

SUPREME COURT OF QUEENSLAND

CITATION: *R v Olssen* [2026] QCA 132

PARTIES: **R**
v
OLSEN, Matthew Francis
(applicant)

FILE NO/S: CA No 55 of 2025
SC No 86 of 2016

DIVISION: Court of Appeal

PROCEEDING: Subsequent Appeal Leave Application

ORIGINATING COURT: Supreme Court at Townsville – Date of Conviction:
21 October 2016 (Holmes CJ)

DELIVERED ON: 17 June 2026

DELIVERED AT: Brisbane

HEARING DATE: 5 June 2025

JUDGES: Mullins P, Brown JA, Henry J

ORDERS: **1. Leave to the respondent to rely on the affidavit of J Salm affirmed 10 June 2025 granted.**
2. Leave to the applicant to rely on the affidavit of J Heath sworn 20 June 2025 refused.
3. Application for leave to make a subsequent appeal refused.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – SECOND AND SUBSEQUENT APPEALS – PARTICULAR GROUNDS OF APPEAL – NEW EVIDENCE – where the applicant was convicted after trial before a jury of trafficking in a dangerous drug (count 1), possession of the dangerous drug (methamphetamine) where the quantity exceeded 200 grams (count 2) and supply of the dangerous drug (methamphetamine) to another person (count 3) – where the applicant’s first appeal against conviction was limited to an appeal against conviction on count 1 and was dismissed in 2018 – where the applicant seeks leave to make a subsequent appeal on all three counts on the basis that there is new and compelling evidence under s 671AC of the *Criminal Code* (Qld) – whether the evidence the applicant seeks to rely on is “new” and “compelling” within the meaning of s 671AB(4) and s 671AB(6) of the *Criminal Code* (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – SECOND AND SUBSEQUENT APPEALS – PARTICULAR

GROUNDS OF APPEAL – NEW EVIDENCE – where the applicant was convicted after trial before a jury of trafficking in a dangerous drug (count 1), possession of the dangerous drug (methamphetamine) where the quantity exceeded 200 grams (count 2) and supply of the dangerous drug (methamphetamine) to another person (count 3) – where another offender was sentenced in a separate proceeding in respect of the criminal activity that was one particular of count 1 – where the prosecution contended in the applicant's trial that he was trafficking methamphetamine in a massage machine but the other offender was sentenced for his role in collecting the massage machine containing pseudoephedrine – where the applicant's trial lawyers were aware at the time of the applicant's trial that the other offender was sentenced on the basis that the massage machine contained pseudoephedrine and not methamphetamine – where there is no estoppel or issue estoppel in the criminal law preventing the prosecution from pursuing the sentencing of the other offender on the basis that the massage machine contained pseudoephedrine and contending in the applicant's trial that there was methamphetamine in the massage machine – where there is no new evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – SECOND AND SUBSEQUENT APPEALS – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the applicant was convicted after trial before a jury of trafficking in a dangerous drug (count 1), possession of the dangerous drug (methamphetamine) where the quantity exceeded 200 grams (count 2) and supply of the dangerous drug (methamphetamine) to another person (count 3) – where the applicant contends that the prosecution failed to comply with a pre-trial direction to particularise the drugs involved in transaction – where the applicant's trial counsel did not pursue any failure by the prosecution to comply with the order – where this is not a proper ground for a subsequent appeal leave application

CRIMINAL LAW – APPEAL AND NEW TRIAL – SECOND AND SUBSEQUENT APPEALS – PARTICULAR GROUNDS OF APPEAL – NEW EVIDENCE – where the applicant was convicted after trial before a jury of trafficking in a dangerous drug (count 1), possession of the dangerous drug (methamphetamine) where the quantity exceeded 200 grams (count 2) and supply of the dangerous drug (methamphetamine) to another person (count 3) – where a critical issue for the jury at trial was whether the male speaker on the telephone intercepts was the applicant – where a strategic decision was made in the applicant's trial for the applicant not to give evidence at trial – where the applicant now contends that it was not his voice on the telephone intercepts – where this can be characterised as the applicant

seeking to re-litigate the evidence led at trial – where this ground does not rely on any new evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – SECOND AND SUBSEQUENT APPEALS – PARTICULAR GROUNDS OF APPEAL – AVAILABILITY OF EVIDENCE AT TRIAL – where the applicant was convicted after trial before a jury of trafficking in a dangerous drug (count 1), possession of the dangerous drug (methamphetamine) where the quantity exceeded 200 grams (count 2) and supply of the dangerous drug (methamphetamine) to another person (count 3) – where a witness gave evidence to police that was inconsistent with the prosecution case that the massage machine contained methamphetamine – where this inconsistency was known to the applicant’s trial lawyers and was relied on to argue in favour of there being reasonable doubt as to the type of drug being trafficked – where there is no new evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – SECOND AND SUBSEQUENT APPEALS – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the applicant was convicted after trial before a jury of trafficking in a dangerous drug (count 1), possession of the dangerous drug where the quantity exceeded 200 grams (count 2) and supply of the dangerous drug (methamphetamine) to another person (count 3) – where it became apparent at the hearing of the subsequent appeal that the pages of the telephone intercept transcript given to the jury for their assistance at trial did not accord with the version of the transcript produced in the appeal record book for the first appeal – where the parties were directed to file further submissions on the results of their inquiries to locate the relevant recording where the applicant filed supplementary submissions together with an affidavit of a document examiner that compared the transcript of the relevant telephone intercept given to the jury at trial with the transcript produced in the appeal record book of the applicant’s first appeal – where the respondent filed an affidavit outlining the inquiries made about the discrepancies in the telephone transcript intercept – where the applicant had not been granted leave to file any further material in the nature of expert opinion – where the evidence before the jury was the audio of the telephone intercept and not the transcript – where it is indisputable as to the content of the recording of the telephone intercept played to the jury despite any error in the transcript produced in the appeal record book – where leave for the applicant to rely on the affidavit containing the expert opinion is refused – where leave for the respondent to rely on the affidavit is granted

Criminal Code (Qld), s 671AB, s 671AC

Luo v The King [2025] WASCA 36, cited
R v Kostandy [2026] QCA 75, cited
R v Lloyd [2025] QCA 47, cited
R v Olssen [2018] QCA 114, related
Rogers v The Queen (1994) 181 CLR 251; [1994] HCA 42, cited
Van Beelen v The Queen (2017) 262 CLR 565; [2017] HCA 48, cited

COUNSEL: The applicant appeared on his own behalf
M B Lehane for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MULLINS P:** On 21 October 2016, Mr Olssen was convicted after trial before a jury in the Supreme Court of trafficking in a dangerous drug between 1 June and 19 October 2011 (count 1), possession of the dangerous drug methylamphetamine where the quantity exceeded 200 grams on or about 26 August 2011 (count 2) and supply of the dangerous drug methylamphetamine to another person (Mr Alexander) on or about 26 August 2011 (count 3). He was sentenced to imprisonment for nine years on count 1 and convicted and not further punished in respect of counts 2 and 3. Parole eligibility was set after he had served six and one-half years' imprisonment. Mr Olssen's appeal against his conviction and sentence (the first appeal) was dismissed: *R v Olssen* [2018] QCA 114 (the COA reasons).
- [2] Mr Olssen applies for leave pursuant to s 671AC(2) of the *Criminal Code* (Qld) to make a subsequent appeal against his conviction on all three counts on the ground that there is either fresh and compelling evidence or new and compelling evidence.
- [3] The first ground of the application in respect of the conviction on count 1 (that was raised in Mr Olssen's application and supporting affidavit filed on 27 March 2025 as modified by his written submissions) is that new and compelling evidence demonstrates that a miscarriage of justice occurred when the first transaction relied upon at the trial by the prosecution to prove trafficking concerned a substance in a massage machine that was delivered by Mr Grainger to Mr Alexander which the prosecution alleged or inferred at Mr Olssen's trial was methylamphetamine but asserted for the purposes of the sentencing of Mr Alexander on 26 November 2014 was pseudoephedrine.
- [4] The second ground of the application in respect of count 1 was raised in Mr Olssen's affidavit filed on 28 April 2025 and was that the prosecution failed to comply with the pre-trial direction given by North J for the prosecution to particularise the nature of the drugs involved in the transactions and that constituted a procedural error at the trial.
- [5] The third ground of the application relates to the convictions on counts 2 and 3 and was also raised in Mr Olssen's affidavit filed on 28 April 2025. The third ground is that the prosecution relied at the trial on a series of intercepted telephone conversations in which it was alleged that Mr Olssen's voice was recorded and he denies that it was his voice.

