v Western Australia* (2017) 51 WAR 96 at 105 [52].

The Court of Appeal

9 The appellant, having allowed the period within which to appeal to expire, sought an extension of time within which to appeal against his conviction. His proposed appeal was grounded in the contention that "as a result of fresh or new evidence a miscarriage of justice has occurred"[9]. His application for an extension of time was refused by a majority of the Court of Appeal of the Supreme Court of Western Australia (Buss P and Newnes JA; Mitchell JA dissenting) on the basis that there was no merit in his proposed appeal[10].

New evidence

10 The new evidence on which the appellant relied consisted of transcripts of testimony given by Detective Coen in earlier trials. These transcripts revealed that Detective Coen had previously given evidence to the effect that naturally grown female cannabis plants may yield between 300 g and 600 g of head material[11] ("the Earlier Coen evidence"). A yield above the mid-level of that range was, of course, consistent with the appellant's account that the head material in his possession had come from two of the three plants found at his house.

11 The prosecution had not disclosed the Earlier Coen evidence to the appellant at trial, and the appellant's counsel did not know of it.

12 The Earlier Coen evidence was admitted by the Court of Appeal pursuant to s 40(1)(e) of the *Criminal Appeals Act 2004* (WA), which allows an appeal court to "admit … other evidence" in its discretion[12].

13 The Court of Appeal also admitted additional evidence adduced by the State from Detective Coen[13]. He explained that he had changed his earlier opinion about cannabis yield per plant by reducing the range from 300 g to 600 g

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9 *Rodi v Western Australia* (2017) 51 WAR 96 at 108 [69].

10 *Rodi v Western Australia* (2017) 51 WAR 96 at 100 [9].

11 *Rodi v Western Australia* (2017) 51 WAR 96 at 125 [160].

12 *Rodi v Western Australia* (2017) 51 WAR 96 at 116-117 [106].

13 *Rodi v Western Australia* (2017) 51 WAR 96 at 116-117 [106].

to 100 g to 400 g after his own experiments and discussions with growers of cannabis about the subject[14]. He explained further that, in the witness statements he made after this change in his opinion, he qualified his evidence by referring to his previous views and explained that his opinion had changed[15]. It is convenient to note here that no such qualification was made by him in his evidence at trial in the present case.

14 In the Court of Appeal, Detective Coen also gave evidence under cross-examination to the effect that[16]:

- it was possible for a cannabis plant to yield less than 100 g, and that he has seen plants yield between 500 g and 600 g;
- he would not be surprised by a plant yielding between 500 g and 600 g; and
- in his experience, plants yielding very large amounts of cannabis were grown naturally (as the appellant's plants had been) rather than hydroponically.

15 Indeed, Detective Coen said that in one of his experiments he saw a naturally growing cannabis plant that yielded 600 g of head material[17].

16 In the Court of Appeal, the State also called evidence from Ms White of Counsel, who had been the State prosecutor at trial. Ms White's evidence was that she had no idea until the first day of the trial that the appellant's defence would be that the cannabis found inside his house came from the plants found growing outside his house[18]. Ms White said that it was only then that she thought to ask Detective Coen to give evidence of cannabis yield and in particular

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14 *Rodi v Western Australia* (2017) 51 WAR 96 at 109 [79].

15 *Rodi v Western Australia* (2017) 51 WAR 96 at 109 [81].

16 *Rodi v Western Australia* (2017) 51 WAR 96 at 110-111 [83(h)], 133 [209].

17 *Rodi v Western Australia* (2017) 51 WAR 96 at 137 [228].

18 *Rodi v Western Australia* (2017) 51 WAR 96 at 126 [167].

whether the cannabis found at the appellant's house could have come from the plants found outside his house[19].

The decision

17 Buss P (with whom Newnes JA agreed) accepted that the Earlier Coen evidence was fresh evidence in the sense that "the appellant could not have obtained prior to the trial, by the exercise of reasonable diligence and for use at the trial, details of Detective Coen's previous opinion on typical cannabis yields"[20]. His Honour was also prepared to assume, without deciding the point, that there had been a breach of the prosecution's duty of disclosure under s 95(6) of the *Criminal Procedure Act 2004* (WA) in relation to the Earlier Coen evidence[21].

