IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA147/2022
[2025] NZCA 216

BETWEEN	BROOKE MAURICE DUNN Appellant
AND	THE KING Respondent

Hearing:	14 March 2024 and 30 April 2025
Court:	French, Palmer and Cooke JJ
Counsel:	N P Chisnall KC for Appellant I S Auld for Respondent
Judgment:	5 June 2025 at 11.30 am
Reissued:	13 June 2025

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence and reopen the hearing is declined.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Mr Dunn was found guilty at trial of seven charges of possessing and supplying hypophosphorous acid (HPA) for the purpose of manufacture of methamphetamine.[1] The charges arose as a result of a police investigation into his importation of large quantities of HPA in the name of his paint manufacturing business Brooke Dunn Coatings Ltd (the company). HPA is a key ingredient in the manufacture of methamphetamine.

[2] Mr Dunn now appeals his convictions.[2]

[3] At the appeal hearing held on 14 March 2024 Mr Dunn was represented by Mr Chisnall KC. After the appeal was heard but before any decision was issued, Mr Chisnall filed a memorandum seeking leave to adduce further evidence in support of a new appeal ground and for the hearing to be reopened. This was opposed by the

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1 Being offences under ss 12A(1)(a) and 12A(2)(a) of the Misuse of Drugs Act 1975. He was sentenced to four years and three months' imprisonment: *R v Dunn* [2021] NZDC 24848 [sentencing notes] at [20].

2 An appeal against sentence was also filed but later abandoned.

Crown and subsequently the Court convened a further hearing to consider whether Mr Chisnall's application should be granted.

[4] For the reasons set out at [87] to [123], we have decided not to grant leave to adduce the further evidence.

Background

[5] Between December 2012 and May 2018, Mr Dunn ordered and received the following shipments of HPA from China:

(a) 2,500 kg ordered on or about 12 December 2007;

(b) 2,000 kg ordered on or about 13 May 2012;

(c) 3,000 kg ordered on or about 18 December 2013; and

(d) 5,000 kg ordered on or about 16 January 2017.

[6] In June 2017, having been alerted by the New Zealand Customs Service | Te Mana Ārai o Aotearoa to the large importation earlier that year, police officers visited the company's premises and spoke to Mr Dunn. The purpose of the visit was to see what Mr Dunn was using the HPA for, where it was stored and the security arrangements. In evidence, one of the officers described it as a "fact-finding mission".

[7] Mr Dunn told the police he did not sell the HPA to the public and only used it in his business for three purposes — mixing paint, as a paint stripper and as an ingredient in a rust converter product that the business made on-site. He told them he used very little HPA.

[8] As regards storage, Mr Dunn stated that he was storing the HPA in large drums in a locked shipping container in the yard. He also said he had removed the labels because he was aware of the potential use of HPA in the manufacture of methamphetamine and wanted to avoid being targeted by criminals. The police officers did not inspect the container.

[9] Following the visit, police made inquiries of industry experts about the use of HPA in the painting industry. Those inquiries led to the police executing a search warrant at the company's premises and at Mr Dunn's private residence on 22 May 2018.

[10] The search at the premises involved three separate teams: the Clandestine Laboratory Response Team and the Institute of Environmental Science and Research (ESR) scientists whose focus was on locating chemicals, in particular HPA, the Asset Recovery Unit which was tasked with locating any business documents, and the Digital Forensic Unit whose job it was to locate and clone any computers and other digital devices.

[11] During the search, police found nine unlabelled 20 litre plastic containers. Testing indicated the content of the containers was HPA.

[12] The search of the premises did not yield any evidence of any product being manufactured on site that used HPA or any other legitimate use for HPA. Nor were police able to find any evidence of the manufacture of a rust converter product. While there were records of formulae involving other chemicals, none of the formulae referenced HPA.

[13] One of the documents found concerned payments for a storage unit rented by Mr Dunn at a public storage facility some three kilometres away. The police obtained a search warrant to search the unit. They cut the padlock and found three 1,000 litre containers full of HPA. This amounted to 3,494 kg of HPA. There was nothing else in the storage unit.

[14] The police returned three days later to Mr Dunn's business premises with a further search warrant to retrieve certain items and to obtain the key to the padlock of the unit at the off-site storage facility. By then Mr Dunn was aware the unit had been searched and confirmed he was the sole keyholder. He was asked why he had not told police about this HPA on 22 May when he had been specifically asked where the HPA was stored and had only pointed out a few 20 litre containers and made no mention of the storage unit. According to the police officer's evidence at trial, Mr Dunn replied

that he was "in shock or traumatised by the whole thing and forgot to mention it". He also stated that nobody had asked him about it. When the police officer disputed the latter assertion, Mr Dunn had nothing further to say.

[15] In total, at the time of the search (May 2018), Mr Dunn was in possession of 3,024 litres of HPA.

[16] The cloning of the hard drives of the computers that were located at the business premises and Mr Dunn's home captured some 227,000 documents and an accounting software. Mr Dunn and his family's bank accounts were also searched.

[17] Mr Dunn was subsequently arrested and charged with nine offences. In respect of each of the four shipments and the quantity of HPA discovered during the 2018 search, he was charged with five counts of possession of material capable of being used in the manufacture of methamphetamine with the intention of it being used as such. The other four charges alleged he had supplied the HPA from the four shipments (or some of it) to others knowing it was intended to be used to manufacture methamphetamine.

[18] Mr Dunn declined to be interviewed by the police and entered pleas of not guilty to all charges.

The trial

[19] At trial, it was not disputed that the material found in Mr Dunn's possession was HPA. The issue was whether Mr Dunn used the HPA and was in possession of it for legitimate business purposes or whether he intended it to be used for the manufacture of methamphetamine or supplied it to others for that purpose.

[20] There was no evidence of any actual sales of HPA to the illicit drug trade and it was never part of the Crown case that Mr Dunn himself was involved in the manufacture of methamphetamine. As the prosecutor put it to the jury in her opening address, the Crown case was that Mr Dunn had a very large quantity of HPA. He had no legitimate use for bulk amounts of HPA. Of the very large quantity of HPA sourced

by him, much of it vanished without a trace and at the same time Mr Dunn "made a whole lot of cash".

