JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : BEVAN -v- THE STATE OF WESTERN AUSTRALIA [2012] WASCA 153

CORAM : PULLIN JA

BUSS JA
MAZZA JA

HEARD : 23 MARCH 2012

DATE OF FINAL

SUBMISSIONS : 19 JULY 2012

DELIVERED : 9 AUGUST 2012

FILE NO/S : CACR 97 of 2011

BETWEEN : RUSSELL IDRIS BEVAN

Appellant

AND

THE STATE OF WESTERN AUSTRALIA
Respondent

ON APPEAL FROM:

Jurisdiction **:** DISTRICT COURT OF WESTERN AUSTRALIA

Coram : YEATS DCJ

File No : IND 1455 of 2009

Catchwords:

Criminal law - Appeal against conviction - Intent to sell or supply MDMA - Whether substantial miscarriage of justice

Evidence - Admissibility of text messages extracted from mobile phone - Whether extraction devices were reliable

Practice and procedure - Application to reopen prosecution case - Principles applicable - *Misuse of Drugs Act 1981* (WA) s 38B(3) - Requirement to give notice of evidence to be led in rebuttal of certificate

Legislation:

Criminal Appeals Act 2004 (WA), s 30(3), s 30(4)
Criminal Procedure Act 2004 (WA), s 96(3), s 97(2), s 97(3)
Evidence Act 1906 (WA), s 79C
Misuse of Drugs Act 1981 (WA), s 6(1)(a), s 11(a), s 38, s 38A, s 38B

Result:

Appeal dismissed

Category: A

Representation:

Counsel:

Appellant : Mr P D Yovich

Respondent: Mr J McGrath SC

Solicitors:

Appellant : Andrew Maughan & Associates

Respondent: Director of Public Prosecutions (WA)

Case(s) referred to in judgment(s):

Abbott v The State of Western Australia [2005] WASCA 42; (2005) 152 A Crim R 186

Baiada Poultry Pty Ltd v The Queen [2012] HCA 14; (2012) 86 ALJR 459

Bevan v The State of Western Australia [2010] WASCA 101; (2010) 202 A Crim R 27

Burgoyne v Earl [1999] WASCA 154

Chiou Yaou Fa v Morris (1987) 87 FLR 36

Crawley v Laidlaw [1930] VLR 370

Georgiou v Spencer Holdings Pty Ltd (No 4) [2011] FCA 1222

Holt v Auckland City Council [1980] 2 NZLR 124

Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298

Killick v The Queen [1981] HCA 63; (1981) 147 CLR 565

Lawrence v The Queen (1981) 38 ALR 1

Manyam v The State of Western Australia [2010] WASCA 107

McDonald v Camerotto (1986) 36 SASR 66

Mehesz v Redman (No 2) (1980) 26 SASR 244

Philpott v Boon [1968] Tas SR 97

Porter v Kolodzeij [1962] VR 75

Quaid v The Queen [2011] WASCA 141; (2011) 210 A Crim R 374

R v Brown [1985] 2 Qd R 126

R v Chin [1985] HCA 35; (1985) 157 CLR 671

R v Ciantar [2006] VSCA 263; (2006) 16 VR 26

R v Maynard (1993) 70 A Crim R 133

R v Soma [2003] HCA 13; (2003) 212 CLR 299

R v West London Metropolitan Stipendiary Magistrate; Ex parte Kaminski [1983] Crim L R 40

R v Wood (1982) 76 Cr App R 23

Reid v Kerr (1974) 9 SASR 367

Shaw v The Queen [1952] HCA 18; (1952) 85 CLR 365

Williams v Berini [1960] WAR 21

Zappia v Webb [1974] WAR 15

TABLE OF CONTENTS

1. **PULLIN JA**: This is an application for leave to appeal against conviction. The appellant was convicted on 8 April 2011 after a trial before Judge Yeats and a jury on a single count in an indictment which read:

> On 22 February 2009 at Perth [the appellant] had in his possession a prohibited drug namely … MDMA with intent to sell or supply it to another.

2. The grounds of appeal allege that the trial judge erred in admitting certain evidence and erred in making an order permitting the prosecution to reopen its case. The respondent denies that any error was made, but submits, in the alternative, that if either or both grounds should be upheld, then no substantial miscarriage of justice occurred and, for that reason, the appeal should be dismissed. The grounds of appeal and the respondent's submissions make it necessary to relate the evidence that was adduced and the events which occurred during the trial in some detail.

The prosecution evidence

3. In order to state the evidence in chronological sequence, it is necessary to refer to evidence of an event occurring about two years before the date of the offence with which this appeal is concerned. This evidence was led as propensity evidence admissible under s 31A of the *Evidence Act 1906* (WA).

4. The evidence was that on 4 September 2008, police executed a search warrant at the appellant's South Perth residential unit. Police located 18.21 g of methylamphetamine of up to 16% purity. They also located 31 g of dimethylsulphone containing traces of methylamphetamine, along with electronic scales that had traces of methylamphetamine on their surface, boxes of clipseal bags and other evidence consistent with drug dealing by the appellant. As a result, he was convicted on 21 August 2009 of the offence of possessing methylamphetamine on 4 September 2008 with intent to sell or supply.

5. The evidence more directly relating to the charge the subject of this appeal was as follows. A police officer, Sergeant O'Rourke, testified that on 22 February 2009, he was driving on the Graham Farmer freeway when he noticed a Hyundai vehicle, registration no 1BTT871, driven by the appellant. Other evidence proved that the appellant had hired this vehicle on 11 November 2008. Sergeant O'Rourke noticed that the appellant was speaking on a mobile telephone. He pulled the appellant's vehicle over at the western end of the tunnel. Sergeant O'Rourke spoke to the appellant and after obtaining his name he contacted the police by radio and received information about the appellant. This prompted Sergeant O'Rourke to ask the appellant to empty his pockets and the appellant produced a red Nokia mobile telephone and a blue Nokia mobile telephone. Other evidence was led that these two telephones were registered in false names and that they shared an identical six digit pin code which was the date of birth of the appellant. Evidence (referred to below) was given, revealing that text messages consistent with drug dealing were retrieved from those two phones.

6. Sergeant O'Rourke called for the assistance of another police unit and Constable Wood and another officer arrived in a police car. Constable Wood testified that he looked in the

driver's side window of the appellant's car and saw a clipseal bag containing a 'white crystal substance' in the bottom compartment of the driver's side door. The appellant was arrested by Sergeant O'Rourke. Sergeant O'Rourke called for detectives to attend and Detective Sergeant Coelho and Detective Senior Constable Yuswak arrived.

7. Sergeant O'Rourke had with him a police dog trained in drug detection and it was deployed. The dog showed interest in a green canvas bag in the vehicle on the passenger's seat. This bag was shifted by Sergeant O'Rourke into the back of the car while the dog continued its search. The dog was also attracted to something under the driver's seat.

8. When the detectives arrived, Detective Coelho searched the vehicle and found two packets containing a white crystal substance in the driver's side door compartment. He examined the green canvas bag in which were found electronic scales and a pipe used for smoking methylamphetamine. By other evidence, both these items were proved to have traces of methylamphetamine on them. Under the driver's seat of the car Detective Coelho found a plastic bag which contained a large quantity of tablets or pills. Detective Yuswak placed the plastic bags containing the crystal substance into exhibit bags and he placed the bag of tablets in a separate exhibit bag. The electronic scales and pipe were also seized.

9. An exhibit log was created by Detective Yuswak. The exhibit log recorded that the items mentioned above, including the mobile telephones, had been seized.

10. Detective Yuswak took the exhibits to the City Detectives' Office, placed them in a safe and then subsequently took them out of the safe and went to the Organised Crime Squad building at Curtin House. The tablets were taken out of the plastic bag and he counted them. There were 367 tablets weighing 107.8 g in total. Detective Yuswak put these tablets into a new drug bag, placed them into a safe at the City Detectives' Office and subsequently took them to the Drug Receival Unit at Midland. Other witnesses established that the tablets and the crystal substance were then taken from the Drug Receival Unit and handed to Mr Hoare, an analyst at the ChemCentre. They were then analysed. Two certificates were prepared and tendered pursuant to s 38 of the *Misuse of Drugs Act 1981* (WA). They were signed by Mr Hoare.

11. The certificate in relation to the tablets stated that the analyst received for analysis 'a sealed drug movement envelope … enclosing off-white tablets with no markings'. The certificate stated that the weight of the tablets was 107 g, that the tablets contained MDMA and that the MDMA content of the tablets was approximately 25%. The other certificate stated that no illicit drugs were identified as a component of the crystal substance. However, the crystals (weighing 5.92 g and 2.55 g respectively) contained dimethylsulfone, which is a cutting agent used by dealers of methylamphetamine.

12. It is appropriate at this point to note some legislative provisions relating to certificates of analysis.

13. Section 38(1) of the *Misuse of Drugs Act 1981* (WA) provides:

> An approved analyst … may give a certificate in the prescribed form relating to any analysis or examination carried out by the approved analyst.

14. Section 38(2) provides:

> In any proceedings against a person for an offence, production of a certificate purporting to be signed by an approved analyst … stating in relation to any thing -
>
> …
>
> (c) a description, and the quantity or mass, of the thing obtained or received; and
>
> (d) that the thing was analysed or examined by the analyst; and
>
> …
>
> (f) the results of the analysis or examination; and
>
> (g) any other matters relating to the analysis or examination,
>
> is sufficient evidence of the facts stated in the certificate.

15. Section 38(3) provides:

> For the purposes of subsection (2), proof is not required -
>
> (a) of the signature of the person purporting to have signed the certificate; or
>
> (b) that the person is an approved analyst.

16. There are some other provisions in the *Misuse of Drugs Act* which are relevant to one of the grounds of appeal. Those provisions will be set out when dealing with that ground of appeal.

17. The other relevant prosecution evidence concerned the text messages, briefly mentioned above, which were consistent with drug dealing. At trial, a Detective Tomlinson was called. He was from the Computer Crime Squad. He said that he used 'XRY' and 'Cellebrite' 'machines' to download text messages from the red and blue Nokia mobile telephones which had been in the appellant's pockets.