- [6] Mr Olssen's affidavit filed on 22 May 2025 discloses another complaint which constitutes the fourth ground of the application and relates to the conviction on count 1. It is alleged that Mr Grainger who was a witness at the trial in his statement dated 16 November 2011 stated (at paragraph 37) that on 11 July 2011 he was asked to travel to Brisbane to collect pseudoephedrine but gave evidence at the trial that he believed the substance was methylamphetamine. Mr Olssen alleges that the prosecution misled the Court in relying on Mr Grainger's evidence at the trial which was contrary to the statement he provided to the police and that Mr Grainger was complicit in this misrepresentation and the prosecution also adopted a misleading position on the first appeal.
- [7] An issue arose during the hearing of this application about whether the transcripts of the intercepted telephone conversations in the Appeal Record Books (ARBs) were the same as those that were played at the trial. The ARBs for this application incorporated all the material that was in the ARBs for the original appeal together with the application for leave to make a subsequent appeal and Mr Olssen's supporting affidavit filed on 27 March 2025, the transcript of the appeal hearing on 27 October 2017, the parties' written submissions for that appeal and the reasons for judgment published on 8 June 2018. Mr Olssen had been provided with the brief that was prepared for the confiscations proceeding against him that also contained transcripts of the intercepted telephone conversations that were relied on by the prosecution at his trial. It was apparent that the transcript in that brief of the recording designated "25/08/11 0922 hrs – Barton 1 (313)" (which was exhibit 1 on the hearing of this application) did not accord with the transcript in the ARBs that commences at p 485 which has the same designation and will be referred to as "the Barton 1 (313) recording". As this matter was first raised during the hearing of the application for leave to make a subsequent appeal, the respondent was given an opportunity to make further inquiries about the discrepancy as to the Barton 1 (313) recording that was played and directions were made for the filing of further submissions by both the respondent and Mr Olssen.
- [8] The respondent's supplementary submissions were filed on 11 June 2025 together with the affidavit of Joshua Salm affirmed on 10 June 2025 which set out the results of inquiries seeking to locate the relevant recording. After the appeal was dismissed in 2018, it was the usual practice for the exhibits to be returned by the Court to the office of the Director of Public Prosecutions (DPP) and then returned by that office to the police. The audio disc that was tendered as exhibit 5 with the description "Audio Disc - Schedule 2 - Copy 3" included the Barton 1 (313) recording. The DPP office in Townsville has been unable to locate exhibit 5. The police were unable to locate the recording. Detective Phelps does not dispute that the exhibits from Mr Olssen's trial were returned to the police but does not recall receiving them. If the exhibits were returned to the police, they would have been destroyed after the appeal. As Mr Salm's affidavit reflects the results of the inquiries the respondent's counsel undertook to pursue when the discrepancy about the transcript of the Barton 1 (313) recording was raised by Mr Olssen, leave should be given to the respondent to rely on Mr Salm's affidavit.
- [9] The applicant's supplementary submissions together with an affidavit from document examiner Mr Heath were filed on 1 July 2025. Leave had been given to the applicant to file supplementary submissions. No leave had been given for the filing of any further affidavit in the nature of an expert opinion. The question of leave for Mr Heath's affidavit will be dealt with below.

- [10] Mr Olssen has not sought to amend his application to make a subsequent appeal to raise an additional ground for his application based on this issue concerning the Barton 1 (313) recording. He asserts in his supplementary submissions that the audio recording that was played to the jury was altered or manipulated by the prosecution or the police with entries being added or removed. For ease in dealing with the submissions on this topic, the issue will be referred to as the fifth ground for his application.

Prior to the trial

- [11] Mr Olssen was originally charged with trafficking jointly with Mr Heilbronn, Mr Alexander and others on indictment number 18 of 2014. The prosecution was ordered to provide particulars of the acts or circumstances upon which each defendant was criminally liable (and the legal basis upon which each defendant was said to be criminally liable). The particulars provided on 29 August 2014 in response to that order in respect of Mr Olssen included at paragraph 218:

“12/7/11 he received \$10,000 for meth production costs from Grainger. He gave 550g to 1kg of pseudoephedrine to GRAINGER to bring back to Townsville.”

The particulars provided for Mr Alexander included at paragraph 183:

“13/7/11 Collects GRAINGER who has drugs or precursor drugs in a massage machine from Brisbane. He agrees to store the drugs at Heilbronn’s house for him. He tried to remove the drugs from the massage machine and couldn’t so he had to take it to his house. He took it to Heilbronn.”

Particulars were provided again by the prosecutor on 9 January 2015 in respect of the charge of trafficking against Mr Olssen and they were in the same terms as those provided on 29 August 2014.

- [12] Mr Alexander pleaded guilty to trafficking in dangerous drugs on indictment number 66 of 2014 and was sentenced on 26 November 2014. The statement of facts for his sentencing prepared by Mr Alexander’s lawyers stated that Mr Heilbronn gave Mr Alexander instructions on 13 July 2011 to pick Mr Grainger up from the roadhouse near Mr Heilbronn’s house and told him what to do. Mr Alexander confirmed with Mr Heilbronn when Mr Grainger had arrived. The statement of facts then recorded:

“The Crown alleges that [Grainger] had precursor drugs (500grams of pseudoephedrine) in a massage machine from Brisbane. The defendant agreed to store the drugs at Heilbronn’s house for him. He tried to remove the drugs from the massage machine and couldn’t so he took the item to Heilbronn.”

- [13] On 9 January 2015 the prosecution forwarded to Mr Olssen’s then counsel and his solicitor this statement of facts used for the sentencing of Mr Alexander.
- [14] A separate indictment number 70 of 2014 was presented against Mr Olssen that included a count of production in addition to trafficking in dangerous drugs between 31 March 2011 and 19 October 2011 and the possession and supply counts of methylamphetamine that became counts 2 and 3 at his trial. A pre-trial hearing took place on 1 and 2 October 2015. One aspect of the pre-trial hearing was a *Basha*

inquiry in respect of Mr Bruniera and Mr Alexander. It is of note that Mr Alexander gave evidence which did not reflect the statement of facts prepared for his sentencing. He resiled from that statement and instead said that he had been down to the Sunshine Coast to pick up a few pounds of cannabis. He returned to Townsville by bus. The four pounds of methylamphetamine of which he was found in possession on 27 August 2011 was obtained by him from a man named Blue in Townsville. Another aspect of the pre-trial hearing concerned Mr Olssen's application to exclude evidence of four telephone conversations between Mr Heilbronn and one Mr Clarke on the morning of 7 June 2011 that the prosecution was seeking to adduce as evidence against Mr Olssen on the basis of a conspiracy or arrangement between Mr Olssen and Mr Heilbronn to produce methylamphetamine. That application was successful in the pre-trial ruling delivered on 17 December 2015 (the pre-trial ruling). The pre-trial hearing also concerned an application to exclude evidence of the arrest of one Mr Bright on 8 July 2011 when he was in possession of 10 one pound bags containing cannabis sativa and the conversations between Mr Heilbronn and Mr Olssen on the morning of 10 July 2011 during which reference was made to that arrest. It was argued on behalf of Mr Olssen that no part of the prosecution case against him involved activities to do with cannabis, so that evidence that Mr Heilbronn may have been involved with others in the trafficking, supply or possession of cannabis was irrelevant. Because of other aspects of the conversations on 10 July 2011, the application to exclude this evidence, including Mr Bright's arrest, was rejected in the pre-trial ruling.