[21] The Crown's case was thus a largely circumstantial one and depended on the jury drawing inferences from the following evidence:

(a) The substantial quantities of HPA imported by Mr Dunn.

(b) Expert evidence that HPA was not generally used in the painting industry for the purposes claimed by Mr Dunn and that there were other cheaper and more readily available products.

(c) Police evidence that the almost exclusive use of HPA in New Zealand is in the manufacture of methamphetamine.

(d) The absence of any records at the company's premises relating to the use of HPA in the business.

(e) The existence of records relating to other chemicals used in the business.

(f) The secretive way in which Mr Dunn handled and stored the HPA, which contrasted with how other chemicals were stored in the business including another chemical, toluene, also known to be used in the manufacture of methamphetamine.

(g) Evidence of former staff members[3] that they had never seen HPA at the premises and were not aware of it being used. They were also not aware of it being an ingredient in any product they had ever manufactured, nor that they had ever made a rust converter product.

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[3] One of the staff members who gave evidence had actually returned to work for Mr Dunn and was employed by him at the time of giving evidence.

(h) Evidence of one staff member who had seen HPA at the premises recalled unloading it and then helping Mr Dunn load it onto a truck. Mr Dunn drove it away and the staff member never saw it again.

(i) Evidence of a significant number of what the Crown said were unexplained cash deposits totalling $1.8 million that did not correspond with Mr Dunn's accounting records, including a notable spike in very large cash deposits following the 2012 importation.

(j) Expert evidence that Mr Dunn dealt with cash in a way that was consistent with money laundering practices.

[22] Mr Dunn elected to give evidence. He testified that he used HPA directly as a concrete etcher and also used it in manufacturing a number of products, including a paint stripper, that he either used himself or supplied to customers. The products supplied to customers using HPA were mainly an anti-corrosive steel primer and a rust converter.

[23] Mr Dunn provided an old patent for the use of HPA in the paint industry and explained that he had been in the paint trade all his life having been trained by his father.

[24] Mr Dunn also told the jury that he had written formulations for each of the products that contained HPA at his offices, either in hard copy or on a computer file. He noted that although the formulations did not actually refer to HPA, that had been done deliberately for security reasons like the removal of the labels. He said he wanted to avoid people, including the staff, knowing he used HPA.

[25] As for the allegedly unexplained cash income, Mr Dunn testified that given the nature of his paint business there were a lot of cash sales and that his business activities could account for much of the $1.8 million.

[26] The jury acquitted Mr Dunn of the charges relating to the first shipment but convicted him of all other charges.

Grounds of appeal advanced at March 2024 hearing

[27] At the appeal hearing, Mr Chisnall advanced four grounds of appeal identifying several alleged errors that had occurred at trial. Mr Chisnall submitted that had the errors not occurred there was a real possibility that more favourable verdicts would have been reached and that accordingly there had been a miscarriage of justice.

[28] We turn now to address each of these four grounds of appeal.

The Crown inverted the burden of proof

[29] The contention that the Crown inverted the burden of proof is said to have arisen from the following:

(a) the prosecutor's cross-examination of Mr Dunn about his purported failure to produce records to support his evidence;

(b) the trial Judge allowing the Crown to call rebuttal evidence; and

(c) the Crown's closing address and the Judge's summing up.

[30] In order to understand the arguments, it is necessary first to explain in more detail what happened at the trial.

[31] In his evidence in chief, Mr Dunn stated that he had sold 13,000 litres of primer to just the one customer, Waikato Sandblasting Services Ltd (Waikato Sandblasting), which by his calculations would have involved 1,000 litres of HPA. He also stated that he had records at the company's office showing his legitimate use of HPA, including hard copies of the chemical formulations for the products containing HPA.

[32] As a result of those claims, police conducted a further forensic analysis of the company's accounting records. These showed the company had only ever sold in total 7,446 litres of primer, of which approximately 7,200 litres had been sold to Waikato Sandblasting.

[33] This was put to Mr Dunn in cross-examination. He disputed its correctness and stated that he got his information about the volume of sales to Waikato Sandblasting from his MYOB accounting software system.

[34] In cross-examination, the prosecutor put to Mr Dunn that there were no records to support his claims about the volume of sales to Waikato Sandblasting, and the use of HPA. It was also put to him there were no records regarding the cash transactions. Mr Dunn denied this and claimed there were "plenty of hard copies" of the formulae. He also claimed he had paper invoices for a number of the cash transactions. When invited to produce these records, Mr Dunn replied he could bring them to Court.

[35] In a ruling, the Judge recorded that Mr Dunn's trial counsel, Mr Morgan KC, had been permitted to speak to Mr Dunn to encourage him to gather up the documents he had referred to in his evidence.[4]

[36] The next morning when Mr Dunn was re-examined, he did not produce the chemical formulations or the invoices.

[37] The Crown then applied under s 98 of the Evidence Act 2006 to adduce evidence from the forensic accountant Detective McIntyre who had undertaken the analysis that had been put to Mr Dunn. The application was allowed and the evidence from Detective McIntyre adduced. Mr Dunn was permitted to provide supplementary evidence to respond to the rebuttal evidence. His explanation for the discrepancy was that the records held by the police only went to August 2017, whereas the records he had reviewed went to mid-2019.

[38] In her closing address the prosecutor made the following comments:

> My learned friend is right, in giving evidence Mr Dunn does not assume the burden of proof. That sits squarely here with the Crown. But having said that, when you're assessing credibility you're entitled to take into account how his evidence fits with other available evidence and whether his evidence is consistent both internally and with the other evidence you have heard.

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4 *R v Dunn* [2021] NZDC 10644 [ruling 1]. Permission was necessary because the usual rule is that counsel are not allowed to speak to a witness about their evidence while it is being given.

> You are also entitled to take into account when pressed on an issue he fronts up with what he says exists and if he doesn't you're entitled to take that into account too.

