

REASONS OF THE COURT

(Given by Lang J)

[1] Mr Papps was found guilty by a jury in the District Court on seven charges of being in possession of items with the intention of using them for manufacturing methamphetamine and pleaded guilty to one charge of being in possession of utensils for the purpose of consuming methamphetamine. On 29 July 2022 Judge W Lawson sentenced Mr Papps to seven months home detention and 100 hours community work.¹ Mr Papps appeals against both conviction and sentence.

Factual background

[2] The charges were laid after the police executed a search warrant at Mr Papps' address on 12 April 2019. When they entered the property, they found a garage that was secured with a lock. Security cameras had been installed on the exterior of the address.

[3] When the police entered the garage they found another security camera, although this did not have the ability to record events within the garage. Scattered in different areas of the garage they also found items of equipment that they believed were consistent with having been used for the manufacture of methamphetamine. In addition, they found materials that could be used in the manufacture of methamphetamine. These included iodine, hydrochloric acid, phosphorous acid and caustic material. Swabs taken from several areas in the garage revealed the presence of methamphetamine, although not in significant concentrations.

[4] When the police searched the dwelling at the address, they found pipes and syringes that were consistent with having been used for the consumption of methamphetamine.

¹ *R v Papps* [2022] NZDC 14632 [Sentencing notes] at [14].

The charges

[5] At the beginning of the trial Mr Papps faced 14 charges. The most serious of these alleged that he had manufactured methamphetamine at his address between 9 October 2017 and 12 April 2019. He also faced 12 charges of being in possession of equipment, materials, and a pre-cursor substance with the intention that those items be used in the manufacture of methamphetamine. In addition, he faced one charge of being in possession of a methamphetamine pipe.

[6] The charges of being in possession of equipment related to a steam distiller, a water pump, flasks, a four hob electric stove top, a used pH test strip, and an electric frying pan.

[7] The charges of being in possession of materials related to quantities of hydrochloric acid, phosphorus acid, caustic material and iodine that were found in the garage. All but the iodine were found in liquid form in containers of differing descriptions. The iodine was in solid balls. The charge of being in possession of a pre-cursor substance related to a flask containing a substance that had the properties of hydrochloric acid.

[8] Mr Papps pleaded guilty to the charge of being in possession of a methamphetamine pipe at the commencement of the trial. At the end of the Crown case the Judge discharged him under s 147 of the Criminal Procedure Act 2011 on the charge of being in possession of the pH test strip. This was on the basis that the item had already been used and could not be used again in any future manufacture of methamphetamine.

[9] The jury was unable to reach a verdict on the charge of manufacturing methamphetamine. It found Mr Papps not guilty on all the equipment charges other than that relating to the electric frying pan. The jury found him guilty on that charge as well as on the remaining charges of being in possession of methamphetamine materials and a pre-cursor substance.

The appeal

[10] Mr Papps advances several grounds of appeal. First, he contends the Crown should not have been permitted to file an amended the Crown Charge Notice at the beginning of the trial. This contained a separate charge for each of the items found in his garage. He also contends that the Judge erred in one respect in the wording he used in the question trail. This related to the fact that the question trail asked the jury to decide whether Mr Papps was in possession of the items with the intention that they be used by him “or someone else” to produce or manufacture methamphetamine. In addition, Mr Papps contends an element of unfairness arose because the jury heard a considerable amount of evidence relating to the manufacture of methamphetamine charge when the bulk of the charges did not relate to that issue.

[11] However, the aspect of the appeal that Mr Papps presses most strongly is an assertion that a miscarriage of justice has occurred because of deficiencies in the conduct of his defence by his trial counsel, Mr Craig Horsley. He contends Mr Horsley committed several significant errors before and during the trial and these undermined his defence. Mr Papps contends that Mr Horsley erred:

- (a) in failing to adduce evidence of a hair follicle drug test carried out on 16 May 2019;
- (b) in failing to provide the jury with the digital date stamp of a photograph that Mr Papps produced when he gave evidence;
- (c) in failing to draw Mr Papps’ attention to significant Institute of Environmental Science and Research Ltd (ESR) test results until shortly before the trial;
- (d) in failing to ensure Mr Papps obtained a copy of the booklet of text messages that the Crown proposed to rely on at trial;
- (e) in failing to object to irrelevant and inadmissible text messages within that booklet; and

(f) in handing the wrong document to Mr Papps when he gave evidence.