- [15] The charge of production of methylamphetamine against Mr Olssen was not pursued after that pre-trial ruling.

The trial

- [16] The trial commenced on 19 October 2016. Mr Olssen went to trial on indictment number 86 of 2016 which contained the three counts. Count 1 had been particularised by the prosecution that Mr Olssen trafficked in a dangerous drug including one or more of the following acts:
- (a) he sourced or facilitated, or conducted the actual supply, of a dangerous drug to Mr Grainger. This occurred on or about 12 July 2011;
 - (b) he sourced or facilitated, or conducted the actual supply, of methylamphetamine to Mr Alexander. This occurred on or about 26 August 2011; and
 - (c) he sourced or facilitated, or conducted the actual supply, of methylamphetamine to Mr Bruniera. This occurred on or about 24 September 2011.
- [17] Counts 2 and 3 concerned the methylamphetamine that was the subject of the supply that is the second particular of count 1.
- [18] When the prosecutor opened the case for the prosecution at the trial, he alerted the jury that a major aspect of the trial would be telephone calls which the police had been monitoring and that the prosecution case was that it was Mr Olssen who was organising drug deals on those telephone calls. One of the issues flagged for the jury was whether one of the speakers in those telephone conversations was Mr Olssen. The prosecutor said "those telephone calls deal with three significant drug transactions that involve commercial quantities of the drug, methylamphetamine". The prosecutor then explained the three drug transactions. His explanation for the first transaction was:

“The first occurred on the 12th of July 2011 and you will hear about a man by the name of Stuart Grainger. He was a drug user and he was a man with mental health problems. He was utilised as a courier to go to Brisbane and retrieve drugs – apologies – from Matthew Olssen and then bring them back to Townsville to deliver to another man, and his name is Peter Heilbronn. And they will be the three voices that will be speaking – well, the Crown says, the three voices that will be speaking on the phone within that first schedule or the first bundle of transcripts.

...

On the 12th of July, Stuart Grainger, the courier, went down to Brisbane. He flew on a flight at 8.35 am and he arrived there mid-morning at about 10.30. Evidence of that flight will be before you in the form of an admission; that’s simply an agreement by both parties that, if a witness came to give evidence of a flight detail, that would be before you in the terms described, which is that that flight, on the 12th of July, was taken by a passenger in the name of Stuart Grainger. He went to the Queen Street Mall. He went to Hungry Jack’s. Perhaps people might know where that is if they’ve frequented the Mall. He picked up a quantity of drugs that he says was concealed within a massage machine. He put it in a bag and he immediately went to the bus station at Roma Street in Brisbane and he caught a bus back to Townsville and he delivered the drugs at the same time. He delivered those to Peter Heilbronn. Stuart Grainger will give evidence in this trial and he will give evidence – I expect you to hear evidence in that form. However, there will also be the phone calls that, as I said at the start, will be the foundation of the Crown case, and the Crown says corroborate that journey by Stuart Grainger.

...

You will hear Stuart Grainger speak with Mr Heilbronn and it’s while Mr Grainger was in Brisbane and whilst he was meeting with Mr Olssen – and the three of them will be depicted on the one telephone call that occurred on the 12th of July – and Mr Grainger will identify the voices on that phone call. You will finally hear about phone calls after that event: Mr Grainger returning, Mr Olssen asking Mr Heilbronn whether it was still wrapped up when he arrived, and you will also hear some conversations about whether – or the effect of that massage machine, between Mr Heilbronn and Mr Olssen.

... So that is the first transaction, a quantity of a dangerous drug being transported back to Townsville by Mr Grainger, he acting as the courier for Mr Olssen and Mr Heilbronn’s arrangement.”

- [19] Extensive admissions were made at the trial (exhibit 1). Admissions 1 to 5 related to the execution of the search warrant by police at Mr Olssen’s home on 11 October 2011, the ownership of vehicles by Mr Olssen, and that on 19 June 2011 Mr Heilbronn’s utility was observed by police parked next to Mr Olssen’s utility until Mr Heilbronn’s utility drove off after a short period of time. Admissions 6 to 8 related to Mr Grainger’s flight from Townsville to Brisbane on 12 July 2011 and that on 14 July 2011 a money order in the amount of \$2,500 was purchased in Mr Grainger’s

name and made payable to “Matt Olsen” at Australia Fair. Admissions 9 to 13 related to Mr Alexander including his flight from Townsville to Brisbane on 26 August 2011, that he was a chef at a restaurant owned by Mr Heilbronn, the methylamphetamine of which Mr Alexander was in possession at the Magnetic Island ferry terminal when he was arrested by police, and what was revealed by the analysis of his phone. After the prosecutor in opening the case had referred to the admissions in respect of Mr Alexander and his arrest, the prosecutor explained the second transaction relied on for count 1 as:

“Again, the foundation for that drug bust is a number of phone calls from the 25th to the 27th of August, and it commences with Mr Heilbronn and Mr Olssen talking in what the Crown says is coded conversation, and that is in relation to boxing gloves, that they will divvy up six pairs of boxing [gloves], two for Mr Olssen, and four to be provided to Mr Heilbronn, a correlation with the four pounds that was ultimately received one day later. You will hear Mr Heilbronn say that he is going to send his old head chef, and there will be an admission before you that Jeffrey Alexander was a chef at Fusion 15. You will hear that when Alexander was searched by the police they took his mobile phone and, within that mobile phone of Alexander, the number the Crown attributes to Peter Heilbronn was within that phone under the name Pete, and the number the Crown attributes to Matthew Olssen will be under the name Matt within the phone of Alexander, and he having recent contact with both of them.”

- [20] Admissions 14 to 24 concerned the activities of Mr Bruniera in September 2011 and the analysis of his phone. Admissions 25 and 26 concerned the execution of a search warrant on Mr Safi on 12 November 2011 and that a mobile phone that was seized during that search had as a contact the mobile number ending in 956 under the name “MO”. The prosecutor opened the case for the third transaction relied on for count 1 as follows:

“It involves a man by the name of Christopher Safi. He was the buyer and he was based in Townsville. The courier or assistant with the other drug runs, there is a third party courier, a man by the name of Christopher Bruniera. On the or around about the 23rd of September 2011, Mr Bruniera set off from Townsville to Brisbane. He went to collect drugs and he did so. What he collected on that occasion – and I gave you those figures earlier, but he was – he collected 318 grams of substance with 60 grams of pure methylamphetamine, so still 30 times that aggravated amount.