Voir dire concerning the evidence about the text messages

18. At the commencement of the trial, there had been a voir dire concerning the evidence of Detective Tomlinson. This was conducted as a result of the objection by counsel for the appellant to Detective Tomlinson's evidence. At the hearing of the appeal, counsel for the appellant conceded that the witness was qualified to operate the equipment used to perform the download, but argued that he was not qualified to give evidence about the

accuracy of the download material and the reliability of the material itself. Detective Tomlinson's evidence was that he had a diploma in computer systems engineering and one of the modules was 'A plus certification', which qualified him to deal with computer systems and componentry. Further, while Detective Tomlinson was in the Computer Crime Squad of the Police Service, he did a course and received intermediate EnCase training. He testified that EnCase was a 'computer system' that 'allows us to extract data from computers'. He gave evidence about the Cellebrite and the XRY 'machines' and explained that they allowed data to be extracted from a telephone. He testified that he had used these two machines to extract data successfully from over 100 mobile telephones, including from the SIM cards or memory in such telephones.

19. In examination-in-chief, Detective Tomlinson was asked whether, 'in your experience with this particular matter can you say that the software was - and the device were operating properly at the time?' His answer was, 'I'd have to check through my notes, but I usually - I'll write down whether it was successful, unsuccessful. Usually if it's unsuccessful it means it hasn't downloaded all the data, the complete data on the phone, but successful, it means that everything's been downloaded from the phone'. Detective Tomlinson then referred to his notes, indicating the extent to which he had been able to download data from the phones. He was then asked, 'So you are able to say that the software and the instruments of the device were operating correctly at the time?' His answer was, 'Yes,' and he said that he had performed 'these operations' himself.

20. In cross-examination, Detective Tomlinson explained he did not hold 'a certificate' in relation to the Cellebrite and XRY software packages, but that he was shown how to use them on about ten occasions. He said he did not know the qualification of the person who taught him and did not know whether the person who taught him was qualified 'just by reason of his experience or whether he went and got formal training'. The following exchange then took place:

> Can you tell me how the Cellebrite package actually works - - - I don't understand the question.
>
> How does it work? Explain to me, a layman, who knows nothing about Cellebrite, how it works - - - It extracts data from a telephone.
>
> How? How does it do that - - - It uses software.
>
> And how does that software work - - - I couldn't tell you.
>
> What about the XRY - - - The same.
>
> If you don't know how it works, how can you say its reliable - - - You'd have to ask the manufacturer.
>
> Okay. I'm asking you. How can you say its reliable - - - I can't.

The trial judge's ruling on the voir dire

21. The trial judge, after the voir dire, ruled that the objections to the evidence should be dismissed. The trial judge in her reasons referred to Detective Tomlinson's diploma in computer systems engineering, before quoting Blaxell J in ***Bevan v The State of Western Australia*** [2010] WASCA 101; (2010) 202 A Crim R 27:

> Accordingly, relevant data obtained in this way will be admissible if there is evidence from a suitably qualified person to prove that the process produces accurate results as well as evidence to show that the downloading was properly carried out on the particular occasion in question [35].

Her Honour continued:

> Now, the second of these has clearly been met. The workings of the instrument need not be given and it seems to me that in this case the notes of the experienced officer, the evidence that this software is regularly used by him establishes the level of accuracy and in his notes at the time that he was - successfully used the program seems to me to meet the tests as they were stated in Bevan's case. He was a trained, experienced and competent operator and the software was operated properly and, in those circumstances, in this case I think this evidence is admissible and I will allow it to be given by the qualified expert.

Detective Tomlinson gives evidence to the jury

22. During the trial, Detective Tomlinson gave his evidence to the jury about the text messages extracted from the two Nokia telephones. Some of the messages referred to Russell or Rusty. The appellant's Christian name was Russell. The text messages which had been downloaded by Detective Tomlinson were tendered into evidence and some of them were extracted and collected together on another page. They became exhibit 17 and MFI 19, respectively.

Detective Knight's evidence

23. A Detective Knight was called to comment on the text messages in exhibit 17. He was not involved in the apprehension of the appellant. He was called as an expert familiar with terms used by, and the behaviour of, persons engaged in the drug trade. He testified that some of the text messages contained expressions suggesting that the appellant was engaging in drug dealing, including dealing in MDMA tablets. He also gave evidence that drug dealers often have several telephones registered in false names. He explained that the term 'white shields', used in one of the text messages, was used by those in the drug trade to refer to MDMA tablets which were white and had a shield insignia embossed or stamped on them.

24. In cross-examination, a line of questioning was adopted by counsel for the appellant (not counsel who appeared on the appeal) which could have been objected to. To explain why this is so, it is necessary to refer again to the *Misuse of Drugs Act 1981*. Section 38B(3) reads:

> An accused shall not in any proceedings adduce evidence in rebuttal of any facts stated in a certificate unless the accused has delivered notice in accordance with subsection (1) requiring the approved analyst or approved botanist to attend as a witness in the proceedings.

25. Section 38B(1) reads:

> Section 38(2) does not apply if, not less than 21 days before the proceedings, the accused delivers notice in writing to the Commissioner requiring the approved analyst or approved botanist to attend as a witness in those proceedings.

26. No notice had been given by the appellant under s 38B(3).

27. Notwithstanding s 38B(3), counsel appearing for the appellant attempted to adduce evidence in rebuttal of one of the facts stated in the certificate, and that was the 'description' of the tablets. It emerged, as is explained below, that counsel was seeking to establish that the tablets seized had markings on them, that the tablets analysed did not, that therefore the tablets seized were not those referred to in the analyst's certificate and that, in consequence, the prosecution could not prove that the appellant was in possession of MDMA.

28. Counsel for the appellant made his attempts to adduce such evidence on several occasions. First, when Constable Wood was being cross-examined by counsel for the appellant he was asked the question, 'Do you recall whether the pills had any markings on them?' It was evident from the prosecution brief that the prosecutor intended tendering the certificates.

29. Secondly, a similar question was put by counsel for the appellant to Detective Coelho. The question was, 'Do you remember whether the tablets were marked in any way?' to which Detective Coelho responded, 'No, I don't'.

30. Finally, when Detective Yuswak was called, counsel for the appellant asked whether Detective Yuswak was able to describe the tablets and then asked two questions, to which Detective Yuswak gave the following answers:

> Did they have an insignia on them - - - Not that I can remember, no.
>
> They had a - I'm suggesting they had a little shield on them - - - Not that I can remember.

31. The second question involved an assertion that the tablets had markings on them. The questions put to all three witnesses about whether the pills had markings on them were attempts to obtain evidence that, contrary to the certificate, the tablets were marked. They were attempts to 'adduce evidence in rebuttal' of the description which appeared in the certificate which was to be tendered and was later tendered. The questions could have been objected to by the prosecutor, but there was no objection.

32. The night before Detective Knight gave evidence, counsel for the appellant asked the prosecutor to arrange to have the packet of tablets brought to the court. The prosecutor agreed. The tablets were in a sealed bag. Instead of objecting to the appellant's endeavours to adduce evidence in rebuttal of the description in the certificate, the prosecutor produced and tendered the tablets and they became exhibit 16. The transcript

subsequently reveals the following interchange between the prosecutor the Detective Knight:

> **PASCOE, MS:** If the witness could be handed exhibit 16, specifically the one with the pills in it. I don't have the number in front of me right now.
>
> **YEATS DCJ:** He can give us the internal number---473775.
>
> **PASCOE, MS:** That sounds right. I'm sorry, I don't have it in front of me. Yes, I do. Yes, that's the one containing white tablets---Yes.
>
> Or I won't say what colour they are. In your opinion what - what would you say is in that jar that's inside that bag---They look like ecstasy tablets or what would be sold as ecstasy tablets.
>
> Sure. And what colour would you say they are---Off white, eggshell white, yes.
>
> And can you see any markings on them? You referred to stamps---Yeah. I've never seen these actual pills before. I can see that there's lines, but through a bag and through a jar it's difficult to make out.
>
> Difficult to tell---Yeah.
>
> All right. Just one moment, your Honour. I was wondering if perhaps you might need to provide or be provided with an implement, but if you can actually open that bag---Yeah.
>
> And have a closer look at those pills---Sure. I could rip it open if you want me to.
>
> Yes. Sure---Yeah.
>
> And once you've ripped it open would you be able to re-seal it---No, no. That's - that's the whole point of these bags. They're - they're what's called tamper evident bags. I mean, obviously nothing's tamper proof because you can tamper with it, but it's obvious then for anyone looking at it that it has been tampered with so when they're sealed, I mean, I can open it and would be able to open it. I've never actually tried to open one like this before.
>
> **YEATS DCJ:** You're the second person who's tried today---Eh?
>
> The other person couldn't---?---So the bag's open but that starts on the other side, that's the (indistinct) on the bag. But what I was saying about the tamper evident bag is it's now evident to anyone looking at it that that bag's been tampered with. Would you mind (indistinct)?
>
> **PASCOE, MS:** Certainly, unless anyone else has an objection---Yeah, they're - I mean, there's a stamp on them but they've been around almost two years. They look like shields.
>
> They look like shields to you---Yeah. Yeah, that is. If you do get to look at them just hold them on a certain light and it bounces off, but that's quite a prominent one.
>
> Right. All right---But again it's difficult.
>
> **YEATS DCJ:** Do you want the jury to look at one pill ...
>
> **PASCOE, MS:** Could it be passed around at the moment, your Honour?

YEATS DCJ: Yes, that's what I was thinking.

PASCOE, MS: Certainly. Sure.

YEATS DCJ: Because I have to tell you, ladies and gentlemen, the drugs have to be taken back into custody tonight. We don't even keep them in the court room, but you may never see an ecstasy tablet so just - - -

THE FOREWOMAN: I don't want to touch it.

YEATS DCJ: Doesn't want to touch it---Would you like - sorry, there's a tissue if you want to put it on a tissue.

I don't think it rubs off---It does. You'll see even on the inside of the thing there or even my fingers are covered in powder.

This is just so you can see if you think there's a shield on it. It's a matter for you. The witness said he saw it.

33. There was some cross-examination about the fact that tablets of this type were 'better' in 2009 'than now' and 'often they would have a stamp … more generally they would have a stamp'.