Analysis

[39] In supporting his central contention that the Crown had inverted the standard of proof, Mr Chisnall relied on the prosecutor's cross-examination of Mr Dunn about his failure to produce records to support his claims as well as the comments made in her closing address quoted above.

[40] Mr Chisnall accepted that comments about the absence of records and comments that Mr Dunn's version of events was not supported by the documentary evidence were legitimate submissions for the Crown to make. However, he argued the prosecutor had crossed the line by effectively suggesting to the jury that Mr Dunn had a duty to produce the documents. Mr Chisnall further contended that the problem was compounded by the Judge wrongly allowing the rebuttal evidence, because that provided the prosecutor with a further opportunity in a second cross-examination to rehearse her contention that Mr Dunn had failed to provide corroborating documents. It also allowed the Crown to ambush Mr Dunn and leave it with the last say.

[41] Mr Chisnall acknowledged that in his summing up, the Judge had correctly directed the jury on the onus of proof and on the standard of proof but submitted given the harm that had been done the standard directions were insufficient. In his submission a targeted direction was required.

[42] We do not accept these submissions. In our view, the prosecutor was entitled to respond in the way she did to a positive assertion made by Mr Dunn that the records existed and were readily available. We note too that the impugned comments in the closing address were expressly prefaced with a reminder to the jury as to where the onus of proof lay.

[43] It follows we do not accept the Judge was required to provide a targeted direction in his summing up.

[44] As regards the rebuttal evidence, s 98(1) and (3) of the Evidence Act relevantly state:

> **98 Further evidence after closure of case**
>
> (1) In any proceeding, a party may not offer further evidence after closing that party's case, except with the permission of the Judge.
>
> …
>
> (3) In a criminal proceeding, the Judge may grant permission to the prosecution under subsection (1) if—
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> (a) the further evidence relates to a purely formal matter; or
>
> (b) the further evidence relates to a matter arising out of the conduct of the defence, the relevance of which could not reasonably have been foreseen; or
>
> (c) the further evidence was not available or admissible before the prosecution's case was closed; or
>
> (d) for any other reason the interests of justice require the further evidence to be admitted.
>
> …

[45] The Judge found that because Mr Dunn's claims about the quantities supplied to Waikato Sandblasting had only surfaced for the first time in cross-examination, the Crown could not have known its information would be challenged. The Judge also relied on the fact that Mr Dunn had been given an opportunity overnight to come up with the documents and had not done so. That was something the Judge said weighed heavily in favour of allowing the Crown to call the evidence.[5]

[46] Mr Chisnall emphasised that the discretion under s 98 is fettered and to be exercised sparingly.[6] He submitted that neither s 98(3)(b) nor (3)(c) was engaged in a way that made it in the interests of justice to permit the Crown to adduce the further evidence. In Mr Chisnall's submission, the further evidence did not relate to a matter arising out of the conduct of the defence except in the strictest sense. Rather, it arose from the conduct of the prosecution and it relied on information already in the Crown's possession.

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5 *R v Dunn* [2021] NZDC 11280 [ruling 2] at [12].

6 Citing *R v Timutimu* CA236/06, 30 November 2006 at [12].

[47] We disagree. Given the volume of documentary material, the prosecution could not reasonably have been expected to foresee every aspect of the accounting records that could potentially be relevant depending on the defence evidence and be expected to adduce evidence analysing every set of transactions regarding different products provided to different customers. Mr Dunn did not make a statement to the police and, at the time of the 2017 visit, he told them he used HPA for three purposes, none of which involved its use in a primer. It was only in his evidence that he mentioned it was used in a primer.

[48] In all the circumstances, we consider the Judge was correct to find that the Crown could not have reasonably foreseen prior to Mr Dunn's evidence that the volume of sales to Waikato Sandblasting would be relevant.

[49] We also disagree with a further submission made by Mr Chisnall that the rebuttal evidence only related to a collateral issue. On the contrary, in our view, it bore on a key issue in the trial, namely whether Mr Dunn had used the HPA for legitimate purposes. It was also of course relevant to an assessment of his credibility.

[50] We reject this ground of appeal.

The absence of a lies direction

[51] At trial, the Crown contended that Mr Dunn lied to police during the 2017 visit and again on 22 May 2018 about the whereabouts of the HPA by failing to disclose the off-site storage facility. He was cross-examined on this and it was put to him that he had deliberately misled the police.

[52] In closing, the prosecutor submitted to the jury that the information Mr Dunn gave to police about the storage of the HPA and the uses he had for it was not truthful. She also submitted that his denial of misleading or intending to mislead the police was not credible. She went on to say that clearly he was misleading the police and further that his own evidence was inconsistent on this point because in re-examination, Mr Dunn had suggested he might have been reluctant to tell police where the HPA was stored. And that, she told the jury, "tells you something about Mr Dunn's willingness

to be honest with you under oath in the witness box" and that it was "a very stark example [of] why you cannot rely on what Mr Dunn told you".

[53] Later in her closing address, she commented that:

> The Crown says that Mr Dunn used his carefully researched cover story when the police visited him in June 2017 but what he told them about why he had the [HPA] was no more truthful than what he told them about where he had it. It was a cover story, nothing more, and it doesn't stand up to any kind of scrutiny.

[54] On appeal, Mr Chisnall submits that given the emphasis the Crown placed on the purported lies, the Judge should have given a lies direction under s 124(3) of the Evidence Act and the failure to do so was an error that has led to the risk of a miscarriage of justice.

Analysis

[55] Section 124 of the Evidence Act provides:

> **124 Judicial warnings about lies**
>
> (1) This section applies if evidence offered in a criminal proceeding suggests that a defendant has lied either before or during the proceeding.
>
> (2) If evidence of a defendant's lie is offered in a criminal proceeding tried with a jury, the Judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence.
>
> (3) Despite subsection (2), if, in a criminal proceeding tried with a jury, the Judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests, the Judge must warn the jury that—
>
> (a) the jury must be satisfied before using the evidence that the defendant did lie; and
>
> (b) people lie for various reasons; and
>
> (c) the jury should not necessarily conclude that, just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.
>
> (4) In a criminal proceeding tried without a jury, the Judge must have regard to the matters set out in paragraphs (a) to (c) of subsection (3) before placing any weight on evidence of a defendant's lie.