He – this will be an admission, that he was transporting the drugs for this man, Christopher Safi. As I said, there will be telephone intercepts, and the warrant was in relation to the number that’s attributed to Mr Safi, and, again, it’s Mr Olssen, the Crown says, who is dialling in on Mr Safi’s – or dialling in to Mr Safi’s number and having conversations with him. Again, it will be consistent, or the evidence you will hear in those telephone calls will be consistent or follow the same pattern as the first two conversations between Mr Olssen and Mr Safi in which they arrange to catch up and arrange to have somebody else come down and pick up what it is he’s offering, conversations between Mr Olssen and Mr Safi in which they

communicate about when the courier, being Mr Bruniera, would arrive, and, finally, conversations between Mr Olssen and Mr Safi after the transfer to Mr Bruniera and conversation as to how he's travelling coming back. He was intercepted by police, and you will hear a phone call, again of panic, about the phones being off after that intercept of the drugs by the police."

- [21] Admission 27 set out subscriber details for mobile phone numbers identified in the telephone intercepts.
- [22] There were only two witnesses called for the prosecution: Detective Phelps and Mr Grainger. Detective Phelps explained the process of obtaining warrants to intercept telephone services. Detective Phelps was able to give evidence of the selling price of various quantities of methylamphetamine in 2011. He said that an ounce (or 28 grams) retailed for around \$7,500 and that a pound (which was 16 ounces or 454 grams) could be sold for around \$70,000. A discount might apply if multiple pounds were being purchased. The price was more for a higher quality drug. Methylamphetamine in 2011 was generally a fine white powder. Slang words were used by those involved in the drug trade to refer to money. A code could be anything that the parties involved in the communication would understand. Mr Heilbronn ran a cafe or restaurant and was also involved in a boxing promotion business.
- [23] Detective Phelps produced the discs containing the audio of selected telephone calls that were relied on by the prosecution as relevant to its case against Mr Olssen. There were three separate series of telephone calls relied on. Apart from adducing the audio of each of telephone call that was played for the jury, the prosecution tendered three schedules for the telephone calls and messages that related respectively to the three transactions particularised for count 1. The information on the schedule for each telephone call and message was the date and time of the call or message, whether it was incoming or outgoing and the services involved. Schedule 1 (exhibit 3) contained calls and one message between 27 June and 14 July 2011. Schedule 2 (exhibit 6) set out calls and messages between 25 August and 2 September 2011. Schedule 3 (exhibit 9) set out calls and messages between 15 September and 12 October 2011. The intercepted telephone calls were played while Detective Phelps was giving evidence. The schedules were provided to the jury and transcripts of the telephone calls were also provided. The binder of telephone intercept transcripts was marked for identification "A" in the trial. The prosecutor pointed out an error in schedule 1 which was that calls 1 and 4 had been excised from the schedule shown to Detective Phelps and those phone calls would not be played. (Calls 1 and 4 had not been excised from the copy of schedule 1 that was included in the ARBs but the jurors were required to cross out calls 1 and 4 on their copies of schedule 1. That is why schedule 1 is described above as commencing on 27 June 2011 as that is the date of call 2.) The prosecutor pointed out to the jury that the transcripts for calls 1 and 4 on schedule 1 were not within the bundle of transcripts provided to them. The trial judge gave the usual direction that the transcripts were for the jury's assistance in following the evidence but the evidence was what they heard. The trial judge also explained that, because the transcripts were not evidence, they were only available for the jury to use in the courtroom. The jury members were required to leave the transcripts in the courtroom.
- [24] It is apparent from reading the trial transcript that the numbering of the transcripts of the telephone intercepts in the ARBs do not accord with the numbering of the transcripts provided to the jury for their assistance. The transcripts in the ARBs are

shown as comprising 261 pages. It was common ground in the supplementary submissions that the transcripts in the brief for the confiscations proceeding given to Mr Olssen comprised 194 pages. After the lunch break during the trial on 19 October 2016, the prosecutor announced they were resuming from p 65 with “call 6710” which was a reference to call 21 on schedule 1 which was given the description “Barton 1-6710” which commenced at p 98 of 261 pages and not p 65. When the prosecutor commenced to play the calls on schedule 2, he described that they commenced on p 83, but the first call on schedule 2 described as “Barton 5-304” on 25 August 2011 at 8.17 am is at p 119 of the 261 pages in the ARBs (where it is incorrectly described as “25/08/11 0817 hrs – Barton 1 (304)”). During the cross-examination of Mr Alexander, the prosecutor played the call that was number 18 on schedule 2 with the description “Barton 5-487” that took place on 26 August 2011 at 10.51 am that was incoming from Mr Heilbronn to the phone subscribed in Mr Alexander’s name. It was described by the prosecutor as commencing on p 112 but the transcript of that call commences on p 147 of 261 in the ARBs.

- [25] The transcripts of the telephone intercepts in the ARBs include copies of schedules 1, 2 and 3 that were separately tendered as exhibits 3, 6 and 9. Schedule 1 that is incorporated into MFI “A” in the ARBs has 36 items, whereas schedule 1 which is exhibit 3 has only 27 items (when calls 1 and 4 are excluded). During the playing of the telephone intercepts, the prosecutor had read the text messages that were identified in the schedules and a 31-page document which reproduced the text messages was tendered as exhibit 10.
- [26] The trial transcript shows that no issue was raised by any juror or anyone else in the courtroom with access to the transcripts of the telephone intercepts that the recordings of those telephone calls that were played did not accord with the transcripts of the telephone intercepts that were used at the trial.
- [27] The last page of the transcript of the Barton 1 (313) recording at p 128 of 261 pages in the ARBs is as follows:

“M1 Yep

-Background- -Unintelligible Conversation- -Continuous-

M2 That’s why I rung ya back. Fuckin’ ah -Pause- yeah. Well I told you to get your own accountant way back then and I I tell ya now she she’d be a proper snake in the grass that bitch bud

M1 (wd) we already know that man, hey listen I’ve got someone on the other line

M2 Yeah

M1 Got a client, okay

M1 I will -Pause-Alright thanks brother, see ya

M2 See ya then

-Aside-

M1 Sorry”

- [28] The equivalent page of the transcript of that same recording from the brief provided to Mr Olssen in the confiscations proceeding is pp 92 and 93 of 194 pages and

includes 17 additional exchanges as follows that are inserted after M1 said “Got a client, okay” and before M1 said “I will -Pause-Alright thanks brother, see ya”:

“M2 Well as I said there was six pairs of gloves for that next promotion right?

M1 Yep.

M2 If you work it out at twenty-seven hundred

M1 Alright cool.

M2 Ya know what I mean?

M1 Yep.

M2 So overall I always told you the figure’s gonna be twenty-seven so if you divide that by six, ya end up with six right.

M1 Yep.

M2 Six pairs of Rays.

M1 Yep.

M2 And that’s what I said every, you get four and I get two.

M1 Alright Beautiful, love your work.

M2 Instead of three each, you said to me that you wanted the extra gloves

M1 Yep, na, na, it’s all good, I love your work.

M2 So there’s four sets here right now

M1 Alright done.

M2 So get some cunt down here and I’ll they can pick that motor up at the same time.”

[29] Detective Phelps also gave evidence about the purchase price of cannabis in Townsville in 2011. A pound of cannabis was around \$4,500 for a pound of hydroponic grown cannabis. Bush grown cannabis was slightly cheaper by the pound. A pound of cannabis was a lot bigger package than a pound of methylamphetamine.