34. It is not necessary to relate the detail of the continuity evidence which proved that the tablets seized in the appellant's car were the tablets delivered to the analyst. This was not put in issue in the appeal.

The prosecution closes its case

35. The prosecution closed its case after Detective Knight completed his evidence.

The accused elects not to give evidence

36. Counsel for the appellant announced that the appellant elected not to give evidence nor to adduce evidence in his defence (ts 179).

Discussion in the absence of the jury

37. The jury were sent out of the court and there was a discussion in the absence of the jury about the issues in the case. Counsel for the appellant said that the first issue was whether the appellant had any knowledge that the drugs were in the vehicle. He then said:

> The second issue relates to the certificate of analysis, which I think is exhibit 6. The certificate [sic] analysis says that what is analysed by the ChemCentre is further on at (indistinct) - and what is analysed by the ChemCentre is this: A sealed drug I'll perhaps rephrase what I've just said. The certificate of analysis says this that: Murray Norman Hoare received [sic] analysis a sealed drug movement bag envelope W00473775 enclosing off-white tablets with no markings. Those latter words being 'with no markings', we would respectfully suggest as being critical because the

> evidence is, it seems to be that what was seized by the police were tablets, perhaps off-white - described as 'off-white'. It's a matter for the jury to determine what colour they think it was. But clearly with markings on them. And you have evidence from the police officer saying 'these tablets had markings on them.' So the question then arises is, has what was seized been analysed to the jury's satisfaction? If not, then there's no evidence that any drugs were located.

38. There was then some discussion about whether or not the respondent was challenging the certificates of the analyst and whether, because of s 38B(3) of the *Misuse of Drugs Act*, he was permitted to do so. Counsel for the appellant claimed that he was not challenging the correctness of the certificates. Counsel for the appellant said;

> I'd invite your Honour to say that it's not satisfactory to leave that question to the jury where the State has led conflicting evidence in its own case.

39. Counsel for the appellant, having asked questions during the trial, apparently hoping, but failing, to adduce evidence that the tablets had markings on them, had had the good fortune that the prosecutor had adduced the evidence that the appellant might not have been allowed to adduce without giving notice under s 38B(3) of the *Misuse of Drugs Act*.

40. The trial judge said that if the appellant's counsel wanted to make a 'no case' submission, the trial judge would consider that overnight. Counsel for the appellant then said that he did make that submission.

41. The response of the prosecutor was that in those circumstances 'the State would seek to reopen its case to call a chemist on this point for opinion evidence on the marking of drugs and - pills, whether they're marked on both sides, how clear markings are, all that sort of information if that's going to be a factor'. Counsel then said that the prosecution would rely on the continuity evidence. Soon after, the jury returned and were told that the case was adjourned until the following day.

The prosecutor applies to reopen its case

42. The transcript of the proceedings the next day reveals that the prosecution then applied to reopen its case as it had foreshadowed. Submissions were made in support of this application and some information was provided about why the tablets were brought to court. Counsel for both parties told the judge that they had both agreed that the tablets be brought to the court. The judge said it was unusual, but that it 'wasn't reasonably foreseeable from the State's point of view that Mr Knight would examine them and see little shields on them' (ts 200).

43. Further submissions were made by the prosecutor, referring to Detective Knight's evidence that it was difficult to see the markings on the tablets and prosecuting counsel continued:

> **PASCOE, MS:** The State appreciates that and our submission in respect of that is there is no doubt that the certificate is - it goes into evidence as the fact on the certificate. The State has no problem with that. The way the State sees it is primarily it's a piece of evidence to be weighed against all the other pieces of evidence they have before them just like any other piece of evidence

and we would also say that whilst it is - the description of the pills is one of the facts on the certificate, it is a subjective fact as opposed to the facts that are described by way of say a notorious scientific instrument, the measurement of the purity - - -

YEATS DCJ: It is on the measurement that it's a subjective fact, but it is then the fact - - -

PASCOE, MS: It is a fact and it is one - - -

YEATS DCJ: It is a description of what he tested and I think Mr Maughan has quite a good point on that.

PASCOE, MS: I do hear what your Honour has to say in relation to that. I have one final point subject to what your Honour has to say on the issue of re-opening the State case and in terms of finding a special circumstance to re-open the case the State again points out that it was not given sufficient notice being the 14 days under section 96(3) of the Criminal Procedure Act that continuity was in issue to which this issue appears to now directly relate or for that matter notice of the factual elements of the offence that the accused may contend cannot be proved, specifically section 96(3)(c). In that circumstance the State says that this is a special circumstance that would allow your Honour to allow the State to re-open its case and to call a further witness and that further witness would be the analyst who performed this test.

44. Counsel for the appellant opposed the application to reopen. Counsel for the appellant made the following submissions:

MAUGHAN, MR: Your Honour, we would oppose the application to re-open. We say that this issue was squarely put on the table by the defence, that we did put the State by plea firstly he denies the allegation so as a prima facie point the State is then put to proof of each of the elements of the offence for which Mr Bevan is charged and that includes obviously proving that what was seized was a drug. Now, in relation to the suggestion by my learned friend that the police had no notice that there was any indication that there was markings on these tablets, with great respect I would have to dispute that because Officer Knight provided a deposition which forms part of the prosecution brief of evidence as found at page 23. Now, coincidentally and it would be a significant coincidence Officer Knight in his deposition makes reference to and I'm referring now to page 26, the second paragraph: I note in the last report on white shields was of 19 February 2009 from Western Australia. So reference to white shields in his report and the next paragraph: White heart ecstasy tablets. So with great respect clearly someone has told Officer Knight that that is the nature of the drug which is in dispute.

YEATS DCJ: That there's something on them.

MAUGHAN, MR: Indeed.

YEATS DCJ: And that - yes.

MAUGHAN, MR: And so it was clearly part of the prosecution brief that at least Officer Knight was alert to that fact. Now, what the State is seeking to do with great respect is they have allowed the certificate to go in and they are stuck with that certificate as part of the State's case and the certificate bears the evidentiary weight as is given to it by section 38, I think it's 38 of the Misuse of Drugs Act and the fact that that is - that the description of the drugs tested is evidence of that fact, this is what is tested. And so what the State are now seeking to do is to re-open their case, to call the analyst and to cross-examine him about his certificate. They're seeking in effect to impeach their own witness and that ought not with great respect be allowed. So the difficulty the State have is that the issue is alive, the issue was alive to the defence, ought to have been alive to

> the prosecution and the State on the papers. The State have put the certificate in to evidence. The State put the pills into evidence. The State adduced evidence from Officer Knight that these pills had markings on them. The jury have been shown pills with markings on them and the case is now fatally flawed and what the State is seeking to do is to rectify that problem and that is not an exceptional circumstance. And in my submission the application to re-open by the State ought to be rejected and then I'd seek to be heard on the no submission further on, your Honour, if you're with me on that point.

The trial judge's order permitting the prosecutor to reopen and the reasons for that order

45. The trial judge made an order permitting the prosecutor to reopen its case and gave reasons for that decision. In her reasons, the trial judge referred to the evidence that had been given by Detective Knight, to the fact that the drugs had been brought to the court, and to the fact that the prosecutor showed the detective the drugs. Her Honour then related what Detective Knight had said about what he observed.

46. The trial judge also directed herself concerning the application to reopen, saying:

> Reopening its case is an unusual procedure and reasonable foreseeability is a very prominent principle. Also, the court looks for special circumstances. This is an interesting reopening proposal in that it's not to rebut the defence case. The defence is actually relying on a flaw, an issue in the State's case.

47. The trial judge then found it was 'not reasonably foreseeable that Detective Knight would examine the tablets and see the shields on them and, particularly, the prominent one that was pointed out'. The trial judge said there were 'special circumstances' which were described as follows:

> It seems to me that there are a number of special circumstances in this case. One of them is having tablets brought to the court and examined by the closing witness in a trial. That is extremely unusual and the State I don't think has to wear that because contradictory evidence came out. The State could not have known what that witness was going to say. They were urged to have the tablets here as a result of what the defence wanted and the defence has been raising the issue of shields on the tablets in its cross-examination of witnesses. The State was not in a position to closely examine the drugs because the drugs were throughout all of this time carefully packaged in bags that could not be opened. Until the security movement bag was opened in court in front of the jury no one had looked at those tablets since they'd been packaged after the ChemCentre examination. It is fundamental that the jury have clear evidence in relation to the certificate and when an event develops in a trial that casts doubt on a fact in a certificate it seems to me that I should allow the case to be re-opened so that the analyst can clarify the situation if the analyst is able to. I consider these are special circumstances related to the certificate itself.

48. Her Honour also said:

> I also notice that in this trial it's quite clear that the defence is not meeting any obligations about giving notice to the State and that's a matter for the defence, but it doesn't allow me to look very favourably on the defence argument that this issue was alive when the State did not have it fully alive until after the detective gave his evidence.'

The State reopens and leads additional evidence

49. The State then led evidence from three additional witnesses: Mr Hoare, Ms Murdoch and Dr Reynolds.

50. Mr Hoare gave evidence that he was an approved drug analyst and had been so for seven years. He described the process by which drugs were received at the ChemCentre and then analysed. He explained that he did not perform any direct testing himself, but that he prepared the certificate of analysis (exhibit 6) and signed it. He identified the person who carried out the analysis as being Ms Murdoch and he explained that photographs had been taken by Ms Murdoch of some of the tablets. He examined one of the photographs in court and said that neither the front nor the back of the particular tablet which had been photographed showed any markings. This photograph became exhibit 25. It was a photograph of one tablet from three different directions. Mr Hoare was shown the tablets. He commented that the tablets had not been particularly well made and that there were a number of blemishes and some imperfections on the tablets. He also noted that a few of the tablets appeared to have marks on them, but he thought that they were 'probably just blemishes and dimples on the actual tablets themselves'. He testified that ecstasy tablets usually contained a very distinctive logo, whilst those being shown to him in court were 'indistinctive'. However, Mr Hoare said that they 'do contain MDMA'. Mr Hoare said that, as an analyst, he would report the tablets as 'unmarked' because there was 'no distinctive logo' (ts 243). Mr Hoare explained that the normal procedure was to weigh a sample of the tablets. He said that an idea was gained as to how many there were and they would take the 'square root of that'. So if there were a hundred tablets, the analyst would take a sample of ten tablets, crush them up to a fine powder to get a representative sample and then run analytical tests on them. In cross-examination, Mr Hoare maintained that some of the tablets were broken or chipped, and that the dye used was of an inferior nature. In re-examination, Mr Hoare repeated this evidence and stated that there 'may or may not be marks on some of them'.