[56] Mr Dunn was represented at trial by a very experienced senior counsel, Mr Morgan. Mr Morgan is unsure whether the Judge raised the issue of a lies direction under s 124(3) with him but suspects the Judge may well have done so. Mr Morgan also says that whether the Judge raised it or not, he (Mr Morgan) would not have requested a complete lies direction. In Mr Morgan's assessment, the complete lies direction is not at all helpful for a defendant and is actually counterproductive. That is because he considers the direction gives credence to the suggestion the defendant has in fact lied.

[57] Mr Morgan also advises he is sure he was content with what the Judge did say on the topic of lies as being the best the defence could hope for.

[58] It appears Mr Morgan's preference to a complete lies direction was to address the matter of lies himself in his own closing address, which he did in the following terms:

> … I wanted to touch on this question of the defendant's conduct, because the way my learned friend put it is that he lied to the police in 2017 because he didn't tell them about the Guardian Self Storage, but, you know, you have to recognise that even Mr Smith, the detective, spoke of this being a low key visit. He was the one who drew up that questionnaire which has been exhibited to you where the bulk of the questions actually refer to the toluene. He was the one who told you that the defendant acknowledged quite candidly that he had imported this large quantity of [HPA] and that it had come in four big drums, and there was no suggestion that the police wanted to look at it or see it. Did he really mislead the police, lie to the police as my learned friend put it, or did he feel a bit uncomfortable about the fact that he actually had it at Guardian Self Storage when it should have been under his 10,000 litre limit on his own yard?
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> You know, this is a pretty classic piece, I suggest, of the prosecution saying the defendant lied, and that because he lied to the police in June 2017 you shouldn't believe him on his oath. Well if you think that he was untruthful — and actually I submit to you that's not clear at all — you then have to say to yourselves, well what reason did he have to lie, does it have any real bearing on guilt? And I suggest the answer to that is no. Does it have any real bearing on his credibility when he comes to give evidence before you? Or, is it just one of those features of the case that makes you say, well it's actually a bit irrelevant in the scheme of things because this is a man who made no effort to conceal his importations in 2006, 2012, 2013, they were all in his office and on his computer, no efforts to conceal that he had made the importation in 2017, what bearing does it have?
>
> I say the defendant's conduct in importing the product and his complete lack of effort at concealing it speaks volume. What man who is intent on importing into New Zealand [HPA] and selling it for this fortune does it quite so openly

> and then banks all the money into his business account and pays the tax and the GST on it? I suggest too silly for words. And then, again on this topic of the defendant's conduct, somehow manages to conceal the fact that over this period of time he's managed to sell it to the drug trade, to people who are intent on manufacturing.

[59] As Mr Chisnall properly points out, a trial judge has an overriding duty to ensure a fair trial and is not bound by the views of trial counsel.[7] However, the views of trial counsel are not without significance, involved as they are in the dynamics of the unfolding trial. We also have no doubt that notwithstanding what appears to be a general policy of Mr Morgan regarding the complete lies direction, had he thought in the circumstances of Mr Dunn's trial that such a direction would be beneficial, he would have actively sought one. Trial counsel error is not advanced as a ground of appeal.

[60] As noted, Mr Morgan was content with the direction the Judge did give about lies. That direction was in the context of a direction about the fact that Mr Dunn had elected to give evidence and an instruction as to the use the jury could make of his evidence. The direction which we quote below immediately followed a summary of Mr Dunn's version of events:

> [30] … If you accept what he says then obviously the proper verdicts are not guilty because his intentions were innocent and his actions were lawful. If what he says leaves you unsure, then again the proper verdicts are not guilty because you will have been left with a reasonable doubt. If what the defendant says seems a reasonable possibility, again the Crown will not have discharged its task and you must acquit.
>
> [31] If you disbelieve the defendant's evidence, then you must not leap from that conclusion to a finding of guilt, because to do that would be to forget who has to prove the case. In other words, you cannot say to yourselves: "We think he's lied, therefore he must be guilty." That is not logical. Rather, you must assess all of the evidence that you accept as reliable, prosecution and defence, and ask yourselves does that evidence satisfy you of the defendant's guilt to the required standard.

[61] In the context of a direction about the drawing of inferences, the Judge also repeated what Mr Morgan had said in closing about the unreasonableness of relying on Mr Dunn's failure to mention the HPA was stored off site given his discomfort

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7 See *W v R* [2023] NZSC 50 at [15].

about storing hazardous substances off site and given the first meeting was, on the police's own account, "a low key visit".

[62] The lie relied on in this case was a lie by omission. It was the failure to disclose the existence of the off-site storage facility. There was no dispute that Mr Dunn had failed to make that disclosure. The competing explanations (or "reasons" to use the statutory phrase) for the non-disclosure were squarely before the jury without, in our view, the Judge needing to repeat them. Mr Dunn's explanation for his non-disclosure was given as part of his evidence. If the jury disbelieved his evidence which included this explanation, they had been unequivocally told they were not to leap from that conclusion to a finding of guilt.

[63] In those circumstances, we are not persuaded that a standalone lies direction under s 124 of the Evidence Act would have usefully added anything more. Indeed, it may well have served only to confuse. There was in our view no error in not giving one. We therefore also reject this ground of appeal.

The Judge erred in his directions on the drawing of inferences

[64] In his summing up, the Judge explained that the Crown case as to whether Mr Dunn had the necessary knowledge and intent depended largely on circumstantial evidence. The Judge then went on to say:

> [20] … Circumstantial evidence relies on reasoning by inference and derives its force from the involvement of a number of factors that independently point to the guilt of the defendant. The analogy … often used by judges is of a rope. If you think about how a rope is made up of many, many small strands, any one strand of that rope may not support a particular weight on its own, but the combined strands are sufficient to do so. The logic that underpins a circumstantial case is that the defendant is either guilty or he is the victim of an implausible, unlikely series of coincidences.