[30] It was apparent from Mr Olssen’s trial counsel’s cross-examination of Detective Phelps that counsel had a copy of Mr Grainger’s statement dated 16 November 2011, as he cross-examined Detective Phelps on the taking of that statement and another document Mr Grainger signed at the same time as signing the statement. In relation to the investigation, Detective Phelps was asked about one Matthew Kier who was based on the Sunshine Coast and with whom Detective Phelps had spoken. Detective Phelps agreed that Mr Kier went by the names of Matt, Matty and Sonic but was most commonly referred to as Sonic or the young lad which were his two nicknames and that Mr Kier was Mr Heilbronn’s courier on the Sunshine Coast.

[31] Mr Grainger’s evidence in chief included the following. He was working for Mr Heilbronn in 2011. He went to Brisbane to meet Mr Olssen after Mr Heilbronn

requested him to pick up drugs. He had previously met Mr Olssen at a nightclub in Townsville where Mr Grainger occasionally worked as a disc jockey. Mr Grainger asked Mr Heilbronn what drugs it was that he was to pick up and Mr Heilbronn responded that “it was something to do with [his] habit, because [Mr Grainger] had an amphetamine habit at the time”. He booked a ticket to fly to Brisbane and took \$15,000 cash given to him by Mr Heilbronn. He left \$5,000 of the cash at his neighbour’s place in Townsville, apart from \$500 out of that \$5,000 he had taken for himself, and he was told to give \$10,000 to Mr Olssen. It was wrapped up as a present. He met Mr Olssen upstairs at Hungry Jack’s in the mall. While he was with Mr Olssen, he spoke to Mr Heilbronn on Mr Olssen’s phone. He gave the money to Mr Olssen. They went to a multistorey carpark where Mr Olssen gave Mr Grainger a massage-type sports machine which Mr Grainger put into a large travel bag. It was about a foot wide by about a foot high and had a couple of tubes coming off it and some buttons. Mr Grainger left with the massage machine in his bag and went to Roma Street station where he booked a one way bus to Townsville. He got off at Alligator Creek Roadhouse and was picked up by Mr Alexander. They took the machine to Mr Heilbronn in Townsville. Mr Grainger got paid \$2,500 for this trip. The recording of call 6709 which was number 20 on schedule 1 (and accorded with the transcript at p 454 of the ARBs which was p 95 of 261 and described as “12/07/11 1136 hours – Barton 1 (6709)”) was played. Mr Grainger recognised the voices on the phone call of Mr Heilbronn (M1) and Mr Olssen (M2). During the conversation the phone was passed over to someone (M3) and Mr Grainger recognised that was a conversation that then took place between Mr Heilbronn and himself. That conversation took place when Mr Grainger was at the top level of Hungry Jack’s.

- [32] Mr Olssen’s trial counsel’s cross-examination of Mr Grainger elicited the following. Mr Grainger had been using cannabis, ecstasy and methylamphetamine from the age of 19 years. He had been experiencing suicidal and paranoid thoughts in February 2011 and again in November 2011. At the end of November 2011, he was admitted to hospital under an involuntary treatment order for about six weeks. On 13 December 2013, he pleaded guilty to trafficking in methylamphetamine and trafficking in cannabis. He was only involved in one trip moving cannabis from Brisbane to north Queensland. When Mr Grainger was interviewed by police on 20 October 2011, it was the interviewing police officer Detective Squire who first mentioned Mr Olssen. At that stage Mr Grainger did not wish to speak to police about his trip to Brisbane on 12 July 2011. He did so when he returned to the police station on 16 November 2011 and spoke with Detective Phelps. It was put to Mr Grainger that the package he received on 12 July 2011 was wrapped but he said it was not wrapped, but he agreed that he put it into a bag “sight-unseen”. On 12 July 2011, Mr Grainger had “a raging cannabis habit”. Mr Grainger did not believe there was cannabis in the package as he thought that, when Mr Heilbronn was referring to Mr Grainger’s habit, it was to his methylamphetamine addiction and not his cannabis addiction. When it was put to Mr Grainger that he did not meet with Mr Olssen on 12 July 2011, Mr Grainger confirmed his evidence that he did meet with him. Mr Grainger conceded that he had never spoken to Mr Olssen before 12 July 2011.
- [33] In re-examination, Mr Grainger was shown the photoboard on which he had identified Mr Olssen as the person at number 9 and which Mr Grainger signed on 16 November 2011 (exhibit 11).
- [34] Mr Olssen did not give evidence at his trial but he called two witnesses, Mr Bruniera and Mr Alexander. Mr Bruniera’s evidence included the following. He pleaded

guilty to two counts of possession of methylamphetamine. One count related to a small quantity found in the back of his car and the other count was in relation to a quantity that was discovered outside a rehabilitation centre in Charters Towers. He had agreed with one Mr Safi to do a trip to southeast Queensland to meet a person who would give him a package. The admissions in exhibit 1 in relation to the transaction that was the subject of count 3 included that the male person Mr Bruniera met in the Brisbane CBD was a person he had not met before and he described that man as “maybe mid-20s to mid-30s roughly”; and the male person was in Mr Bruniera’s company for no more than 20 minutes and left a sack wrapped in cloth in the car. Mr Bruniera was asked whether, on 26 September 2011, he took possession of anything from the man who was sitting in the dock and his response was “No, I don’t believe so”. Mr Bruniera said the package had marijuana in it. He knew it was marijuana from the smell. He took the cannabis to Rockhampton and met with another person to whom he gave the marijuana and that person who went by the name “Wolf” gave Mr Bruniera the methamphetamine. Whilst in Rockhampton, Mr Bruniera injected methamphetamine. He stayed in Rockhampton for a few hours but then got paranoid and left early in the morning to travel to Townsville through Emerald, Clermont and coming through the back way to Charters Towers. Because he was scared, he buried the methylamphetamine in Charters Towers. He was arrested by police at Giru and taken to Townsville. He provided police with information about the location of the methylamphetamine at Charters Towers.

- [35] In cross-examination Mr Bruniera was asked the size of the package he received. It was roughly 50 cm deep and 20 cm long. When it was put to him that what he picked up was a little sack wrapped in a cloth, he responded that was what he collected in Rockhampton. He was reminded of evidence he had given on 1 October 2015. The evidence was to the effect that he drove to Brisbane and was sent a mobile number to call; he called the number from a payphone and arranged to meet a male person in the city; and he received a little sack wrapped up in a cloth from the male person. He accepted that he had given that evidence on a previous occasion. When it was suggested that his evidence in Mr Olssen’s trial was completely different, he responded “A little sack to me can constitute as something that big or big to little, you know, like there’s a big – big difference”. He refuted the proposition that at no time had he traded a quantity of cannabis for a quantity of methylamphetamine. He conceded that he had never told the police that he traded from cannabis to methylamphetamine. He conceded he did not give that evidence on 1 October 2015 that he made a trade of cannabis to methylamphetamine. He denied the proposition put to him that he had got methylamphetamine from Mr Olssen.
- [36] Mr Alexander’s evidence included the following. He pleaded guilty to possession of four pounds of methylamphetamine of which he was found in possession in August 2011 at the ferry terminal to Magnetic Island. He used to be a chef and worked for Mr Heilbronn. He agreed to do a run for Mr Heilbronn on 26 August 2011 to southeast Queensland. He flew to Brisbane early in the morning of 26 August 2011. He got off the plane at the airport at Brisbane and travelled by train to Central Station and then got a train to Nambour where he met up with a person who gave him a few pounds of marijuana in a bag. He took it back to Townsville on a bus that left from Nambour station. A woman came to see him and took the cannabis after he got his “little bit out of it for doing the thing”. On the morning he got back from Brisbane a man called Blue came to his house and delivered the methylamphetamine. It was in a different container and it smelled, so Mr Alexander put it into the yellow container to take it over to Magnetic Island which he had when the police intercepted

him. He had never met Mr Olssen prior to 26 August 2011 and Mr Alexander did before not see him on that day. He had never spoken to Mr Olssen on or before 26 August 2011.