18 Nevertheless, his Honour concluded that neither the fresh evidence nor the non-disclosure of the Earlier Coen evidence established that a miscarriage of justice had occurred. For the purposes of the appeal to this Court it is material to note that this was for reasons which included that[22]:

- once the appellant's possession of the cannabis was admitted, the State had no further onus of proof to discharge[23];
- the appellant called no expert evidence, and did not object to Detective Coen's giving of expert evidence on cannabis yields on the ground that he was not qualified to do so, or challenge his relevant evidence-in-chief in cross-examination[24];
- there was a reasonable explanation for defence counsel's decision not to challenge Detective Coen's opinion evidence about typical cannabis

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19 *Rodi v Western Australia* (2017) 51 WAR 96 at 127 [175]-[176].

20 *Rodi v Western Australia* (2017) 51 WAR 96 at 122 [140].

21 *Rodi v Western Australia* (2017) 51 WAR 96 at 122 [142].

22 *Rodi v Western Australia* (2017) 51 WAR 96 at 119-124 [118]-[151].

23 *Rodi v Western Australia* (2017) 51 WAR 96 at 119 [118].

24 *Rodi v Western Australia* (2017) 51 WAR 96 at 119-120 [119]-[124].

yields, and no incompetence on the part of defence counsel at trial was alleged[25]; and

- Ms White was an honest witness whose evidence should be accepted. In this regard, prior to the commencement of the trial Ms White did not know of the nature of the appellant's defence, or that typical yields from cannabis plants would be in issue in the trial[26].

19 In addition, and importantly, Buss P held that Detective Coen's explanation for his change in opinion on typical cannabis yields was "credible and cogent"[27].

20 While Buss P observed that the Earlier Coen evidence would have been admissible only as a prior inconsistent statement and not as proof of the facts stated[28], his Honour acknowledged that the evidence given by Detective Coen in cross-examination in the Court of Appeal was evidence that he had seen cannabis plants that yielded between 500 g and 600 g[29]. Nevertheless, his Honour went on to conclude that[30]:

> "there is no significant possibility that, on the whole of the trial record and the additional evidence, a fact-finding tribunal, acting reasonably, would be satisfied that the appellant has established on the balance of probabilities that he did not intend to sell or supply to another any of the 925.19 g of cannabis."

21 In dissent, Mitchell JA concluded that a miscarriage of justice had occurred because the appellant had been deprived of an opportunity to make an effective challenge to Detective Coen's evidence[31]. His Honour noted that the

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25 *Rodi v Western Australia* (2017) 51 WAR 96 at 120-121 [125]-[128].

26 *Rodi v Western Australia* (2017) 51 WAR 96 at 121 [129]-[131].

27 *Rodi v Western Australia* (2017) 51 WAR 96 at 123 [147]-[148].

28 *Rodi v Western Australia* (2017) 51 WAR 96 at 123 [143].

29 *Rodi v Western Australia* (2017) 51 WAR 96 at 123 [149].

30 *Rodi v Western Australia* (2017) 51 WAR 96 at 124 [150].

31 *Rodi v Western Australia* (2017) 51 WAR 96 at 136 [223], 138 [231].

"extent of the change in [Detective Coen's] position was dramatic"[32], and that the 925.19 g of cannabis found was well within the 600 g to 1200 g range suggested by the Earlier Coen evidence.

22 Detective Coen's evidence at trial had been the basis for a contention by the prosecution that the appellant was lying in his evidence about the source of his cannabis[33]. In this regard, Mitchell JA said[34]:

> "[T]he fresh evidence [was] at least capable of calling into question an important aspect of the State's evidence, which was potentially influential in the jury's assessment of the appellant's evidence."