[65] After explaining that circumstantial evidence is not inherently weak, the Judge stated that it was for the jury to judge on the evidence that had been presented to them whether it was strong enough to support the allegations made by the Crown. He further instructed the jury that when considering a circumstantial case, the jury was also "of course" required to have regard to the "defence circumstances", meaning circumstances in the evidence that favour the defence.

[66] The Judge continued by setting out the key items of circumstantial evidence relied on by the Crown and the defence, the latter being identified as:

> [24] The circumstances on which the defence relies were addressed in detail by Mr Morgan and grouped together under five headings:
>
> (a) Method of Proof: Given the absence of any evidence of actual sale of [HPA] by Mr Dunn or any other link to the drugs trade, is it reasonable to conclude that there can only be an unlawful explanation for his imports of [HPA]?
>
> (b) Time: The time over which the imports and usage of [HPA occurred] was a whole decade. A whole decade of legitimate use could potentially explain how 7,000 litres have been consumed.
>
> (c) Conduct: Is it reasonable to put great reliance on Mr Dunn's failure to mention that the [HPA] was in fact stored off site in that first meeting with police, given his discomfort about storing hazardous substances off site; even the police describe that first meeting as a low-key visit? Is drawing the inference invited by the Crown that he lied about the [HPA]'s whereabouts, therefore he is lying generally and lying to you, is that reasonable in those circumstances?
>
> (d) Expert Evidence: Is it logical to conclude that just because a big manufacturer at the cutting edge of the industry is not using HPA that a small old-fashioned manufacturer cannot still be legitimately using it?
>
> (e) Money Laundering: Whilst Mr Glenny may have done some research to support his opinion that HPA is not used legitimately in New Zealand, the same cannot be said for the forensic accountant Ms Jacks, who you may think has insufficient experience of private practice and carried out no research. Her opinion that the cash deposits were unusual in small businesses is relied upon heavily by the Crown but in the circumstances her opinion carries very little weight.

[67] The Judge concluded by stating:

> [25] So taking those circumstances on board, both outlined by the Crown and by defence [c]ounsel, the ultimate issue in this aspect of the case is whether or not, on the totality of all the evidence, you are satisfied beyond reasonable doubt that the defendant intended the [HPA] to be used to manufacture methamphetamine.

[68] Mr Chisnall submitted this direction was defective because the Judge failed to elaborate on *how* the task of taking the defendant's circumstances into account was to be performed. In particular, Mr Chisnall contended first that the Judge should have

told the jury that if there were two possible conclusions that could be drawn from the facts found to be proved, it was not safe to draw an inference adverse to Mr Dunn.

[69] Mr Chisnall further submitted the Judge should have provided what is sometimes called the *Hodge* direction.

[70] The *Hodge* direction is derived from an 1838 English decision and is to the effect that before finding the defendant guilty, the jury must be satisfied not only that the circumstances are consistent with the defendant having committed the act but also that the facts are such as to be inconsistent with any other rational conclusion than that he or she was guilty.[8]

[71] Mr Chisnall contended that applying the *Hodge* direction to this case, the jury should have been directed that the Crown was required to prove the facts were consistent with Mr Dunn's guilt and were inconsistent with the conclusions the defence invited the jury to reach.

[72] Mr Chisnall's first contention appears to suggest the Judge was required to direct the jury to first consider what inferences could be drawn from each individual item of evidence and then put to one side any item where there was an equally tenable defence inference to that advanced by the Crown. In so far as that proposition was part of the submissions, we consider it to be wrong. It is well established that in circumstantial cases, it is the combined effect of the individual items of the evidence that is important and it is in relation to the combined effect of the evidence as a whole that a jury should be directed in relation to inferential reasoning.[9]

[73] That is exactly what the trial Judge did in this case in the passage quoted above at [60]. In addition, he also gave the orthodox direction on the burden and standard of proof in accordance with *R v Wanhalla* and, as already indicated, the standard tripartite direction was tailored to Mr Dunn's evidence.[10]

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8 *R v Hodge* (1838) 2 Lew CC 227, 168 ER 1136.

9 *Guo v R* [2009] NZCA 612 at [50]; *Webb v R* [2013] NZCA 666 at [22]; and *R v Puttik* (1985) 1 CRNZ 644 (CA) at 647.

10 *R v Wanhalla* [2007] 2 NZLR 573 (CA).

[74] As regards the *Hodge* direction, we acknowledge that in the 1986 decision of *R v Hart* this Court left open to trial judges the option of providing a *Hodge* direction, noting that it could be desirable in certain circumstances but at the same time confirming that it was not required as a matter of law.[11] This Court also confirmed elaborate general directions about inferences should be discouraged.[12]

[75] The Court in *R v Hart* did not identify the circumstances in which a *Hodge* direction would be desirable and it appears that since 1986 the direction has seldom, if ever, been given. Mr Chisnall referred us to some Canadian articles suggesting it should be revived.[13] However, in our view correctly analysed the *Hodge* direction is simply a rephrasing of the concept of reasonable doubt in the language of consistency.

[76] In this case, the Judge gave orthodox and clear directions on the burden and standard of proof. Like the Court in *Cameron v R*, we consider that no more was required.[14]

[77] For completeness, we note that in the course of his submissions regarding the *Hodge* direction, Mr Chisnall also challenged the reasoning in several decisions of this Court to the effect that trial judges should not tell the jury that if two inferences of equal weight exist they must draw the inference most favourable to the defendant.[15] To give such a direction, this Court has said, is to invite the jury to speculate.[16] As noted in the very recent decision of *Do v R*, the point is something that has been "routinely emphasised".[17]

[78] We see no reason to depart from that line of authority and in particular do not perceive there to be any necessary or logical tension between it and the observations in *R v Hart* about the *Hodge* direction.