Amendment of the Crown Charge Notice

[12] In its original form, the Crown Charge Notice contained charges that grouped together the various items of equipment and material found in Mr Papps' garage. Mr Horsley advised the Crown prior to the trial that Mr Papps proposed to advance separate defences in relation to each of the items found in his garage. The Crown therefore applied for leave to amend the Crown Charge Notice by laying a separate charge for each item of material and equipment found in the garage. Not surprisingly, Mr Horsley did not object to the application and the Judge granted it on the first day of the trial.

[13] Mr Papps contends that the amendments disadvantaged him because they resulted in convictions being entered on numerous charges rather than one or two as would have been the case if the Crown Charge Notice had remained in its original form.

[14] Mr Papps' argument on this issue faces an immediate obstacle because the decision to amend the charges followed orthodox charging principles. It is well established that a charge must generally relate to a single offence, and it must also contain sufficient particulars to fairly inform the defendant of the substance of the offence alleged.² As the Supreme Court observed in *R v Qiu*:³

Separate counts facilitate fairness in the conduct of the trial by focusing attention on matters of fact and law which can and need to be distinguished for the purposes of different counts. In the event of conviction, they assist the sentencing Judge by indicating the extent of culpability.

[15] The appropriateness of laying a separate charge for each item in the present case is demonstrated by the fact that Mr Papps sought to advance different explanations as to how he came into possession of each item, as well as the use to which it was to be put. The amendment allowed the jury to concentrate on the

² Criminal Procedure Act 2011, s 17(1) and (4).

³ *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [8].

evidence for the Crown and defence in relation to each item. This is reflected in the jury's verdicts that were not the same for each offence.

[16] More importantly, significant practical issues would have arisen if the Crown Charge Notice had remained in its original form. If the jury had returned a guilty verdict on one of the composite charges the trial Judge would not have known which items the jury had found were in Mr Papps' possession with the requisite intent. He would have been required to reach his own conclusion on that issue when determining the sentence to be imposed on each charge. This could have been to Mr Papps' significant detriment. By way of example, the Judge may have concluded that the jury had found Mr Papps guilty of being in possession of all the items of equipment with the requisite intent when, as the verdicts demonstrate, that was not the case.

[17] We are satisfied no injustice was caused to Mr Papps by the amendment of the Crown Charge Notice. This ground of appeal fails as a result.

The wording of the question trail

[18] The Judge prepared a separate question trail for each of the charges that Mr Papps faced. He distributed the question trails and explained them to the jury before counsel delivered their closing addresses. Each of the question trails relating to the charges of being in possession of items found in the garage contained the following question:

Has the Crown made you sure that Mr Papps intended that either he or someone else would use the [items] to produce or manufacture methamphetamine?

[19] Mr Papps takes issue with the inclusion of the words "or someone else". He points out that the Crown never suggested that another person would use the items found in his garage to manufacture methamphetamine. He therefore says that the words added an element that was irrelevant to the Crown case.

[20] Mr Horsley raised this issue with the Judge at the conclusion of the Crown case. In a minute issued on 7 March 2022, the Judge decided not to remove the words for the following reasons:⁴

[4] I have considered *Moore v Police* which is a decision of Randerson J on 23 August 2001. In that case Randerson J makes it clear that the essential element as it applies to that question includes the intention of the person in possession maybe to use the equipment or material personally for the specified offence or that someone else will do so.

[5] I am satisfied that the question should remain as it is and that is the question that will go the jury in relation to charges 2 and following.

[21] In *Moore v Police*, the police had found items consistent with use in the manufacture of drugs at the appellant's property.⁵ When interviewed, the appellant told the police that he was looking after the equipment for a friend. He denied using the equipment himself to manufacture methamphetamine or any other drug. Randerson J noted that the relevant intention for the purposes of the charge is that of the person who has possession of the equipment or material and must be assessed at the time that the person is found in possession of it. However, the Crown may allege that the person in possession intended to use the equipment or material personally to commit the specified offences or intended that someone else will do so.⁶

[22] That issue was obviously relevant in *Moore* because of the appellant's claim that he was looking after the equipment for a friend.⁷ It is not, however, relevant in the present case because the Crown did not allege, and there was nothing in the evidence to suggest, that another person might use the items to manufacture methamphetamine. The reasoning in *Moore* is therefore of little assistance in the present case.

[23] On the Crown's behalf Mr Thompson contends that the Crown did not expressly allege that Mr Papps had the items in his possession with the intention of using them himself in the manufacture of methamphetamine. He points out that the prosecutor told the jury in his closing address that they could be sure the items found

⁴ *R v Papps* DC Tauranga CRI-2019-019-002299, 7 March 2022 (footnote omitted).

⁵ *Moore v Police* HC Tauranga AP11/01, 23 August 2001.

⁶ At [25(c)].