51. Ms Murdoch was then called. She testified that she was a chemist in the forensic science laboratory at the ChemCentre, in the illicit drugs section. She also testified that she had been employed in that section since 2008, and was an approved analyst, but at the time she analysed the drugs she was employed as a chemist. She testified that she did not take out each tablet individually to check the markings. She prepared worksheets covering the steps in the analysis of the tablets. She referred to an internal document which showed that each case was subject to a peer review process where a checker would peer review the case file before a certificate was issued. Ms Murdoch recognised the signature of the person who carried out the peer review in this case as being that of Dr Reynolds, who was also an approved analyst. Ms Murdoch was shown the tablets and she confirmed that there was not any obvious marking on any of the tablets that she could see. She testified that her notes indicated that she saw no markings on either side of the tablets that she examined. Ms Murdoch also observed from the papers that Mr Hoare was also involved in the peer review process and that he reviewed the casework in order to generate the certificates of approved analyst. Both Mr Hoare's and Dr Reynolds' signatures appeared on the documents on the ChemCentre file. Ms Murdoch testified that the single tablet which had been photographed was selected at random from the container of tablets (ts 268).

52. Finally, Dr Reynolds was called. He confirmed that he was an approved analyst under the *Misuse of Drugs Act* and that he was the manager of the illicit drugs group at the ChemCentre. Dr Reynolds gave evidence about the process at the ChemCentre which did not detract, in any respect, from the evidence given by Mr Hoare and Ms Murdoch.

The State closes its case for a second time

53. The State closed its case again (ts 298). Counsel for the appellant then announced that Mr Bevan elected again not to give evidence in his defence, nor to adduce any evidence (ts 299). He did not renew the 'no case' submission.

Addresses to the jury

54. Counsel then addressed the jury and the trial judge gave directions to the jury. Counsel for the appellant did not address for long, but about half of the address was to the effect that the certificate was 'challenged'. He referred to the evidence given by Mr Hoare and Ms Murdoch, who he said 'fidget[ed] through the bucket of pills to try and locate a pill which best suited the State's case'. He said that the jury should consider 'how much weight' should be 'put on their ability to properly test anything' and that the drugs analysed were 'a different set of drugs with no markings'.

The trial judge's directions to the jury

55. The trial judge's directions are not called into question, but it is relevant to note that her Honour referred to Detective Knight's evidence and said:

> [T]he problem was that there was now a conflict between what was examined at the ChemCentre and what was brought into court as being what was examined at the ChemCentre, and that's why we had extra evidence for you yesterday. The issue was, were these the same tablets described by the approved analyst as white tablets without marks?

56. Subsequently, the trial judge referred to the continuity evidence which established that the tablets seized from the vehicle were delivered into the hands of Mr Hoare at the ChemCentre. Her Honour said:

> [I]t is very important that you be satisfied that the drugs that were seized on 22 February were the same drugs that were examined at the Chemistry Centre (ts 325).

57. Her Honour said that she would leave that issue to the jury. At the end of her directions, the trial judge said:

> But, ladies and gentlemen, I have never, in my 18 years on the bench, had the drugs in court. I'm going to send them in with you, because they've been so much in the centre of your deliberations, but you are not to open them. You are not to open them and what goes in has to come back out and you can look in there. You've had a chance to see a number of the tablets, but you're not to actually open that and do any further looking other than [sic] at it. I will send it in with you.

58. The tablets and the powder from the crushed tablets which were analysed were in clear plastic containers in a plastic exhibit bag. The bag is clear on one side with a label on the other (exhibit 29 - see ts 298).

A question from the jury and the verdict of guilty

59. After the jury had retired, they requested a transcript of Detective Knight's evidence. The jury returned and the trial judge explained that generally transcript was not given to the jury. Her Honour asked whether the jury wanted to hear the entire evidence of Detective Knight and the forewoman said that they wanted specifically to hear the evidence 'when he's speaking about markings on the tablets'. That portion of the transcript was then read to the jury and the jury then retired to consider its verdict. The jury returned with a verdict of guilty.

The grounds of appeal

60. There were five grounds of appeal. All but two were abandoned, however one of the maintained grounds was amended. The grounds which this court was left to consider were that:

    (a) the trial judge erred in law in overruling the objection to the tendering of the text messages from the blue and red Nokia phones; and

    (b) the learned trial judge made an error on a question of law in granting leave to the prosecution to reopen its case, thereby giving rise to a miscarriage of justice.

    On 2 October 2011, Mazza J referred the application for leave to appeal on these grounds to the hearing of the appeal.

The first ground - the text messages

61. In ***Bevan v The State of Western Australia***, Blaxell J (Owen & Buss JJA agreeing), said that text messages of a general character consistent with them being communications in the course of illicit drug dealing, found on a telephone in the possession of a person facing a charge of possession of a prohibited drug, could rationally affect the jury's assessment of whether or not the appellant had been in possession of the prohibited drug [23] - [26]. His Honour also referred to the rebuttable presumption at common law as to the accuracy of 'notorious' scientific or technical instruments which, by general experience, are known to be reliable [29]. His Honour then added:

> Mobile phones and laptop computers are ubiquitous items which have been in common use in the community for a number of years. Most people (including school children) are very familiar with the processes of sending and receiving text messages on mobile phones, and of downloading data from computers. It is also a matter of general knowledge and experience that these processes are accurate in the sense that the data displayed (or printed out) replicates what is actually there. It

> follows that mobile phones and laptop computers each fall into the category of 'notorious' scientific instruments.
>
> In my view, the downloading of data from a mobile phone into a laptop computer is a process which probably requires very little evidence to be readily understood, but which is not yet generally known to be accurate. Accordingly, relevant data obtained in this way will be admissible if there is evidence from a suitably qualified person to prove that the process produces accurate results, as well as evidence to show that the downloading was properly carried out on the particular occasion in question. (There is no reason why evidence as to both of these matters cannot come from a person who has had sufficient experience of the process on previous occasions) [34] - [35].

62. Blaxell J observed that, on the evidence, the constable involved had only given a brief description of what was involved in downloading the text messages. Blaxell J said that the constable was experienced in carrying out the operation of downloading messages from the SIM card but that his evidence 'permits only a vague understanding of what was involved' [36]. Blaxell J said there were greater difficulties in understanding the downloading process from the mobile phone memory. The constable was not asked to explain the process in any detail, but he made mention of a web camera taking film of the text messages while they were displayed on the mobile phone. Critically, it was the first time the constable had experienced the relevant software and he did not have any formal training in its use. It was also his evidence that the software 'tried to do its best job at doing it' [37]. The result was that, in that case, questions were raised as to the reliability of the software and of the constable's correct use of it. The conclusion was that the prosecution failed to establish that the downloading process was of a type generally accepted by experts as being accurate and that the particular downloading by the constable was properly performed.

63. No evidence was led in that case or in this case about any police testing carried out on the Cellebrite and XRY machines and their associated software to determine whether they were accurate. It may be assumed that if the police department receives some new device to enhance evidence gathering, then, before it is used, the new device will be tested to ensure that the results it produces are reliable. In the case of the Cellebrite and the XRY machines and their associated software, it would not be unreasonable to expect that the police, before employing them, would test them on numerous mobile telephones on which the police had sent and received known text messages to determine whether the machines and the software did, in fact, always accurately retrieve the messages sent, received or deleted. Such tests would then afford evidence that, in subsequent cases, the machines and their software could be regarded as reliable in producing evidence of text messages and would therefore reduce the likelihood of the issue which has been raised in this case and raised in the earlier ***Bevan*** case. Such testing may have been carried out before the Cellebrite and XRY machines were employed to gather evidence, but, if it was, no evidence of such testing was given.

64. The question then is whether Detective Tomlinson's evidence of the use of the machines in other cases provides sufficient assurance in this case about the reliability and accuracy of the results produced by the machines.

65. In this case, there was evidence that the two machines (with associated software) were used to extract text messages sent, received and read, from over 100 telephones. Detective Tomlinson was a trained computer systems engineer with a diploma in computer systems and componentry. He had also received additional training on software allowing the extraction of data from computers. The appellant does not challenge Detective Tomlinson's qualifications as an expert.

66. By saying that he had 'successfully' extracted data, it may properly be inferred that success involved an accurate extraction of the content of the text messages. The appellant's written submissions in support of this ground of appeal were that the prosecution was 'unable to establish that the downloading process of the SMS messages was of a type generally accepted by experts as being accurate and that the particular downloading by [Detective] Tomlinson was properly performed'.

67. Detective Tomlinson qualified as an expert able to testify about the performance of the machines and the software. It may be inferred that he, as an expert, considered the process to be accurate. It may also be inferred that the downloading was properly performed by Detective Tomlinson as he had done before on many other occasions. It was not necessary that he understand how the software worked. Therefore, Detective Tomlinson's evidence constituted 'evidence from a suitably qualified person to prove that the process produces accurate results' (***Bevan*** [35]). His evidence provided sufficient assurance that the results produced by the machines were reliable and accurate, because he (a trained operator of the machines) observed them to be so.

68. In my opinion, this ground of appeal should be dismissed.

The first ground - Section 79C of the *Evidence Act 1906*

69. During the course of the appeal there was a question raised by a member of the bench about whether the material derived from the Cellebrite and XRY machines was evidence admissible under s 79C of the *Evidence Act 1906*. The parties were directed to file written submissions about this issue.

70. The prosecution wished to prove that the appellant was in possession of mobile telephones which contained text messages sent or received by the person in possession of those telephones and that that person was the appellant. The prosecution was not seeking to prove the truth of the content of the text messages, but merely that the text messages were stored on the telephones. Statements may be proved if they are 'derived' from a business record and 'derived' is defined to mean 'derived, by the use of a computer or otherwise' (s 79B). It is not necessary to consider s 79C further because s 79C does not make admissible a statement which is otherwise inadmissible, save in certain circumstances which do not apply here (see s 79C(3)). The issue in this case is whether the text messages obtained by use of the XRY machine and software and the Cellebrite machine and software were accurately derived from the mobile telephone, but if Detective Tomlinson's evidence about how this was achieved was admissible then there is no need for any consideration to be given to s 79C.