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11 *R v Hart* [1986] 2 NZLR 408 (CA) at 413, referring to *R v Hedge* [1956] NZLR 511 (CA).
12 *R v Hart*, above n 11, at 413, referring to *R v Puttick,* above n 9.
13 Tushar Pain "Hodge's Case still relevant on circumstantial evidence" *The Lawyers Weekly* (online ed, Canada, 22 February 2013); and *Canadian Encyclopedic Digest* (4th ed, 2023, online ed) Evidence at I.C.16.
14 *Cameron v R* [2010] NZCA 411 at [85].
15 See for example *H (CA267/2022) v R* [2022] NZCA 294.
16 See for example *Hutchins v R* [2016] NZCA 173 at [31]; *Edwardson v R* [2017] NZCA 618 at [77]; and *Hines v R* [2018] NZCA 242 at [33].
17 *Do v R* [2024] NZCA 97 at [25].

The Crown's reference to the potential yield of methamphetamine

[79] In the Crown's opening and closing addresses as well as in evidence, references were made to the potential volume of methamphetamine that could have been manufactured from the quantity of HPA imported by Mr Dunn. In her opening address, the prosecutor stated that each litre of HPA supplied by Mr Dunn when combined with other chemicals had the potential to make between 500 and 750 g of methamphetamine, which extrapolated out to "literally thousands of kilograms of drug".

[80] Evidence was given by an ESR scientist that, in combination with other chemicals, 161 litres of HPA could potentially yield up to 117 kg of methamphetamine, being the equivalent of 145 kg of methamphetamine hydrochloride, the product in its final solid state. This evidence was not challenged by the defence.

[81] In the Crown closing, the prosecutor made reference to the "massive amounts of methamphetamine" that the amount of HPA held by Mr Dunn could produce.

[82] At Mr Dunn's sentencing, his counsel, Mr Morgan, filed publicly available statistics that showed the total methamphetamine use in New Zealand was 700 kg per year during the time frame of the charges.[18] In light of that information, the Judge rejected as unrealistic a Crown submission that he should sentence Mr Dunn on the basis he had sold up to 5,000 litres of the 8,000 litres of HPA from the three shipments and that it had all been used to manufacture methamphetamine.[19] The Judge did however accept that Mr Dunn had supplied a significant quantity of the HPA to the methamphetamine trade.[20]

[83] On appeal, Mr Chisnall contended that the Crown should have been familiar with the literature filed by Mr Morgan at sentencing and was duty bound to produce it. Mr Chisnall further submitted that given there was no evidence of actual supply to

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18 Paul Bellamy and Dr Glenn Hardingham *Methamphetamine in New Zealand: A snapshot of recent trends* (Parliamentary Service | Te Ratonga Whare Pāremata, Research Paper, 1 March 2021); New Zealand Police | Ngā Pirihimana o Aotearoa *Wastewater drug testing in New Zealand: Quarter One 2020 Findings: National Overview* (August 2020); and Anusha Bradley "New Zealand 'awash' with imported meth" *Radio New Zealand* (online ed, 3 May 2018).

19 Sentencing notes, above n 1, at [6]–[8].

20 At [11].

the illicit drug trade, the Crown should not have broached the topic of potential yield at all. As it was, the comments made by the prosecutor in opening and closing were, Mr Chisnall argued, an appeal to prejudice.

[84] We do not accept those arguments. The comments were all expressed in terms of the potential yield and were relevant to the potential financial gain Mr Dunn could achieve by selling the HPA. The reference to the "massive amounts" was also made in the context of the Crown's explanation as to why Mr Dunn would have sold it off slowly with corresponding ongoing deposits of cash. Given the large volumes, it would not have been possible to sell it all in one go. Rather, it needed to be done over time.

[85] In our assessment neither the language nor the content of the comments crossed the line. We also consider the prosecutor was entitled to rely on the undisputed evidence of the ESR scientist and was not required to undertake a search for other information.

Conclusion

[86] We are not persuaded that any of the grounds of appeal advanced at the March 2024 hearing, whether viewed individually or in combination, warrant appellate intervention.

The application for leave to adduce further evidence and reopen the hearing

The proposed new evidence

[87] It will be recalled that at the trial, the Crown called evidence from a forensic accountant Ms Jacks. The proposed new evidence consists of affidavit evidence from another forensic accountant, Mr Parsons. The affidavit was originally provided by Mr Dunn for the purposes of High Court civil proceedings brought by the Commissioner of Police against him under the Criminal Proceeds (Recovery) Act

2009.[21] In his affidavit, Mr Parsons reviews the evidence given by Ms Jacks and details his own analysis of the business records and raw data from Mr Dunn's business accounting software known as MYOB. His opinion is that, contrary to what the jury were told, a very substantial portion of the roughly $1.8 million in unexplained cash deposits cited by Ms Jacks was from legitimate sources.

[88] Once he became aware of the existence of this evidence, Mr Chisnall acted promptly in drawing our attention to it. For the purposes of the subsequent hearing before us, we were provided with copies of some of the affidavit evidence which the Commissioner of Police had filed in the civil proceedings in response to Mr Parsons' evidence, as well as an affidavit from Mr Dunn's trial counsel Mr Morgan and Mr Dunn himself. Four of the deponents — Mr Dunn, Mr Parsons, Ms Jacks and Ms May (a Crown witness who has expertise in MYOB) — were cross-examined.

What is the correct test?

[89] It was common ground that this Court has jurisdiction to determine the application as a result of its inherent power to regulate its own procedure.[22] Counsel did not however agree on the test we should apply.

[90] Mr Auld for the Crown advised that he had been unable to find any other case where this Court has been asked to reopen a hearing and allow an appellant to raise an entirely new ground of appeal and to file evidence in support of that new ground. He acknowledged the existence of a 1968 Practice Note which allows the filing of further submissions after the conclusion of a hearing "in exceptional circumstances",[23] but submitted that if exceptional circumstances were required for the filing of further submissions, then the threshold for filing new evidence and grounds of appeal should be even higher.

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21 Counsel advised us that the civil proceedings have been settled on the basis inter alia that Mr Dunn consented to the making of a profit forfeiture order but without making any admissions or concessions in relation to this appeal. The settlement was approved by the High Court: see *Commissioner of Police v Dunn* [2024] NZHC 3023.