⁷ At [10].

at Mr Papps' address "were intended for the future use of methamphetamine manufacturing".

[24] We agree that this aspect of the Crown's closing address was framed in general terms. However, the thrust of the Crown case was to the effect that Mr Papps had been responsible for manufacturing methamphetamine in his garage and that he had the material and equipment in his possession with the intention of using it for the same purpose in the future. Given the way in which the Crown ran its case we agree with Mr Papps that it was not necessary for the words "or someone else" to be included in the questions left to the jury.

[25] We are also satisfied, however, that no miscarriage of justice occurred because the words were included in the question trail. The jury would be left in no doubt that the Crown alleged Mr Papps was the person who would be using the items to manufacture methamphetamine in the future because they were found locked in his garage and he had manufactured methamphetamine in that location in the past. We therefore do not consider the jury would have been distracted by the inclusion of the words, or that this could have contributed to the jury's decision to find him guilty on some of the charges.

[26] This ground of appeal fails as a result.

Evidence relating to manufacture of methamphetamine

[27] Mr Papps contends that a miscarriage of justice occurred because of the extent to which the jury heard evidence relating to the alleged manufacture of methamphetamine. Some of the text message evidence related exclusively to that issue, as did much of the evidence called by the Crown from a scientist from ESR, Mr Russell, and a police drug expert.

[28] We do not consider it surprising that much of the evidence at trial was devoted to issues relating to the manufacture of methamphetamine because this was the most serious charge Mr Papps faced. The allegation that he had manufactured methamphetamine in the past was also highly relevant to the issue of whether he was in possession of the items that the police found in his garage with the intent of using

them to manufacture methamphetamine in the future. Nor can there be any suggestion that the jury erroneously relied upon evidence relating solely to the manufacture of methamphetamine in finding him guilty on other charges. This is demonstrated by the fact that the jury acquitted him on all but one of the charges of being in possession of equipment with intent that it be used for the manufacture of methamphetamine.

[29] This ground of appeal fails as a result.

Charges 10 and 11

[30] Before dealing with Mr Papps' principal ground of appeal it is necessary to deal with issues that arose before and during the hearing in this Court in relation to charges 10 and 11.

[31] These charges alleged that Mr Papps was in possession of hydrochloric acid and phosphorus acid with the intention that those items be used in the manufacture of methamphetamine. During a conference held before the hearing in this Court Mr Papps advised that he wished to cross-examine Mr Russell regarding several issues. The Court had therefore asked the Crown to ensure Mr Russell was available for cross-examination at the hearing.

[32] On the day before the hearing Mr Thompson filed a memorandum advising that he had discussed the facts underpinning charge 10 with Mr Russell. This led Mr Thompson to acknowledge that the quantity of hydrochloric acid found in a flask at Mr Papps' address was insufficient to be capable of being used in the manufacture of methamphetamine. The Crown therefore conceded there was insufficient evidence to support this charge.

[33] Notwithstanding this concession, Mr Papps indicated that he wished to cross-examine Mr Russell on other matters. During cross-examination Mr Russell agreed that the quantity of phosphorus acid that formed the basis of charge 11 was also insufficient to be capable of being used in the manufacture of methamphetamine. This prompted Mr Thompson to concede that there was insufficient evidence to support this charge as well.

[34] The appeal against conviction must therefore succeed in relation to charges 10 and 11.

Trial counsel error

The law

[35] An appeal based on trial counsel error will only succeed if the appellant can demonstrate that a miscarriage of justice has occurred.⁸ The notion of a miscarriage of justice in this context requires the Court to undertake a two-step enquiry.⁹ First, the appellant must establish the existence of an error. Secondly, the appellant must establish there is a real risk the error may have affected the outcome of the trial or rendered it unfair or a nullity.¹⁰

[36] In *Hall v R*, this Court held that an appeal based on trial counsel error focuses on the trial process and its outcome rather than on the characterisation of counsel's conduct.¹¹ An appeal will therefore not succeed unless it can be shown that an error by trial counsel may have affected the outcome of the trial.

[37] Earlier, in *R v Scurrah*, this Court noted that at one end of the spectrum there may be errors that could not have affected the outcome of the trial. In such a case there is no need to go further. However, at the other end of the spectrum the error may have effectively prevented the defendant from presenting a defence. In such a case prejudice would readily be found.¹²

[38] In *Hall*, this Court considered the situation that may arise where trial counsel fails to follow the client's instructions on a fundamental trial decision. The three fundamental trial decisions relate to plea, the election whether to give evidence and the need to advance a defence based on the defendant's version of events.¹³

⁸ Criminal Procedure Act, s 232(2)(c).