The appeal to this Court

23 In this Court, the appellant submitted that his conviction should have been set aside by the Court of Appeal on the basis that:

(a) the fresh evidence gave rise to a significant possibility that the appellant would have been acquitted by the jury; or

(b) there was a breach of the duty to disclose evidentiary material pursuant to s 95(6) of the *Criminal Procedure Act* or at common law.

24 The appellant argued that, on either basis, there had been a miscarriage of justice within the meaning of s 30(3)(c) of the *Criminal Appeals Act*.

25 By notice of contention, the respondent sought to argue that the decision of the Court of Appeal should be affirmed on the grounds that the majority of the Court erred in proceeding on the footing that there was a breach of the prosecutor's statutory duty of disclosure, and should have held that there was no such breach.

26 The appeal to this Court should be allowed on the ground that the fresh evidence gave rise to a significant possibility that the appellant would have been

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32 *Rodi v Western Australia* (2017) 51 WAR 96 at 137 [227].

33 *Rodi v Western Australia* (2017) 51 WAR 96 at 138 [231].

34 *Rodi v Western Australia* (2017) 51 WAR 96 at 136 [223].

acquitted had the evidence been before the jury. As Mitchell JA held[35], the miscarriage of justice which occurred was one to which the proviso did not apply[36].

27 Accordingly, it is unnecessary to resolve the other issues raised by the appeal and the respondent's notice of contention. It would be distinctly inappropriate for this Court to embark upon a consideration of the effect of the material provisions of the *Criminal Procedure Act* relating to disclosure by the prosecution, and the intersection of those provisions with the prosecution's obligations of disclosure at common law, when the Court of Appeal did not itself essay a considered statement of the position, and when a firm conclusion on the point is unnecessary for the determination of the appeal.

A miscarriage of justice?

28 There was no issue between the parties as to the test to be applied in order to determine whether fresh evidence requires that a conviction be set aside and a new trial had on the basis that a miscarriage of justice has occurred. It is settled that a miscarriage of justice will be established where fresh evidence, when viewed in combination with the evidence given at trial, shows that there is a "significant possibility that the jury, acting reasonably, would have acquitted the accused" had the fresh evidence been before the jury[37]. Nor was it in dispute that the additional evidence adduced in the Court of Appeal was fresh evidence insofar as it was evidence which was not available to or obtainable by the appellant with the exercise of reasonable diligence[38]. That being so, a miscarriage of justice would be established if there were a significant possibility that the jury acting reasonably might have acquitted the appellant had that evidence been available to it.

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35 *Rodi v Western Australia* (2017) 51 WAR 96 at 138 [233].

36 cf s 30(4) of the *Criminal Appeals Act*. See *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; [2010] HCA 35; *Filippou v The Queen* (2015) 256 CLR 47 at 54-55 [15]; [2015] HCA 29.

37 *Gallagher v The Queen* (1986) 160 CLR 392 at 399, 402, 414, 421; [1986] HCA 26; *Mickelberg v The Queen* (1989) 167 CLR 259 at 273, 301; [1989] HCA 35.

38 *Gallagher v The Queen* (1986) 160 CLR 392 at 411; *Mickelberg v The Queen* (1989) 167 CLR 259 at 288-289, 301.

29 The reasons given by the majority for concluding that a miscarriage of justice had not occurred included a number of reasons that were not concerned with the prospect that the fresh evidence was apt to have given rise to a significant possibility of an acquittal. In this regard, as noted above, the majority approached the question whether the appellant was able to demonstrate a miscarriage of justice on the basis of an evaluation of other factors, even though it was accepted that the evidence was fresh in the sense that it could not have been discovered and used with reasonable diligence by the appellant. That approach led the majority into error.