22 See *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [113]–[114].

23 Practice Note [1968] NZLR 608.

[91] Emphasising the importance of finality and the need to take a cautious approach, Mr Auld suggested that the principles governing the exercise of the recall jurisdiction should be applied by analogy. That meant, in his submission, that (a) such post-hearing applications should only be entertained in exceptional circumstances, (b) the threshold to admit the further evidence ought to be higher than the threshold that generally applies for the admission of further evidence on appeal, and (c) it must be clear that a real or significant or substantial injustice will occur if the application is not granted.

[92] For his part, Mr Chisnall contended that Mr Dunn's case fell squarely within the Practice Note because one of the examples it gives of a qualifying exceptional circumstance is a new matter that has arisen since the hearing which was not anticipated by counsel. Mr Parsons' evidence was a new matter that had arisen since the hearing.

[93] Further, in Mr Chisnall's submission, there was no reason why the usual test for admission of further evidence on appeal as articulated in the Privy Council decision of *Lundy* should not apply.[24]

[94] That test requires the appellate court to apply a sequential series of tests, namely whether the proposed new evidence is sufficiently credible, fresh and cogent. If the evidence is both fresh and credible it should generally be admitted unless the court can be satisfied that if admitted it would have no effect on the safety of the conviction.[25] If the evidence is credible but not fresh, then it should be admitted if having regard to its strength and potential impact on the safety of the conviction the Court is satisfied there is a risk of miscarriage of justice were it to be excluded.[26]

[95] Mr Chisnall accepted that in applying the *Lundy* test we were entitled to take into account not only Mr Parson's evidence but also the affidavit evidence filed by the Crown.[27]

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24 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.
25 At [120].
26 At [120].
27 Referencing *R v Bain* [2004] 1 NZLR 638 (CA) at [28].

[96] The central theme of Mr Chisnall's submissions was that re-opening the appeal in accordance with the Practice Note was in the interests of justice and consistent with the Court's power to respond to a wide variety of circumstances in order to avoid injustice.[28] Reopening the appeal was, he argued, more appropriate than issuing the decision and then looking to alternative remedies such as recall or applying for leave to appeal to the Supreme Court.

[97] In the end, it has not proved necessary for us to decide which of the thresholds posited by counsel is the correct one. That is because we are satisfied that whatever formulation is applied, the outcome would be the same.

[98] The following analysis is based on adopting for the purposes of the argument the usual *Lundy* test for the admission of further evidence as advocated by Mr Chisnall.

[99] Turning then first to the criterion of freshness.

Is the further evidence sufficiently fresh?

[100] There is no doubt that in this case the proposed further evidence could with reasonable diligence have been called at trial and so in that sense it is not fresh evidence. We are further satisfied that the decision not to call accounting evidence was a strategic decision made by competent trial counsel.

[101] The evidence that supports those findings is as follows. The trial commenced on 20 May 2021. The defence had been provided with Ms Jacks' draft witness statement the year before on 13 January 2020. In his evidence, Mr Morgan deposes that he and Mr Dunn spent a great deal of time on the topic of Mr Dunn's business practices. He had been "on to Mr Dunn" about engaging an accountant ever since receipt of Ms Jacks' evidence.

[102] Mr Morgan originally approached Mr Dunn's own accountant but he declined to assist. Mr Morgan then instructed another accountant from a different firm, Mr Dickey. The Crown objected at a relatively late stage to Mr Dickey being called

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[28] Citing *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [29].

as a defence witness due to his connections with the Crown Solicitor's office. However, the tenor of the information provided by Mr Morgan is that, independently of the Crown objection, he would never have called Mr Dickey to give evidence anyway. The thrust of Mr Morgan's evidence is that he only provided Mr Dickey's report to the Crown in the hope it might temper Ms Jacks' evidence in chief.

[103] The reason given by Mr Morgan that he did not want to call Mr Dickey was because ultimately Mr Dickey advised that he could not fault Ms Jacks' conclusions except in one respect, which was not about inventory management or cash sales, and which, in the end, was not part of her evidence at trial. Mr Morgan also says:[29]

> 4. … I elected to deal with [the cash situation] by cross examination of [Ms] Jacks rather than attempting to call Mr Dickey. The difficulty over the cash was that in fact there was a cash invoicing system which was very simple and if it had been used would have accounted for all the money. The other difficulty was that the employees of Brooke Dunn Coatings Limited gave evidence and said that they did actually use it, so this all had the appearance of there being a perfectly good system which only Mr Dunn didn't use. He also maintained his wife didn't use it as well, but she wouldn't give evidence. This and other aspects of the conduct of the business … was such that I never really considered it a sensible option to call Mr Dickey at all. …
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> 5. I was also wary of calling Mr Dickey due to his likely cross examination on topics such as Mr Dunn's banking practices.

[104] Mr Morgan further states that Mr Dunn was very involved in Mr Dickey's work and that Mr Dunn gave instructions and information directly to Mr Dickey. Mr Morgan acknowledges that Mr Dunn tended to leave trial decisions to him but says Mr Dunn was consulted about whether Mr Dickey should be called as a witness.

[105] Mr Dickey was not a forensic accountant and Mr Morgan could have sought an adjournment and engaged another expert on the grounds of the Crown's objection to Mr Dickey. However, Mr Morgan explains that although he and Mr Dunn never discussed a forensic accountant, that was because he would have expected Mr Dickey to have told him that he did not have the necessary expertise if that were the case and to have recommended instructing another forensic accountant. Mr Dickey never gave any such advice. Further and in any event, there were costs pressures militating against engaging another expert.

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[29] In correspondence to appellate counsel, exhibited to his affidavit.

[106] Our conclusion that the proposed new evidence is not fresh is not of itself determinative. It is well established that further evidence may be admitted on appeal, notwithstanding a lack of freshness or the absence of trial counsel error, provided the evidence in question is sufficiently credible and cogent and its admission meets the overriding requirement of promoting the interests of justice.[30]

Is the evidence credible?