The second ground of appeal - the ruling permitting the reopening of the prosecution case

71. A trial judge has a wide discretion to permit the prosecutor to lead rebuttal evidence: ***Shaw v The Queen*** [1952] HCA 18; (1952) 85 CLR 365, 383 - 384 (Fullagar J), approved in ***Killick v The Queen*** [1981] HCA 63; (1981) 147 CLR 565, 568 (Gibbs CJ, Murphy & Aiken JJ); ***Manyam v The State of Western Australia*** [2010] WASCA 107 [19] and [98]. Generally speaking, special or exceptional circumstances will have to be shown before a trial judge will exercise the discretion: ***Shaw*** (379 - 380) (Dixon, McTiernan, Webb & Kitto JJ); ***Killick*** (568) (Gibbs CJ, Murphy & Aiken JJ). However, the discretion ought not be regarded as limited or governed by any rigid rule or formula: ***Shaw*** (383 - 384) (Fullagar J); ***Killick*** (568 - 569) (Gibbs CJ, Murphy & Aiken JJ).

72. It is necessary to find special or exceptional circumstances because, generally speaking, the prosecution is obliged to offer all its proof before the accused is called on to make his or her defence (***R v Soma*** [2003] HCA 13; (2003) 212 CLR 299 [36]) and that is because an accused will usually be 'unfairly prejudiced' by the admission of rebuttal evidence. In ***Killick***, the plurality explained why rebuttal evidence will usually be prejudicial. They said:

> Evidence tendered by the Crown after the defence has closed its case may assume an inflated importance in the eyes of a jury. The very fact that the last piece of evidence which the jury hears is given in contradiction of evidence already given by or on behalf of the accused tends to tilt the scales in favour of the prosecution (69).

See also ***Shaw*** (383 - 384) (Fullagar J), quoted in ***Killick*** (568 - 569) (Gibbs CJ, Murphy & Aiken JJ); ***Soma*** [36].

73. In ***Killick***, Wilson and Brennan JJ, said:

> That enunciation of the principle as a prohibition against the splitting of the prosecution case tends to overshadow the obverse of the principle, namely, that evidence for the prosecution may be given after the closing of the defence case 'where it becomes necessary to rebut matters which have been raised for the first time by the defence' (per Lord Goddard LCJ in ***Owen*** (1952) 36 Cr App R 16 at 21). There is no inconsistency between the enunciation of the exclusionary rule in ***Shaw*** and the facultative rule expressed in the dictum in ***Owen*** (575).

74. Wilson and Brennan JJ added:

> Where the defence is the first to raise at the trial a matter of exculpation, evidence which merely rebuts that matter does not split the prosecution case on any issue and ***Shaw*** furnishes no reason for excluding the evidence (576).

75. Wilson and Brennan JJ added that there may be cases where the evidence which the Crown seeks to call in rebuttal of a new matter introduced by the defence is, at the same time, confirmatory of the case which the Crown has sought to make. Such cases require the trial judge to 'exercise a discretion'. Their Honours stated that the trial judge must ensure, on the one hand, that evidence which is clearly relevant to the Crown case - not

marginally or minimally relevant - is not admitted in breach of the rule laid down in ***Shaw*** merely because of its relevance to a fact first raised in the defence case. They said, equally, the trial judge must not exclude evidence which is in substance rebuttal evidence because some minimal or marginal relevance to the Crown case would have made it admissible in that case. The discretion must be exercised according to the circumstances of each case.

76. The situation in the present case is that the appellant, through trial counsel, attempted to adduce evidence that the tablets were marked rather than unmarked as the certificate stated. His attempts failed. Counsel for the appellant asked two witnesses if the tablets were marked. Those witnesses were unable to say whether the tablets were marked or not. The third witness was not only asked if the tablets were marked, it was put to him that they were marked. That attempt to raise the issue also failed. This was an attempt to adduce evidence in rebuttal of the statement in the certificate that the tablets were unmarked.

77. Up until that point, there was therefore no issue to be addressed by the prosecution. Counsel for the appellant then asked the prosecutor to have the tablets brought to court. It was then the prosecutor, perhaps due to inexperience, who asked the question of Detective Knight, whose answer raised the issue about whether the tablets were marked or unmarked. Detective Knight's answer that he could see one or a few tablets with a mark if the tablets were held up to the light in a particular way, surprised counsel for the prosecution. The appellant conceded that counsel for the prosecution was surprised by the answer. The appellant, having attempted to call evidence in rebuttal of the certificate without giving the notice required under s 38B(3), gained the answer he was seeking, as a result of the prosecutor's question. If the prosecutor had not asked the question, then there can be no doubt that counsel for the appellant would have done so. If that had happened, the appellant would have 'adduced evidence in rebuttal of' a fact in the certificate in breach of s 38B(3) and there would have been no reason to doubt that the trial judge would have properly exercised her discretion to permit the rebuttal evidence to be called.

78. It was only after the close of the prosecution case and after the appellant elected not to give or adduce any evidence, that the appellant's counsel clearly articulated his contention that if some of the tablets in court were marked, then they were not the tablets analysed and, in consequence, the tablets seized were not proven to contain MDMA. That contention was flawed because it ignored the fact that continuity of movement of the drugs from under the appellant's car seat into the hands of the analyst had not been contradicted. On appeal, the appellant's contention was formulated differently. The argument was that the evidence of Detective Knight contradicted the certificate of analysis, thus creating a 'discrepancy' in the prosecution case, and potentially doubt in the minds of the jurors. The appellant argues that he was prejudiced by the reopening because the prosecution was allowed to correct this apparent discrepancy and dispel any possible resulting doubts.

79. On either formulation, in the circumstances of this case, there was no prejudice to the appellant in the trial judge's exercise of her discretion to allow the prosecutor reopen the prosecution case and call the three extra witnesses. The appellant cannot claim prejudice because technically the prosecutor adduced the evidence that the appellant had been trying to adduce. Further, the continuity evidence remained uncontradicted.

80. The prosecutor did not foresee that evidence would be adduced in rebuttal of a fact in the certificate before Detective Knight gave his evidence.

81. As a result, it has not been demonstrated that the trial judge erred in permitting the prosecution to reopen its case and ground 2 should be dismissed.

Application of s 30(4) of the *Criminal Appeals Act 2004* (WA)

82. The respondent submitted that even if either or both grounds should be upheld, the appeal should still be dismissed because of s 30(4) of the *Criminal Appeals Act*. As I would dismiss both grounds, that submission does not have to be considered. However, the point was argued so I will consider the point and in doing so assume that, contrary to my reasons, both grounds of appeal should succeed.

83. Section 30(3) *Criminal Appeals Act* provides that the Court of Appeal must allow the appeal if the grounds set out in that subsection are established. Section 30(4) then reads:

> Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

84. In ***Baiada Poultry Pty Ltd v The Queen*** [2012] HCA 14; (2012) 86 ALJR 459, French CJ, Gummow, Hayne and Crennan JJ referred to the provision in the common form criminal appeal statute (s 30(4) is in this form). The following points were made:

> (a) no single universally applicable description of what constitutes 'no substantial miscarriage of justice' can be given;
>
> (b) no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved to the appeal court, beyond reasonable doubt, that the accused was guilty;
>
> (c) it is not possible, nor useful, to attempt to argue about the application of s 30(4) by reference to some supposed category of 'fundamental defects' in a trial. To do so distracts attention from the necessary task of statutory construction;
>
> (d) section 30(4) is cast in permissive terms which means that the proviso gives the Court of Appeal the power to dismiss the appeal if the stated condition is satisfied; but if the court decides that there has been no substantial miscarriage

of justice, then the appeal must be dismissed and, in consequence, s 30(4) does not confer a 'discretion' on the Court of Appeal;

(e) the appellate court must undertake the task of determining whether no substantial miscarriage of justice has actually occurred in the same way as it would decide whether the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence;

(g) the significance to be given to the fact that the jury has returned a guilty verdict must be assessed paying proper regard to what were the issues that the jury were directed to determine;

(h) it is not enough that the Court of Appeal identifies evidence that 'permitted' the jury to conclude beyond reasonable doubt that the accused was guilty. The evidence reviewed must 'compel' the appeal court to reach that conclusion; and

(i) section 30(4) cannot be engaged unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict. That is a negative proposition which states a necessary, but not sufficient, condition for applying the subsection. As a result, demonstration that a chain of reasoning can be articulated that would require the verdict reached at trial does not always permit, let alone require, the conclusion that no substantial miscarriage of justice actually occurred.

85. The last point is important because it means that sometimes a review of the evidence may lead the Court of Appeal to conclude that the accused was guilty beyond reasonable doubt based upon a review of the evidence, but there is some other circumstance or reason which prevents a conclusion that there was no substantial miscarriage.

86. In the present case, if the evidence led in rebuttal is entirely ignored, the evidence of Detective Knight gives rise to no reasonable doubt that the drugs analysed were the drugs seized. The continuity evidence is clear. The uncontradicted evidence is that the drugs seized in the car were carried from the car to various places and eventually into the hands of the analyst who signed the certificate. The difference in evidence between the description in the certificate that the tablets were unmarked, and the evidence of Detective Knight that one, or perhaps a few, tablets had marks on them (which he found difficult to see), does not, in any respect, contradict the continuity evidence. All it shows is that perceptions about how one would describe badly made tablets might differ. The verdict of the jury which may be taken into account reveals that the jury, which had the tablets before them, considered beyond reasonable doubt that the tablets seized were the tablets analysed and certified.

87. If the evidence of the text messages is ignored, the case against the appellant compelled the conclusion that the appellant was guilty beyond a reasonable doubt.

88. A review of the whole of the evidence which is summarised at the beginning of my reasons reveals that the appellant was caught red-handed in a vehicle with the drugs under his seat and with other drug paraphernalia in the car with him. In the car door he had materials used as a cutting agent. There was undisputed evidence that he had a propensity to engage in drug dealing by reason of the offence he had committed on 4 September 2008.