- [37] Mr Alexander's evidence in cross-examination included the following. The proposition was put to him that he picked up four pounds of methylamphetamine from Brisbane. Mr Alexander disagreed with that. He also disagreed with the proposition that he had travelled back from Brisbane with that methylamphetamine for Mr Heilbronn. Mr Alexander repeated his evidence that he had the "weed" for a girl in Townsville and he got the methylamphetamine in Townsville. The drug that he obtained from southeast Queensland was not for Mr Heilbronn but for the girl. He was cross-examined on the statement of facts which was read out in his sentencing which included that he travelled to Brisbane to obtain a quantity of four pounds of methylamphetamine and he was transporting those drugs for Mr Heilbronn. He explained that he pleaded guilty to facts there were not true as he had been advised if he pleaded guilty his sentence would be far less. He was cross-examined on the content of call 487 which was number 18 on schedule 2 which was a conversation between Mr Heilbronn and him.
- [38] In re-examination, Mr Alexander identified the person whom he met at Nambour and who gave him the cannabis as known to him by the names of Mick and Matty and the nickname of Sonic.
- [39] The appellant's trial counsel presented the following arguments to the jury. Counts 2 and 3 were related to the second particular of count 1. Mr Grainger's evidence was relevant to the first particular of count 1 and Mr Bruniera's evidence was relevant to the third particular of count 1. The most serious allegation in the trial related to Mr Alexander because it concerned the second particular of count 1 and counts 2 and 3. The appellant's counsel reminded the jury of the prosecutor's opening in respect of the Barton 1 (313) recording and the reference to boxing promotions, people's last fights, the ATO, the bookkeeper had not done bills and Golden Lion Promotions and read out from p 92 (which was the part of the recording that is shown in exhibit 1 on this application and not in the ARBs) where reference was made to "six pairs of gloves for that next promotion" and that "there's four sets here right now" and submitted that it was a matter of speculation by the prosecution that was a reference to four pounds of methylamphetamine as there was no witness who had explained that boxing gloves was code for a parcel of methylamphetamine.
- [40] The jury were asked to act on the evidence of Detective Phelps as to the involvement of Matthew Kier on the Sunshine Coast as a courier for Mr Heilbronn and the names by which he was known and accept from Mr Alexander's evidence that the person who supplied Mr Alexander on 26 August 2011 with the cannabis who was known as Mick, Matty or Sonic was Matthew Kier.
- [41] In relation to the third particular of count 1, Mr Olssen's trial counsel submitted that the prosecution had to prove that the voice on the mobile phone at around 4.00 pm to 5.00 pm on 26 September 2011 was Mr Olssen. He submitted that the prosecution case that Mr Olssen met with Mr Bruniera in Brisbane and supplied to Mr Bruniera the drugs that were discovered in Charters Towers could never be established.
- [42] On the basis of the evidence given by Detective Phelps as to the respective prices in 2011 for a pound of cannabis or a pound of methylamphetamine, Mr Olssen's trial counsel submitted that the purchase of \$12,250 that was requested for the drugs

supplied to Mr Grainger was more consistent with a purchase of cannabis and not methylamphetamine. The problems that Mr Grainger had in 2010 and 2011 with psychotic delusions and hallucinations and an unreliable memory were emphasised. Mr Grainger was locked into the story that he had given to the police for his statement of 16 November 2011 and there was a prospect of his having to go to prison for a longer period of time if he departed from that statement. Apart from Mr Grainger's identification on one telephone intercept of Mr Olssen's voice, nothing was played to the jury with Mr Olssen's voice. The jury were reminded that the prosecution must establish beyond reasonable doubt that it was Mr Olssen's voice on each of the tapes which relate to the various particulars and that he was involved in the possession, supply and trafficking of methylamphetamine. In the trial, two out of three couriers denied that Mr Olssen was anywhere near the deals and the other courier had never spoken to Mr Olssen previously and had massive (mental health) problems.

[43] The prosecutor's submissions at the trial included the following. The significant issue was whether the jury could safely conclude that Mr Olssen was the person who was speaking on the phone. The prosecutor pointed out the various connections that the jury could make between Mr Olssen and the intercepted telephone conversations. In relation to the final conversation between Mr Grainger and the person the prosecution alleged was Mr Olssen on 13 July 2011, Mr Grainger was told "you got to be happy with that work" and the prosecutor relied on the use by Mr Safi in the conversation with Mr Bruniera about how good that work was when he was referring to methylamphetamine to urge the jury to use that to conclude that it was methylamphetamine that Mr Grainger brought back from Brisbane.

[44] In the summing up, the trial judge referred to the submission made on behalf of Mr Olssen that the sum of \$10,000 Mr Grainger took to Brisbane was not enough to pay for four pounds of methylamphetamine and that the amount was more consistent with payment for cannabis. The trial judge then observed:

"Now, on that topic you might think, but it's a matter for you, that it doesn't necessarily follow that the money being taken down to Brisbane was payment for the drugs going back, as opposed to being part payment of old debts or splitting up of profits. There just doesn't seem to be clear evidence about that. You hear a lot of the other person on the phone saying 'I need my wages' or 'I'm so broke' but it's correct that there's no direct evidence that it was methylamphetamine being taken back. The Crown asks you to infer it from Mr Grainger's evidence about Heilbronn referring to the drug to which he was addicted; he took it to mean methylamphetamine, but he was addicted to cannabis too. And the Crown would also say it's consistent with later seizures of methylamphetamine from Bruniera and Alexander. Again that's going to depend on what you make of their evidence which I'll come to."

[45] The trial judge made it clear to the jury that the prosecution case was that in respect of each of the three transactions particularised for count 1, the methylamphetamine was handed over by Mr Olssen and that the particulars should be read with the words "sourced or facilitated" omitted. The jury were also asked to return special verdicts, if they did return a verdict of guilty on the charge of trafficking. In respect of each of the three transactions particularised for count 1 to which the trial judge in the summing up gave the letters (a), (b) and (c), they answered the following questions in the affirmative:

- (a) Do you find the defendant, Matthew Francis Olssen (a) conducted the supply of a dangerous drug to Stuart Grainger?
- (b) Do you find that Matthew Francis Olssen (b) conducted the supply of the dangerous drug to Jeffrey Alexander?
- (c) Do you find that Matthew Francis Olssen (c) conducted the supply of the dangerous drug to Christopher Bruniera?

The first appeal

[46] Mr Olssen's appeal against conviction was limited to an appeal against conviction on count 1 primarily on the ground that the evidence adduced in relation to the first of the three transactions particularised for count 1 was insufficient to prove that it involved methylamphetamine. The approach on the appeal on behalf of Mr Olssen (set out at [34] of the COA reasons) accepted that the jury could have been satisfied beyond reasonable doubt of the second and third transactions in respect of count 1. Morrison JA (with whom Fraser and Gotterson JJA agreed) concluded (at [36]) that it was open to the jury to find beyond reasonable doubt that the parcel collected by Mr Grainger in Brisbane contained dangerous drugs and, in particular, methylamphetamine. Morrison JA then stated:

“If the jury accepted Grainger's evidence then they could have accepted the following:

- (a) that he was asked to fly to Brisbane, collect a parcel from a man at Hungry Jacks and immediately get on a bus back to Townsville;
- (b) that he was collecting drugs;
- (c) that the drugs were to do with his methylamphetamine habit;
- (d) having met [Mr Olssen] they both went to the toilet where the money was handed over, and then went to a car park where the package was handed to Grainger;
- (e) the \$10,000 handed over was short by \$2,500;
- (f) the machine handed to Grainger only cost \$300;
- (g) Grainger was paid \$2,500 to make the trip;
- (h) while he was with [Mr Olssen], Grainger was told by Heilbronn to do what he had to do, but to be careful and to call Heilbronn when he (Grainger) was close to Townsville; and
- (i) the trip was undertaken on the instructions of Heilbronn.”