[107] Credibility is a given. Mr Parsons is a highly experienced forensic accountant who has given expert evidence in numerous cases for both the defence and the Crown. His credibility goes without saying and we therefore turn to the critical question of cogency.

Is the further evidence sufficiently cogent?

[108] As indicated, cogency in the context of further evidence that is credible but not fresh requires the Court to assess the strength of the evidence and its potential impact on the safety of the conviction.[31]

[109] Mr Parson's central thesis is that if you endeavour — as he says Ms Jacks did — to determine the extent of the unexplained cash deposits by looking only for matching invoices, then there will be a significant volume of unexplained revenue. However, he contends that such a limited inquiry is flawed and leads to a misleading result. In particular, he says a focus on invoices overlooks that the MYOB software being used by the business at the time enabled quotes and orders to be recorded as well as the issuing of invoices. His examination of the data revealed extensive records of what appear to be legitimate quotes and orders which he says are capable of accounting for a significant volume of the cash deposits.

[110] In his oral evidence, Mr Parsons acknowledged the existence of a facility on MYOB whereby quotes and orders can be converted into invoices but says that needs to be counterbalanced by the absence of point of sale software. He said further that,

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30 *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [33]; *Lundy v R*, above n 24, at [120]; and *R v Bain*, above n 27, at [22], approved in *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [34].

31 *Lundy v R*, above n 24, at [120].

in his experience, during the relevant period it was common for small businesses, especially in the trades, to be paid in folding cash and for invoices not to be issued.

[111] Finally, he accepted that even on his analysis there was still between $600,000 to $800,000 of unexplained cash. He also conceded that the fact Mr Dunn paid tax on the cash income was not necessarily an indicator the income was derived from genuine business transactions because tax is generally seen by criminals as an unavoidable cost of money laundering.

[112] As for Ms Jacks, while she made some concessions in cross-examination, she essentially maintained the opinions she had given at trial. Ms May (who was not called as a witness at trial) disputed aspects of Mr Parsons' evidence relating to the MYOB software and its operation. The point was made too that quotes and, to a lesser extent, orders do not unequivocally evidence the fact of a subsequent sale or service. Both Crown experts also disputed Mr Parsons' contention about the prevalence of invoice-less business-to-business cash transactions. That had not been their experience and they further contended that businesses were incentivised to obtain an invoice because without it they would not be able to claim a deductible expense from Inland Revenue.

[113] We acknowledge that the mere fact other experts dispute Mr Parsons' evidence cannot in principle be determinative of the outcome of this application. It is not our task to resolve the conflict as if we were a fact finder.

[114] There is also no reason to doubt that Mr Parsons is an experienced and capable forensic accountant. However, that does not of itself mean his evidence is sufficiently cogent for the purposes of this application. In our view, a major difficulty with the evidence is that it attempts to explain the cash levels by, in effect, postulating a new essentially speculative theory about how the business was run, a theory that is inconsistent with the trial evidence including, importantly, the evidence given by Mr Dunn himself.

[115] The question of how the business was run, its cash levels and its record keeping, was squarely in issue at trial. Mr Dunn was well aware of Ms Jacks' analysis.

At no stage in his evidence did Mr Dunn ever attempt to justify the paucity of invoices by reference to having relied on quotes and orders as being sufficient.

[116] When specifically asked in cross-examination at trial why, in a business like his with accounting software that produces invoices, would a customer not get one, Mr Dunn's explanation was simply that the computer system had no point of sale software and was very slow. He then added that it was "way quicker" to write out a paper invoice which he always did for customers who wanted an invoice. He further stated "we tried whenever we could to give people an invoice". As previously mentioned, Mr Dunn also gave evidence that he had a large number of copies of invoices which he would bring to Court the next day but which never eventuated.

[117] In another part of the cross-examination, he denied the absence of records for the large cash deposits and said that "obviously we have got records". When asked to tell the Court what these records were, his responses were solely about invoices.

[118] Furthermore, there was other uncontested trial evidence that Mr Dunn was off site for significant periods of time and that the office/shop work was generally done by two employees, who gave evidence, and Mrs Dunn, who did not. Mr Dunn and indeed Mrs Dunn were said by one witness to only help in the shop "from time to time".

[119] In their evidence, the two employees who worked in the office gave uncontested evidence that the customer base consisted of a large number of sales via TradeMe, regular trade customers, and "walk-ins" looking for a good deal on paint.

[120] One of those employee witnesses was Mr Back, the employee primarily responsible for customer service and processing sales. His evidence was to the effect that the majority of the TradeMe sales were affected through the automated TradeMe payment system. Sometimes people would phone and give credit card details or come in and pay direct usually by EFTPOS. He said there were "[n]ot a lot" of cash sales in the shop.

[121] Mr Back further stated that no matter the form of payment, he would the "[m]ajority of the time" issue an invoice. The occasions when he did not was if the customer did not want an invoice, but even on those occasions he would always enter the payment through the MYOB system. As regards regular trade customers, he would invoice them after they had collected the product.

[122] To similar effect was the evidence of the employee who assisted Mr Back on a daily basis over an 18-month period. He said that in the case of both categories of customer (walk-ins or trades), he would "99% of the time" generate an invoice through the computer accounting system, whether the customer was paying by EFTPOS or cash. On "a couple of times" when the computer was down he also completed a printed invoice form by hand. The witness confirmed that he put every sale through the computer system including when the customer did not request an invoice. The one occasion that he could recall when he had not generated an invoice was during his first week on the job when a customer purchased a product that was not on the computer system and he had not been told about the paper invoice form.

[123] Having regard to all these matters, we are satisfied that the proposed new evidence is not cogent. It does not potentially impact on the safety of the conviction and there is no risk that a miscarriage of justice has occurred due to it not being before the jury. It is not admissible, and there is therefore no basis to re-open the appeal hearing.

Outcome

[124] The application for leave to adduce further evidence and reopen the hearing is declined.

[125] The appeal against conviction is dismissed.

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