89. There is no other consideration or reason which prevents a conclusion that there was no substantial miscarriage of justice.

90. The application for leave to appeal should be granted, but the appeal should be dismissed.

91. **BUSS JA**: The appellant was convicted, after a trial in the District Court before Yeats DCJ and a jury, on one count in an indictment.

92. The count alleged that on 22 February 2009, at Perth, the appellant had in his possession a prohibited drug, namely MDMA, with intent to sell or supply it to another, contrary to s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) (the MD Act).

93. He appeals to this court against his conviction.

94. I agree with Pullin JA (with whom Mazza JA has agreed in relation to ground 1) that the appeal should be dismissed, but for different reasons.

The grounds of appeal

95. Initially, the appellant relied on five grounds of appeal. Most of the grounds were abandoned at the hearing. Ultimately, he relied on two grounds.

96. Ground 1 alleges that the trial judge erred in law in finding on a voir dire that text messages apparently extracted from mobile telephones in the appellant's possession were admissible in evidence as part of the State's case.

97. Ground 2 alleges that her Honour erred in law in granting the State leave to reopen its case and call additional evidence after defence counsel made a submission of no case to answer, and that this error occasioned a miscarriage of justice.

98. On 2 October 2011, Mazza JA referred the application for leave to appeal on these grounds to the hearing of the appeal.

Ground 1: the relevant facts and circumstances

99. On 22 February 2009, the appellant was driving a motor vehicle on the Graham Farmer Freeway in Perth. He had hired this vehicle on 11 November 2008. A police officer, Sergeant Simon O'Rourke, noticed that the appellant was speaking on a mobile telephone. Sergeant O'Rourke required the appellant to stop. After speaking to the appellant and obtaining his name, Sergeant O'Rourke contacted another police officer by radio and received additional information about the appellant.

100. The appellant, in response to a request by Sergeant O'Rourke, produced from his pockets a red Nokia mobile telephone and a blue Nokia mobile telephone. These telephones were registered in false names. Each of them had an identical six digit pin code which corresponded to the appellant's date of birth.

101. Shortly afterwards, other police attended the scene. The other police included Constable Matthew Wood, Detective Sergeant Stephen Coelho and Detective Senior Constable Yuswak. Detective Coelho and Detective Yuswak carried out a video-recorded search of the appellant's vehicle. Various items were seized including two plastic zip lock bags containing a white crystalline substance, another plastic zip lock bag containing 367 white tablets, a set of electronic scales, a foil containing 10 prescription tablets, a glass pipe smoking implement and a silver Nokia mobile telephone.

102. The appellant was arrested and charged with the offence in the indictment.

103. First Class Constable Bradley Tomlinson was assigned the task of retrieving data from the mobile telephones seized from the appellant. He gave evidence at the trial that he used two different machines/software packages - 'XRY' and 'Cellebrite' - to download text messages from the mobile telephones. Some of the text messages were sent to or by a person described as 'Russell', 'Rusty' or 'Russ'. They were consistent with the person who received or sent the messages being involved in drug dealing. The appellant's first given name is 'Russell'.

Ground 1: Constable Tomlinson's evidence on the voir dire

104. At the commencement of the trial, the trial judge conducted a voir dire in relation to the admissibility of the text messages which Constable Tomlinson said he had downloaded from the mobile telephones.

105. Constable Tomlinson gave evidence on the voir dire. He said, in examination-in-chief, relevantly:

(a) He is a First Class Constable attached to the Computer Crime Squad. He has been attached to this Squad since at least 2008.

(b) His role at the Computer Crime Squad is to extract data from computer systems. He has good experience 'with computers and mobile phones generally' (ts 60).

(c) He has an 'industry-based qualification', namely, a Diploma in Computer Systems Engineering and an 'A-Plus certification' (ts 60). He explained that the A-Plus certification 'just allows me to be qualified in dealing with computer systems and componentry' (ts 60).

(d) He has undertaken other 'industry-based training', being an 'intermediate Encase training' course. This course included 'specific software training' in relation to a computer software programme known as 'Encase' (ts 61).

(e) He used 'two devices' for the purpose of extracting data from the mobile telephones in question. The devices were an 'XRY machine' and a 'Cellebrite machine' (ts 61).

(f) He was trained in the operation of the Cellebrite machine at the Computer Crime Squad 'by the trainers there' (ts 61).

(g) He gave this explanation as to the function performed by these machines:

> Cellebrite and XRY, they're two different machines but basically they extract data from a mobile telephone (ts 61).

(h) He then said that he had used the XRY machine and the Cellebrite machine to extract data from 'over 100 phones' (ts 61).

(i) He was asked 'how exactly Cellebrite and XRY work'. This was his response:

> So my - my role as such, I'll receive a mobile telephone and the mobile telephone usually has a SIM card and a memory card and what you do is you - you connect the connectors to the phone and follow the prompts and that will enable you to download the - the phone or the data on the phone. Once that's complete we give that a letter which would be A and once that's downloaded I will take the SIM card and memory card out and again download that phone and that will become A1, then I would download the SIM card which would be A2 and then I'd download the memory card which is A3. There'd be a lot of duplication in data received, but that's just so we can find out what data was on what part of the phone (ts 61 - 62).

(j) The prosecutor asked whether, in the present case, he had successfully downloaded the data from the mobile telephones. After referring to contemporaneous notes he made in the present case in relation to the downloading procedure, Constable Tomlinson gave this evidence:

> PASCOE, MS: In respect to this matter---My notes say that there's three phones so the first phone which is a Nokia 1208, the first download was successful, the second was successful and the third was successful. The second phone which is a Nokia 5000D2, the first download was successful, the second download was successful and the third download was successful and third phone, a Nokia 6610, the first download was successful, the second download was unsuccessful because it was unable to process the phone without a … SIM card and the third one was successful.

So you are able to say that for software and the instruments of the device were operating correctly at the time---Yes.

And you yourself performed these - these operations---I did, yes (ts 62).

106. Defence counsel's cross-examination of Constable Tomlinson elicited the following evidence:

(a) Constable Tomlinson received the Diploma in Computer Systems Engineering upon completing a one-year full-time course at Thornlie TAFE. The course dealt with computers, but not mobile telephones. The A-Plus certification was also received from TAFE.

(b) The Encase software in respect of which Constable Tomlinson received training does not include XRY software or Cellebrite software.

(c) He does not have any formal training in relation to the use of XRY software or Cellebrite software.

(d) The training he received in relation to XRY software and Cellebrite software was from a person at the Computer Crime Squad who showed him how to use it. He was shown about 10 times how to use each type of software.

(e) He is not aware of what qualifications (if any) are held by the person at the Computer Crime Squad who showed him how to use the XRY machine and the Cellebrite machine. He identified the person who taught him as Adam Stafford. He does not know what qualifications Mr Stafford may have.

(f) He said that the Cellebrite machine 'uses software' and 'extracts data from a telephone', but he does not know how the software 'works' (ts 64). He gave the same evidence in relation to the XRY machine.

(g) He then gave this evidence in response to questions from defence counsel:

If you don't know how it works, how can you say it's reliable---You'd have to ask the manufacturer.

Okay. I'm asking you. How can you say it's reliable---I can't.

You can't. And, in fact, on one occasion that you used it in relation to the Nokia, it was unsuccessful---Yes, that's right (ts 64).

107. In re-examination, the prosecutor sought to clarify Constable Tomlinson's comments about the unsuccessful extraction of data from one of the mobile telephones:

PASCOE, MS: Constable Tomlinson, you told us that the Nokia - the unsuccessful download of the Nokia was because the phone required the SIM card---Yes, that's correct.

> - - - to be in it … Did you want to elaborate on that---Just different phones work differently and because of that, the - the software obviously works differently to different phones as well. So yeah. Sometimes it doesn't work because it needs a SIM card to process the phone (ts 65).

Ground 1: the trial judge's ruling and reasons on the voir dire

108. The trial judge ruled that Constable Tomlinson's evidence as to the data he extracted from the mobile telephones, and the extracted data, were admissible in evidence as part of the State's case.

109. Her Honour reasoned as follows:

> [R]elevant data obtained in this way will be admissible if there is evidence from a suitably qualified person to prove that the process produces accurate results as well as evidence to show that the downloading was properly carried out on the particular occasion in question. Now, the second of these has clearly been met. *The workings of the instrument need not be given and it seems to me that in this case the notes of the experienced officer, the evidence that this software is regularly used by him, establishes the level of accuracy, and [his evidence that in the present case he] successfully used the program, seems to me to meet the tests* ... He was a trained, experienced and competent operator and the software was operated properly and in those circumstances in this case I think this evidence is admissible and I'll allow it to be given by the qualified expert (ts 75). (emphasis added)

Ground 1: Constable Tomlinson's evidence at the trial

110. The evidence given by Constable Tomlinson at the trial was not materially different, for present purposes, from the evidence he gave on the voir dire (ts 146 - 155).

Ground 1: applicable legal principles

111. In *The Science of Judicial Proof* (3rd ed, 1937), Professor Wigmore enunciated three fundamental propositions applicable to evidence based on the use of a mechanical or scientific instrument constructed on knowledge of scientific laws:

> A. *The type of apparatus purporting to be constructed on scientific principles must be accepted as dependable for the proposed purpose by the profession concerned in that branch of science or its related art*. This can be evidenced by qualified expert testimony; or, if notorious, it will be judicially noticed by the judge without evidence.
>
> B. *The particular apparatus used by the witness must be one constructed according to an accepted type and must be in good condition for accurate work*. This may be evidenced by a qualified expert.
>
> C. *The witness using the apparatus as the source of his testimony must be one qualified for its use by training and experience* (§220). (original emphasis)

112. *Wigmore on Evidence* (Chadbourn Rev, Vol III, 1970) §795 states the requirements for the admissibility of evidence based on the use of scientific instruments, as follows:

> What is needed, then, in order to justify testimony based on such instruments, is preliminary professional testimony: (1) to the *trustworthiness of the process* or instrument in general (when not otherwise settled by judicial notice); (2) to the correctness of the *particular instrument*; such testimony being usually available from one and the same qualified person. (original emphasis)

113. In ***Philpott v Boon*** [1968] Tas SR 97, Burbury CJ (Chambers J agreeing) said, in the context of a charge of exceeding the speed limit where evidence was given at the trial of the speed measured by a device called an 'amphometer':

> A court will admit in evidence the results of any scientific test relevant to an issue which it has to determine. The proper foundation of course must be laid. If a scientific instrument is used the court must have evidence from a witness expert in its use to explain its general function to the court and to vouch for its accuracy. This is not to say that detailed evidence as to the working of such an instrument need be given. It is sufficient if it is established that *it is a scientifically accepted instrument for its avowed purpose* and that the particular instrument used was working accurately. Indeed in the case of a well-known instrument such as a speedometer the court is entitled to presume its accuracy in the absence of evidence suggesting otherwise (***Thompson v Kovacs*** [1959] ALR 636; [1959] VR 229) (99 - 100). (emphasis added)

114. Accordingly, there is a distinction between mechanical or scientific instruments of a class which, by general experience, are known to be trustworthy (even if not infallible), on the one hand, and mechanical and scientific instruments that are not within this class, on the other.