[47] Morrison JA concluded (at [38] of the COA reasons) that the combination of the above evidence of the first transaction with the other two transactions was sufficient for the jury to be satisfied beyond reasonable doubt that it was methylamphetamine supplied by Mr Olssen to Mr Grainger on 12 July 2011.

[48] An additional ground was argued that there was a miscarriage of justice by the trial judge's failure to give a direction that the evidence that the second and third transactions involved methylamphetamine could not be relied on as relevant to the

subject matter of the first transaction. That was disposed of on the basis that the particulars that were provided of the first transaction did not specify that the dangerous drug was methylamphetamine and the only real issue in the case was as to the identity of the supplier for all three transactions, Morrison JA (at [49] of the COA reasons) concluded that it was not surprising that the appellant's trial counsel did not see the need to press for the direction that was contended for on the appeal and such a direction would likely have deflected the jury from its proper task of considering whether the prosecution had proved beyond reasonable doubt that the appellant was the supplier in the Grainger transaction. Morrison JA noted that the trial judge directed the jury that each charge had to be considered separately and that the evidence on each charge had to be evaluated separately from the others and the jury had to be satisfied beyond reasonable doubt on each charge and no complaint was made as to that direction. That ground also failed.

What is required for leave to make a subsequent appeal?

- [49] The requirements for bringing a subsequent appeal are set out in s 671AC of the *Code* which provides:

“Right of subsequent appeal

- (1) This section applies if—
 - (a) a person appealed, or applied for leave to appeal, against a conviction of the person under section 668D; and
 - (b) the Court, under chapter division 2—
 - (i) refused to grant leave to appeal; or
 - (ii) dismissed the appeal in whole or in part; or
 - (iii) determined the appeal and dealt with the person under section 668F.
- (2) The person may make a subsequent appeal to the Court, with the leave of the Court, against the person's conviction on a ground that there is fresh and compelling evidence or new and compelling evidence.
- (3) Also, the person may make a subsequent appeal under subsection (2) if—
 - (a) the Court has, under this chapter division, refused to grant an earlier application for leave to make a subsequent appeal; or
 - (b) the Court has, under this chapter division, dismissed an earlier subsequent appeal in whole or in part.
- (4) The Court may give its leave to make a subsequent appeal at any time it considers necessary or desirable.”

- [50] The dismissal of Mr Olssen's first appeal fulfils the requirement of s 671AC(1). The meaning of “fresh” evidence is dealt with in s 671AB(2) and (3). The meaning of “new” evidence is dealt with in s 671AB(4). As Mr Olssen accepted during the

hearing of his application that the evidence he sought to rely on at that stage was “new” rather than “fresh”, it is relevant to set out s 671AB(4):

“Evidence is *new* if—

- (a) the evidence was not adduced in the proceedings in the court of trial before which the appellant was convicted; and
- (b) the evidence could have been adduced in the proceedings in the court of trial with the exercise of reasonable diligence by the defence.”

[51] Pursuant to s 671AB(6) of the *Code* evidence is “compelling” if:

- “(a) the evidence is reliable; and
- (b) the evidence is substantial; and
- (c) the evidence—
 - (i) is highly probative in the context of the issues that were in dispute in the proceedings in the court of trial before which the appellant was convicted; or
 - (ii) would have substantially weakened the case for the prosecution in the proceedings in the court of trial.”

[52] Some elements of the analogous provisions in the *Criminal Law Consolidation Act 1935* (SA) were considered by the High Court in *Van Beelen v The Queen* (2017) 262 CLR 565. The South Australian definition of “compelling” is in identical terms to s 671AB(6) of the *Code*, except the South Australian definition does not include s 671AB(6)(c)(ii). The Court in *Van Beelen* observed in relation to the construction of the terms used for the definition of “compelling” at [28]:

“Nothing in the scheme of the CLCA or the extrinsic material provides support for a construction of the words ‘reliable’, ‘substantial’ and ‘highly probative’ in other than their ordinary meaning. Understood in this way, each of the three limbs of sub-s (6)(b) has work to do, although commonly there will be overlap in the satisfaction of each. The criterion of reliability requires the evidence to be credible and provide a trustworthy basis for fact finding. The criterion of substantiality requires that the evidence is of real significance or importance with respect to the matter it is tendered to prove. Plainly enough, evidence may be reliable but it may not be relevantly ‘substantial’. Evidence that meets the criteria of reliability and substantiality will often meet the third criterion of being highly probative in the context of the issues in dispute at the trial, but this will not always be so. The focus of the third criterion is on the conduct of the trial. What is encompassed by the expression ‘the issues in dispute at the trial’ will depend upon the circumstances of the case. Fresh evidence relating to identity is unlikely to meet the third criterion in a case in which the sole issue at the trial was whether the prosecution had excluded that the accused’s act was done in self-defence. On the other hand, fresh evidence disclosing a line of defence that was not apparent at the time of trial may meet the third criterion because it bears on the ultimate issue in dispute, which is proof of guilt.”
(footnotes omitted)

- [53] When considering applications by two prisoners for leave to bring subsequent appeals, relevant observations were made by the Western Australian Court of Appeal in *Luo v The King* [2025] WASCA 36. The Court noted (at [47]) that “the right of an offender to bring a second or subsequent appeal against conviction is not at large”, as it is a limited right. The Court noted further that it can only be brought if there is fresh and compelling or new and compelling evidence. The Court then observed (also at [47]):

“Thus, the focus of any second or subsequent appeal against conviction must be on the fresh and compelling or new and compelling evidence sought to be adduced, and its cogency and effect. By definition, fresh and compelling or new and compelling evidence cannot be evidence adduced at an offender’s trial. Thus, a second or subsequent appeal is not to be regarded as another opportunity to merely relitigate, reformulate, reargue or reinterpret evidence led at the trial or an earlier failed appeal.”

- [54] One difference in the Western Australian provisions for bringing a subsequent appeal is that s 35F(4) of the *Criminal Appeals Act 2004* (WA) expresses the test for giving leave to appeal on a ground of appeal as the Court of Appeal must be satisfied that the ground identifies fresh and compelling evidence or new and compelling evidence that should, in the interests of justice, be considered on an appeal and the ground has a reasonable prospect of succeeding. As was observed by Brown JA (with whom Bond JA and Bleby AJA agreed) in *R v Kostandy* [2026] QCA 75 at [26] the threshold question of what level of satisfaction is required for the granting of leave is not specified in s 671AC. Brown JA noted (at [26]) that one construction is that the Court needs to be satisfied only that there is a reasonable argument that the evidence meets the description of “fresh and compelling” or “new and compelling” or the other construction is that the Court had to be satisfied that the evidence met the statutory definition of either being fresh and compelling or new and compelling. Brown JA then detailed (at [27]-[28]) the divergent approaches taken in Victoria, Western Australia and South Australia. It was noted (at [29]) that it was not necessary in *Kostandy* for the proper level of satisfaction required before leave could be granted under s 671AC to be determined.