30 The Earlier Coen evidence and the evidence of Detective Coen under cross-examination on appeal were consistent with the appellant's evidence of the source of his cannabis. The circumstance that the appellant bore the onus of proof on the issue of the intent which informed his possession of the cannabis was irrelevant to whether there was a significant possibility of a different verdict if the new evidence had been before the jury[39]. So was the circumstance that no expert evidence was adduced by the appellant on this issue[40]. And so was the circumstance that the appellant's counsel at trial had failed to object to Detective Coen's evidence[41] and to seek an adjournment of the trial[42]. Similarly, the circumstance that the non-disclosure by Ms White to the appellant's counsel at trial was understandable in the context of the exigencies of the trial was not relevant to whether the fresh evidence disclosed a possibility that the jury, acting reasonably, might have acquitted[43].

A significant possibility of acquittal

The prosecution's closing address

31 The majority treated the additional evidence given in the Court of Appeal by Detective Coen and Ms White as fresh evidence. It may be that Mitchell JA may have regarded the fresh evidence as confined to the Earlier Coen evidence.

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39 *Rodi v Western Australia* (2017) 51 WAR 96 at 119 [118].

40 *Rodi v Western Australia* (2017) 51 WAR 96 at 119 [119], 121 [133].

41 cf *Rodi v Western Australia* (2017) 51 WAR 96 at 120 [120]-[121].

42 *Rodi v Western Australia* (2017) 51 WAR 96 at 120-121 [122]-[128].

43 *Rodi v Western Australia* (2017) 51 WAR 96 at 121 [129]-[132].

This possible difference was not adverted to by the parties in argument in this Court. Nothing turns on this possible difference in approach on the part of the members of the Court of Appeal.

32 On the approach taken by the majority, the evidence which emerged in the Court of Appeal in the course of Detective Coen's cross-examination suggests that he could not exclude the possibility that a naturally grown cannabis plant could yield up to 600 g of head material. If this evidence had been before the jury, as would have occurred had the cross-examination which occurred in the Court of Appeal occurred at trial, it would have been distinctly apt to improve the prospect that the appellant's evidence would have been accepted by the jury. Even on the more confined approach of Mitchell JA the possibility that the jury may have reached a different verdict is apparent.

33 At the trial, Ms White deployed Detective Coen's evidence to submit to the jury that the appellant's evidence as to the source of his cannabis was demonstrably a lie because "the expert says [that he has not seen [500 g of] head material grown on [one] plant] before in his experience". Her address included the following further remarks, evidently directed to the 531 g of cannabis found in the shower recess[44]:

> "[T]he fact of the matter is that there are a couple of lies, and those lies are the crux of what the State says you can use to find that he's unable to satisfy you on the balance of probabilities because it is a lie, it is fanciful, there is no expert evidence that anyone could possibly grow 530 grams of head material on one plant. And therein lies the key. He got that bit wrong."

34 Given that, as was rightly conceded by the respondent in this Court, that submission could not properly have been made in light of the Earlier Coen evidence and the further evidence given by Detective Coen in the Court of Appeal, it is impossible to accept that there is no significant possibility that the jury's verdict would have been different. The Earlier Coen evidence meant that what was advanced by the prosecution as "the crux" of its case for the rejection of the appellant's evidence as demonstrably false was a contention that could not be sustained.

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44 *Rodi v Western Australia* (2017) 51 WAR 96 at 130 [194].

35 Of course, it would not necessarily follow from the fact that the appellant grew his cannabis himself that he had discharged his burden of proving that he did not intend to sell or supply it to another person. But, as Ms White's address to the jury shows, to demonstrate that the appellant lied about the source of his cannabis was to strike a devastating blow to the credibility of his evidence that his cannabis was for personal use only. Given that the case for the prosecution did not include evidence of a kind usually associated with the supply of drugs such as a store of cash on his premises or telephone evidence of unusually frequent contact with numerous other persons, the blow dealt to the appellant's credibility by Detective Coen's evidence at trial was undeniably significant to the jury's assessment of the strength of the appellant's evidence.

Detective Coen was a credible witness

36 On the basis of the majority's conclusion that Detective Coen's explanation of the Earlier Coen evidence was "credible and cogent", the respondent argued that their Honours' acceptance of his explanation as to why his opinion as to yield had changed over time meant that there was no significant possibility that the appellant might have been acquitted.