115. In ***Zappia v Webb*** [1974] WAR 15, Jackson CJ said:

> It is well established that the courts will take judicial notice of the use, nature and purpose of many mechanical or scientific instruments in common use, such as watches, thermometers, barometers, speedometers and the like. These instruments are of a class which by general experience are known to be trustworthy, even if not infallible, so that there is a presumption of fact, in the absence of evidence to the contrary, that readings taken from such instruments are correct, and hence it is not necessary to show that at the relevant time the instrument had been tested and found to be working correctly. *But the acceptance of a particular instrument without proof of its function, operation and accuracy depends upon the extent to which it is commonly used within the community, so that a mechanical or scientific device recently invented will usually require expert evidence to establish what it can measure or accomplish and whether it can be relied on*. Later, as the device and its use becomes known, a stage may be reached where the courts will be sufficiently familiar with it not to require proof of what it is and what it does, but may still require evidence of its accuracy at the relevant time (17). (emphasis added)

See also ***Holt v Auckland City Council*** [1980] 2 NZLR 124, 127 - 128 (Richmond P, Richardson & McMullin JJ).

116. In ***Mehesz v Redman (No 2)*** (1980) 26 SASR 244, King CJ (Cox J agreeing) cited with approval the passages I have reproduced from the reasons of Burbury CJ in ***Philpott*** and from *Wigmore on Evidence* (246). A little later, King CJ summarised the applicable legal principles governing the admissibility in evidence of results generated by scientific instruments:

> If an instrument is so well known that its accuracy may be assumed as a matter of common experience, the Court is entitled to presume its accuracy without evidence: ***Porter v Kolodzeij***

([1962] VR 75); ***Parker v Fauser*** ([1962] SASR 176); ***Skalde v Evans*** ([1966] SASR 176). In the case of other instruments, *evidence is required of the trustworthiness of that type of instrument in general* and of the correctness of the particular instrument. The evidence of the trustworthiness of that type of instrument in general may be supplied by the expert who uses it and *who can testify as to its acceptance as a reliable instrument in his field of science*. The accuracy of the particular instrument will ordinarily be proved by those who use and test it (247 - 248). (emphasis added)

See also ***Mehesz*** (251 - 252) (White J); ***R v Ciantar*** [2006] VSCA 263; (2006) 16 VR 26 [9] (Warren CJ, Chernov, Nettle, Neave & Redlich JJA).

Segment #4
Segment #5
Segment #6

205. Seventhly, the circumstances of the present case are properly to be characterised as extraordinary or exceptional. Her Honour was entitled to exercise her discretion to permit the State to split its case. The following comments by her Honour, in her summing up, reflect the remarkable situation that developed during the trial:

> But, ladies and gentlemen I've never had in my 18 years on the Bench, had the drugs in court. I'm going to send them in with you, because they've been so much in the centre of your deliberations, but you are not to open them. You are not to open them and what goes in has to come back out and you can look in there. You've had a chance to see a number of the tablets, but you're not to actually open that and do any further looking other than at it. I will send it in with you. I considered maybe not doing that, but I think you can in this case; I'm going to trust you (ts 330).

206. Ground 2 fails.

Ground 2: some observations about defence counsel's cross-examination

207. I will now make some observations about defence counsel's cross-examination of Constable Wood, Detective Coelho and Detective Yuswak.

208. Defence counsel did not attempt, in his cross-examination of these witnesses, to undermine Mr Hoare's certificate. The cross-examination was directed to establishing that the tablets seized by the police from the appellant's motor vehicle were different from the tablets in drug movement envelope No W000473775. In other words, the cross-examination was directed to the issue of continuity.

209. Mr Hoare's certificate related in terms to the tablets in drug movement envelope No W000473775. His certificate did not relate in terms to the tablets seized by the police from the appellant's vehicle. The certificate had probative force only in relation to the tablets in drug movement envelope No W000473775. These were the tablets he received for analysis.

210. It was necessary for the State to prove, as part of its case, that the tablets seized by the police from the appellant's motor vehicle were the tablets in drug movement envelope No W000473775. The State knew that proof of continuity was required. The prosecutor

sought to prove continuity by calling evidence from Constable Alston, Constable Jones, Detective Coelho and Detective Yuswak.

211. Although, on the evening of 4 April 2011, defence counsel requested the prosecutor to produce, the next day, drug movement envelope No W000473775 together with the tablets in the envelope, the prosecutor had been intending, in any event, to produce the envelope and tablets in court. See [160] above.

212. The ambiguity was created by the prosecutor, not by defence counsel. The prosecutor, on her own volition, tendered drug movement envelope No W000473775, together with the tablets contained in the envelope, as part of the State's case. The prosecutor, once again on her own volition, then requested Detective Knight, in evidence-in-chief, to examine the tablets and give evidence of his opinion as to their characteristics.

213. I will now make some observations about defence counsel's cross-examination of Mr Hoare, Ms Murdoch and Dr Reynolds.

214. Defence counsel did attempt, in his cross-examination of these witnesses, to challenge the probative force of Mr Hoare's certificate.

215. However, this cross-examination was undertaken in response to the prosecutor's efforts, in her examination-in-chief of these witnesses, to demonstrate that there was no material inconsistency between the appearance of the tablets, as perceived by the witnesses, and the description of the tablets, as set out in the certificate.

216. Further, the prosecutor, by:

(a) tendering drug movement envelope No W000473775;

(b) requesting Detective Knight to examine the tablets in the envelope and give his opinion in relation to them; and

(c) applying to reopen the State's case and calling Mr Hoare, Ms Murdoch and Dr Reynolds,

abandoned reliance on the status of the certificate under s 38, s 38A and s 38B of the MD Act.

217. This forensic strategy by the prosecutor was a mistake. The trial judge adverted to the mistake in the course of defence counsel's cross-examination of Ms Murdoch (ts 273).

Ground 2: defence counsel's closing address and the trial judge's summing up

218. Defence counsel submitted to the jury, in his closing address, that there was a reasonable doubt that the tablets the subject of Mr Hoare's certificate were the tablets seized by the police from the appellant's motor vehicle (ts 327).

219. The trial judge instructed the jury, in her summing up, in relation to this issue, as follows:

> Are you satisfied beyond reasonable doubt that the pills located under the seat of [the appellant's] vehicle were the ones tested by the Chemistry Centre and were MDMA? If you're left in any reasonable doubt about those matters you would have to acquit [the appellant] and bring in a verdict of not guilty (ts 327).

220. Defence counsel's submission to the jury, and her Honour's instruction to the jury in relation to that submission, reflect the defence case about the only issue of substance fought at the trial, namely, whether the tablets seized by the police were the tablets the subject of the certificate. This issue was concerned with continuity and did not, of itself, involve an impermissible challenge to the probative force of the certificate.

Should the proviso be applied?

221. Section 30(3) of the *Criminal Appeals Act 2004* (WA) provides that this court must allow an appeal against conviction by an offender if, in its opinion:

> (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported;
>
> (b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or
>
> (c) there was a miscarriage of justice.

222. By s 30(4) of the *Criminal Appeals Act*, despite s 30(3), even if a ground of appeal might be decided in favour of the offender, this court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

223. In ***Quaid v The Queen*** [2011] WASCA 141; (2011) 210 A Crim R 374 [215] - [235], I reviewed the principles relating to the application of the common form 'proviso', as explained by the High Court in numerous authorities. It is unnecessary to reproduce my review. See also, more recently, the decision of the High Court in ***Baiada Poultry Pty Ltd v The Queen*** [2012] HCA 14; (2012) 86 ALJR 459.

224. Section 6(1)(a) of the MD Act provides, in essence, that a person who has in his possession a prohibited drug with intent to sell or supply it to another commits a crime. The elements of the crime comprise possession of the prohibited drug with the requisite intention.

225. Section 11(a) of the MD Act provides that, for the purposes of s 6(1)(a), a person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V of the MD Act in relation to the prohibited drug.

226. Schedule V specifies the amounts of particular prohibited drugs giving rise to the presumption, under s 11(a), of an intention to sell or supply. The prohibited drugs listed in Schedule V include MDMA in an amount of 2.0 g.

227. In ***Abbott v The State of Western Australia*** [2005] WASCA 42; (2005) 152 A Crim R 186, Steytler P said in relation to s 11(a):

> Once the fact of possession of more than the specified quantity is proved beyond reasonable doubt or, as in this case, admitted, the prosecution has no other onus to discharge. The very purpose of s 11(a) of the Act is that of putting upon the accused, in such a case, the onus of establishing on the balance of probabilities that, on the whole of the evidence at the trial, he or she did not intend to sell or supply the drug to another [4].

228. The State's case at trial was that the 367 white tablets contained in the plastic zip lock bag seized by the police when they searched the appellant's vehicle were MDMA tablets, the weight of the tablets was 107 g and the MDMA content of the tablets was approximately 25%.

229. The appellant's defence at trial was that the State had not proved the elements of the alleged offence beyond reasonable doubt. The appellant did not give sworn evidence at the trial. Defence counsel did not call any witnesses.