- [55] The provisions in the *Code* dealing with subsequent appeals were introduced by the *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2024* (Qld). It is also relevant to note that the Explanatory Note for the Bill that was enacted as that Act stated (at p 3) in relation to the leave requirement:

“The requirement in the Bill to obtain the leave of the Court of Appeal in order to make a subsequent appeal, acts as a filter to vexatious or untenable appeals. The Court of Appeal must be satisfied that the ground of the subsequent appeal has a reasonable prospect of success to grant permission for the convicted person to make a subsequent appeal.”

The first ground

- [56] The first ground was raised as a result of Mr Olssen’s becoming aware of the statement of facts tendered at the sentencing hearing of Mr Alexander and the transcript of the sentencing submissions made at that hearing before North J on

26 November 2014. It is Mr Olssen's contention that if the true nature of the first transaction involving Mr Grainger had been presented to the jury, it was highly probable he would not have been convicted of trafficking in methylamphetamine.

- [57] As Mr Olssen's legal representatives were aware at least from 9 January 2015 of the fact that Mr Alexander had been sentenced for his role in collecting the massage machine on the basis that pseudoephedrine was hidden in it, it is not a matter on which Mr Olssen himself can now seek to rely. This is particularly so, as Mr Olssen's trial counsel in addressing the jury suggested that the massage machine may have contained cannabis. Mr Olssen's affidavit filed on 27 March 2025 does not address the defence strategy pursued at trial that the drug involved was cannabis and not methylamphetamine.
- [58] In any case, there is no reason why the prosecution could not pursue the sentencing of Mr Alexander on the basis the massage machine contained pseudoephedrine but pursue the trial of Mr Olssen on the basis that the massage machine contained methylamphetamine. No estoppel or issue estoppel applies in the criminal law to the prosecution in relation to the factual basis in which each offender involved in the same criminal activity is prosecuted: *Rogers v The Queen* (1994) 181 CLR 251 at 254 and 278; *R v Lloyd* [2025] QCA 47 at [12] and [17]. There is no substance to this ground, as it is not based on new evidence. In fact, it is not a proper ground on which to base the application.

The second ground

- [59] The second ground raises a procedural matter that is not appropriate for this application. The orders made by North J preceded the trial and any failure to comply with that order was not a point taken on Mr Olssen's behalf to preclude the commencement of his trial. Particulars were formalised for the purpose of the trial and no issue was taken with the content of them by the appellant's trial counsel. This is not a proper ground for this application.

The third ground

- [60] If Mr Olssen had given evidence at the trial and the jury had the opportunity to listen to him speak, it may have added weight to his assertion that it was not his voice recorded in the telephone intercepts. It is apparent from the appellant's trial counsel's cross-examination that Mr Olssen's instructions to his lawyers at his trial were that it was not his voice. Mr Olssen was present at the trial when the recordings were played for the jury. A strategic decision was no doubt made for Mr Olssen not to give evidence at the trial and assert that the voice on the intercepts claimed by the prosecution to be his voice was not in fact his voice, as he then would have been cross-examined on other aspects of the prosecution case. Whether the male speaker who featured in many of the telephone intercepts was Mr Olssen was a critical issue in the trial for the jury. Mr Olssen now, in effect, wishes to give evidence that it was not his voice (which was his case at the trial) and reverse the strategic decision made at the trial that he would not give evidence. That can be characterised as Mr Olssen's seeking to relitigate the same issue that arose in the trial by a different strategy. As explained in *Luo* (at [47]), a second appeal is not an opportunity to relitigate the evidence led at the trial. Again, this is not a proper ground for an application for leave to bring a subsequent appeal. It does not rely on any "new" evidence but is an attempt to reverse the defence strategy at trial.

The fourth ground

- [61] The point that is pursued on this application that the prosecution case that the massage machine contained methylamphetamine was inconsistent with paragraph 37 of Mr Grainger's statement dated 16 November 2011 that he was asked to pick up pseudoephedrine in Brisbane must have been apparent to Mr Olssen's trial lawyers but a strategic decision was made in Mr Olssen's case to pursue a suggestion that it was cannabis in the massage machine. That possibility was referred to by the appellant's trial counsel in his address to the jury and had the benefit of allowing Mr Olssen's counsel to argue that the jury would not convict Mr Olssen of trafficking if they had a doubt that the drug that was trafficked was methylamphetamine. The failure to cross-examine Mr Grainger on paragraph 37 of his statement was a deliberate tactic and like the third ground does not rely on any "new" evidence but is an attempt to revisit the trial strategy. It is not a proper ground for this application. The first appeal was conducted on the record of the trial in the ARBs prepared for the first appeal. It was not conducted by reference to witness statements that were not adduced into evidence at the trial. It was Mr Grainger's evidence at the trial that was relevant to the first appeal. There is no basis for Mr Olssen to assert that the prosecution adopted a misleading position on the first appeal that was inconsistent with Mr Grainger's statement dated 16 November 2011.

The fifth ground

- [62] It is unfortunate that it was not until the hearing of Mr Olssen's application to make a subsequent appeal that the discrepancy in the version of the transcripts of the telephone intercepts in the ARBs for the first appeal was noticed. If the discrepancy had been realised at the time of the first appeal, it could have been addressed on the first appeal when the exhibits remained available to the Court. The significance of the discrepancy is reduced, however, when it is understood that the transcripts of those telephone intercepts were not the evidence before the jury. It was the recordings that were played for the jury. Mr Olssen's legal representatives who acted for him from time to time during the period that commenced when he was charged until the conclusion of the trial had disclosure from the DPP of the audio of the telephone intercepts and would have been provided with the transcripts prepared for the purpose of the prosecution from the audio and been able to discern whether those included in the ARBs as comprising MFI "A" at the trial were, in fact, the transcripts used by the jury at the trial.
- [63] The problem for Mr Olssen in relying on the fact that the transcript of the Barton 1 (313) recording which is in the ARBs did not include the parts of that recording in which reference was made to "gloves" is that it is indisputable on the transcript of the trial that the recording which was played to the jury was the one that referred to "gloves". That part of the conversation referring to "gloves" was embraced during the trial by both the prosecutor and the applicant's trial counsel. Mr Olssen's submission that the integrity of the audio of the telephone intercepts is in issue because of the discrepancy between exhibit 1 and the transcript of the same conversation included in the ARBs is speculation without any evidentiary basis.
- [64] Mr Heath's affidavit exhibits the report that Mr Heath prepared after examining exhibit 1 and comparing it with the transcript of the Barton 1 (313) recording in the ARBs. Mr Heath's opinion on the examination of the transcripts is irrelevant, as it was the audio of the Barton 1 (313) recording included in exhibit 5 that was the evidence before the jury. Leave should therefore be refused for the applicant to rely on Mr Heath's affidavit.

- [65] There is no factual basis for the fifth ground as the content of the Barton 1 (313) recording played to the jury accorded with the transcript that was exhibit 1 on this application which was the transcript used at the trial, despite the error in the ARBs. The fifth ground does not need to be considered further.

Conclusion and orders

- [66] None of the four grounds raised by the applicant in his application constitutes a proper ground for supporting the application. As in *Kostandy*, it is therefore not necessary on this application to address the threshold satisfaction before the Court gives leave to appeal for the purpose of s 671AC(2) of the *Code*.
- [67] The orders which should be made are:
1. Leave to the respondent to rely on the affidavit of J Salm affirmed 10 June 2025 granted.
 2. Leave to the applicant to rely on the affidavit of J Heath sworn 20 June 2025 refused.
 3. Application for leave to make a subsequent appeal refused.
- [68] **BROWN JA:** I agree with the orders proposed by Mullins P for the reasons given by her Honour.
- [69] **HENRY J:** I agree with President Mullins.