37 There was no occasion for the majority of the Court of Appeal to resolve the possibility that the jury may have taken a decisively more favourable view of the appellant's credibility in light of the Earlier Coen evidence by the majority reaching their own favourable conclusion as to the credibility of Detective Coen's explanation for the change in his evidence[45]. It is not to the point to say that Detective Coen's explanation for his change of opinion was credible and cogent. In the context of a challenge to a verdict based on fresh evidence, the requirement that the fresh evidence relied upon be "credible and cogent" is a requirement relating to evidence which *impugns* the verdict at trial. Detective Coen's evidence was directed to sustaining the verdict against the attack based on the fresh evidence. In *Ratten v The Queen*[46], Barwick CJ (with whom McTiernan, Stephen and Jacobs JJ agreed) explained, in a passage adopted by Mason and Deane JJ in *Gallagher v The Queen*[47], that the issue as to the credibility or cogency of fresh evidence for this purpose is not concerned with whether the appellate court "acting upon its own view" accepts the evidence as

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45 cf *Rodi v Western Australia* (2017) 51 WAR 96 at 121 [129]-[132], 123 [148].

46 (1974) 131 CLR 510 at 519-520; [1974] HCA 35.

47 (1986) 160 CLR 392 at 401.

true, but "rather upon that view most favourable to an appellant, which in the court's view a jury of reasonable men may properly take".

38 For the majority of the Court of Appeal to resolve the issue as to the likely effect of the Earlier Coen evidence on the appellant's prospects of an acquittal by the jury on the basis that any doubt thrown upon the reliability of Detective Coen's evidence might be resolved by their Honours' acceptance of his explanation was to misunderstand the role of an appellate court confronted by fresh evidence which impugns the verdict at trial. Whether Detective Coen's explanation was a sound basis for accepting his evidence and rejecting that of the appellant was a matter for the jury in the light of all the relevant evidence.

39 In this regard, Detective Coen's acknowledgment under cross-examination in the Court of Appeal that he had seen cannabis plants yielding between 500 g and 600 g, and that he would not be surprised by a plant yielding between 500 g and 600 g[48], tends strongly to contradict his evidence at trial. At the very least, it throws a doubt on the value of his evidence at trial as an expression of expert opinion.

"Typical yield"

40 The respondent submitted that Detective Coen's evidence at trial was that naturally grown female cannabis plants "typically" yield between 100 g and 400 g of cannabis head material. It was argued that this was not his opinion as to the outer limits of the absolute range but only a "typical range", and further that it was not evidence as to the actual yield from the plants found at the appellant's house. On that basis, the circumstance that Detective Coen said in the Court of Appeal that he had observed yields up to 600 g was said to be consistent with his evidence to the jury and therefore would have been unlikely to mislead it. That submission cannot be accepted.

41 The distinctions now sought to be drawn by the respondent between "particular" plants and "typical" yield, and between "typical" range and "absolute" range, were not drawn at the trial. Detective Coen's evidence was not limited to the yield that might typically be expected from some ideal cannabis plant. In this regard, he gave the following evidence at trial: "I don't think that all the cannabis at the house is from those two plants out the back." And he went on to say: "I'd expect them to yield on the lower end of the 100 to 400 gram

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48 *Rodi v Western Australia* (2017) 51 WAR 96 at 110 [83(h)], 134 [212].

scale."[49] Detective Coen's evidence at trial as to the likely yield of the particular plants from which the appellant claimed to have harvested his cannabis was inextricably linked with his evidence as to typical yield. His evidence was apt to exclude any possibility of those plants having a significantly greater yield than the upper limit of his typical yield range.

Orders

42 The appeal should be allowed, and orders 5 and 6 of the Court of Appeal set aside. The appellant's application for an extension of time to enable his appeal to the Court of Appeal should be granted, and the appeal to that Court allowed and the appellant's conviction quashed. There should be an order for a retrial.

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49 *Rodi v Western Australia* (2017) 51 WAR 96 at 104-105 [48].