230. In my opinion, the trial judge's error in relation to ground 1 did not involve or create facts and circumstances which require that the error be characterised as a 'serious' breach of the presuppositions of a criminal trial or a 'fundamental' departure from the essential requirements of a fair trial. There was a substantial body of evidence at trial on which the appellant could have been convicted and in respect of which her Honour made no error.

231. This court may dismiss the appeal if it is satisfied, without regard to the text messages downloaded by Constable Tomlinson, that 'no substantial miscarriage of justice has actually occurred', within s 30(4) of the *Criminal Appeals Act*.

232. This court may not, however, accord any weight to the jury's verdict of guilty as an aspect of the trial record in deciding whether to apply the proviso. The trial judge's error, in relation to ground 1, in permitting the State to adduce evidence of the text messages could reasonably have influenced the jury's assessment of the admissible evidence. This point would have applied, with even greater force, in relation to ground 2 but, as I have stated, the appellant has failed to make out ground 2.

233. I am satisfied beyond reasonable doubt that the appellant was guilty of the offence in question. The combined weight of all the objective circumstantial evidence, and the evidence that was not genuinely in contest at the trial, compels the conclusion that, despite the appellant having made out ground 1 of the appeal, no substantial miscarriage of justice has occurred. The appellant's conviction on the count in the indictment was correct, and the conviction should not be set aside. My reasons for these conclusions are as follows.

234. At the trial, defence counsel did not seek to impugn the credibility of any of the State's witnesses in any material respect.

235. The following evidence, which was not the subject of any controversy at the trial, was powerful evidence against the appellant:

(a) On 22 February 2009, 367 white tablets were located by police in a vehicle hired by the appellant since 11 November 2008.

(b) When the tablets were located and seized by the police, the appellant was the sole occupant of the vehicle.

(c) The tablets were found under the driver's seat, and the appellant occupied this seat when the vehicle was stopped by Sergeant O'Rourke.

(d) The tablets had a value of about $18,000.

(e) Other drug related paraphernalia was located in the appellant's vehicle and seized by the police, namely, two bags of white powder (which forensic analysis revealed to be the cutting agent, MSM) in the driver's side door pocket; electronic scales with traces of methylamphetamine; and a glass pipe implement with traces of methylamphetamine.

(f) The appellant was in possession of the red and blue Nokia mobile telephones. The telephones were registered in false names. Each of them had an identical six digit pin code which corresponded to the appellant's date of birth. Detective David Knight gave evidence that obtaining multiple mobile telephones in false names was a common practice amongst drug dealers.

236. At the trial, the State adduced evidence concerning the appellant's conviction on 21 August 2009, after a trial in the District Court before a judge and jury, on a count alleging that the appellant had in his possession a prohibited drug, namely methylamphetamine, with intent to sell or supply it to another, contrary to s 6(1)(a) of the MD Act. The State relied on the fact of the conviction, and the material facts underpinning the elements of the offence, as 'propensity evidence', within s 31A of the *Evidence Act*.

237. The prosecutor read this statement into evidence in the presence of the jury:

> On 21 August 2009 following a trial in the District Court at Perth, [the appellant] was convicted of possession of methylamphetamine with intent to sell or supply it to another. The evidence in respect of that offence was as follows. On 4 September 2008, police executed a search warrant at [the appellant's] South Perth residential unit. Police located three clipseal bags in a cupboard above the rangehood in the kitchen, each containing a quantity of a powdery substance. The substance was later tested at the Chemistry Centre and found to be methylamphetamine. The first amount of 13.7 grams was of 15 per cent purity. The second amount of 4.51 grams was found to be of 16 per cent purity. The third bag did not contain an illicit substance. The total amount of the methylamphetamine found was 18.21 grams. Police also located 31 grams of dimethyl sulfone containing minute traces of methylamphetamine in a clipseal bag in the freezer compartment of the refrigerator. Police located a set of electronic scales on the kitchen bench. The scales were analysed and found to have traces of methylamphetamine on their surface. Boxes of clipseal bags and boxes of disposable gloves were found in the pantry. Two exercise books were located on the kitchen bench. The books contained lists of initials, dates and numbers as well as columns headed 'tick' and 'coin'. The State led expert evidence to the effect that the notations and the terminologies used in the exercise books were related to dealings in illicit drugs. A large 2008 diary was also located on the kitchen bench. When asked if the diary was his, [the appellant] said, 'Yeah. I think it's my diary.' He also said the entries in the diary were possibly made by him. There was evidence from a handwriting expert that the notations on the particular pages of the diary and of the orange exercise book were written by the same person. And those are the facts in that previous case (ts 82 - 83).

238. A judge of the District Court ruled, before the commencement of the trial, that this 'propensity evidence' was admissible. The correctness of the judge's ruling is not challenged in the appeal. The propensity

evidence is evidence of the predisposition of the appellant to deal in prohibited drugs.

239. Detective Knight gave evidence to the effect that, on his observation, some of the tablets produced at the trial appeared to have a 'shield stamp'. He said that, on his observation, the tablets were 'off white, eggshell white' in colour. However, he added that it was difficult to see any marking on any of the tablets. It was necessary to 'hold them on a certain light and it bounces off'.

240. In my opinion, Detective Knight's opinion as to the appearance of some of the tablets produced at the trial did not materially diminish the force of the continuity evidence. I would be satisfied beyond reasonable doubt of the appellant's guilt even if it were necessary (which, on my view in relation to ground 2, it is not) to disregard the evidence called by the State after it was given leave to reopen. However, the evidence from Mr Hoare, Ms Murdoch and Dr Reynolds, being the witnesses called by the State after it reopened, destroyed the defence case in relation to continuity.

241. There was no reasonable alternative explanation and no reasonable alternative inference, on the whole of the evidence, to the effect that the 367 white tablets may have been placed in the appellant's vehicle by a third party without the appellant's knowledge and consent.

242. Finally, the appellant did not give or call any evidence to rebut the presumption under s 11(a) of the MD Act. He did not establish on the balance of probabilities that, on the whole of the evidence at the trial, he did not intend to sell or supply any of the 367 white tablets to another.

Conclusion

243. I would grant leave to appeal on each of grounds 1 and 2, but the appeal itself should be dismissed.

244. **MAZZA JA**: I agree with Pullin JA that leave to appeal against conviction should be granted, but the appeal should be dismissed.

245. I agree, for the reasons that Pullin JA gives, that the learned trial judge did not err in overruling the objection to the tendering of the text messages taken from the blue and red Nokia mobile telephones seized by the police from the appellant.

246. My reasons for arriving at the conclusion that the learned trial judge did not err in the exercise of her discretion to allow the prosecution to reopen its case are as follows.

247. The facts of the case, the circumstances in which the State were permitted by the learned trial judge to reopen its case and all of the relevant legislative provisions are set out in Pullin JA's reasons and do not need to be repeated.

248. The discretion to allow the prosecution to reopen its case is, as Dawson J said in ***R v Chin*** [1985] HCA 35; (1985) 157 CLR 671, 685, essentially one of fairness. However, it is a discretion which should only be exercised in exceptional circumstances because of the important principle that the prosecution cannot split its case: ***Shaw v The Queen*** [1952] HCA 18; (1952) 85 CLR 365, 380.

249. There is no closed category of cases to which it would be appropriate to allow the prosecution to reopen its case: ***Shaw v The Queen*** (380). The discretion may be appropriately exercised when matters are raised for the first time by the defence in the course of its case that could not reasonably have been anticipated by the State. The discretion may also be exercised where a prosecutor, through inadvertence, omission or a slip, fails to adduce evidence of a technical or uncontroversial nature: ***Reid v Kerr*** (1974) 9 SASR 367, 376 (Wells J); ***Burgoyne v Earl*** [1999] WASCA 154 [11] (McKechnie J). These examples are not exhaustive.

250. What occurred in this trial could accurately be characterised as exceptional and stemmed from faults by both the defence and the State.

251. It is clear that the appellant sought, in the cross-examination of Constable Wood, Detective Sergeant Coelho and Detective Senior Constable Yuswak, to adduce evidence

contradicting the description of the tablets in the certificate of approved analyst when he had not complied with s 38B(1) of the *Misuse of Drugs Act 1981* (WA). That section requires the appellant to deliver a notice to the Commissioner of Police requiring the approved analyst to be called.

252. There can be no reasonable doubt that had the appellant given notice challenging the description of the tablets that were analysed, the State would have called, as part of its case, the evidence that it eventually called at trial from Mr Hoare, Ms Murdoch and Dr Reynolds.

253. The appellant was fortunate that the prosecutor did not know that what defence counsel was attempting to do was in breach of s 38B(1) of the *Misuse of Drugs Act*. The appellant's luck continued when the prosecutor agreed to defence counsel's request for the tablets that were analysed to be produced in court. It persisted when the prosecutor asked Detective Knight whether there were any markings on the tablets and he, to the prosecutor's surprise, answered in the affirmative.

254. At that stage, the prosecutor might have called Mr Hoare, Ms Murdoch and Dr Reynolds. However, it seems that she did not appreciate the significance of Detective Knight's evidence. After he gave his evidence, she closed the State's case. The significance of Detective Knight's evidence only became clear when defence counsel made his no case submission. It was at this point that the appellant clearly articulated, for the first time, that he would be arguing that the tablets that were analysed were not the tablets seized from the appellant's car.

255. Her Honour, when faced with the prosecutor's application to reopen, acted with complete fairness in the circumstances. The calling of the witnesses from the ChemCentre gave the appellant a further opportunity, through cross-examination, to rebut the description of the thing analysed in the certificate of approved analyst. On the other hand, the State was given the opportunity to explain through the witnesses why there was an apparent discrepancy between the description in the certificate and the appearance of the tablets themselves.

256. Moreover, her Honour did not hold the appellant to his decision not to give or adduce evidence, after the prosecution had closed its case for the first time. After the State had called the witnesses from the ChemCentre, she inquired from the appellant again whether he wished to give or adduce evidence. For a second time, the appellant elected not to give or adduce evidence. Thus the State did not call rebuttal evidence after the appellant called evidence as part of the defence case. Her Honour's decision to allow the State to reopen its case was fair to the appellant and caused him no injustice.

257. In the event that, contrary to my opinion, the two grounds of appeal pursued by the appellant are made out, for the reasons given by Pullin JA, the errors did not give rise to a substantial miscarriage of justice.