⁹ Section 232(4); and *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [23]–[24].

¹⁰ Section 232(4).

¹¹ *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [9], citing *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70] as explained in *R v Scurrah* CA 159/06, 12 September 2006 at [13].

¹² *R v Scurrah*, above n 11, at [14].

¹³ *Hall v R*, above n 11, at [65].

In *R v Condon*, the Supreme Court also confirmed that trial counsel is obliged to present the defence an accused person wants to run.¹⁴

Failure to adduce evidence of the hair follicle test

[39] The Crown alleged at the trial that Mr Papps was a heavy user of methamphetamine. It said he had begun manufacturing methamphetamine both for his own consumption and to earn income selling it to others. The Crown alleged that the text messages produced at trial showed that Mr Papps was engaged in the supply of methamphetamine he had manufactured.

[40] When he gave evidence Mr Papps acknowledged that he was a sporadic, but not a heavy or consistent, user of methamphetamine, there being periods when he used methamphetamine and periods when he did not. To counter the Crown's argument that he was a heavy user of methamphetamine Mr Papps provided Mr Horsley with a negative test result for the presence of methamphetamine in a sample of hair taken from Mr Papps on 16 May 2019. This was approximately one month after his arrest.

[41] Mr Papps alleges that the negative test result would have provided significant support for his contention that he was not a heavy user of methamphetamine. He told us that methamphetamine will remain in a person's system for many months after it is consumed. He says the test result would have enabled Mr Horsley to submit that Mr Papps could not be a heavy user of methamphetamine as the Crown alleged.

[42] Mr Papps has not provided any scientific evidence to support his assertion about the length of time methamphetamine will remain in a person's system but we are prepared for present purposes to proceed on the basis that his assertion is correct. We also accept that the extent to which Mr Papps was consuming methamphetamine at the time of his arrest was a material issue at the trial. This is demonstrated by questions put to Mr Papps during cross-examination and submissions made to the jury in the Crown's closing address.

¹⁴ *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [28].

[43] However, we are satisfied that the issue was of peripheral relevance to the issues the jury was required to consider. The focus of the Crown case was on the unlikely coincidence of Mr Papps being in possession of all the items found in his garage if he had not used them to manufacture methamphetamine in the past and if he did not intend to use them again for that purpose in the future. Its argument that Mr Papps was likely to be a heavy user of methamphetamine was only advanced to establish a motive for Mr Papps to manufacture methamphetamine.

[44] Mr Papps frankly acknowledged that he had been a long-term user of both cannabis and methamphetamine when he gave evidence at trial. This led Mr Horsley to suggest in his closing address that Mr Papps' lengthy association with drugs arguably gave him greater, real-world, expertise on drug-related issues than the experts called by the Crown.

[45] Given the way in which the case was run by both sides we do not consider the issue of whether Mr Papps was a sporadic or heavy user of methamphetamine would have been of any real significance to the jury. Mr Papps could not resile from the fact that he was a user of methamphetamine, whether heavy or sporadic, and the Crown was entitled to suggest that this provided him with a motive to manufacture that drug. The hair follicle test results would therefore have been of marginal assistance to the defence case. There is no prospect that the failure to lead the evidence had any impact on the ultimate outcome.

Failure to adduce digital date stamp of photograph

[46] This issue arises because, when he gave evidence, Mr Papps produced a photograph in which he was depicted spraying a substance onto the teats of a goat. He said he would dump green waste at a friend's address. His friend owned a goat and the goat had developed an infection of the udder and hind legs. He said he went to see another friend who had a dairy farm, and this person gave him iodine to use in treating the goat's infection. He said he mixed the iodine with methylated spirits and water and then sprayed it on the infected area. This resolved the goat's infection.

[47] Mr Papps says that a date stamp on the photograph confirms that it was taken on 10 April 2018, approximately 12 months prior to his arrest. He contends

Mr Horsley ought to have drawn the jury's attention to the date stamp so they would know Mr Papps had been using iodine for an innocent purpose many months before his arrest.

[48] The Crown did not dispute the possibility that Mr Papps may have used some of the iodine for innocent purposes. In his closing address the prosecutor acknowledged this possibility. He pointed out, however, that Mr Papps nevertheless had access to iodine along with numerous other items which, like iodine, can be used in the manufacture of methamphetamine. The prosecutor also pointed out during his cross-examination of Mr Papps that, when iodine is used for animal husbandry purposes, it will generally be in the form of a tincture. The iodine found in Mr Papps' garage was in the form of solid balls of iodine. The evidence established that iodine in this form is commonly used in the manufacture of methamphetamine.

[49] We therefore do not view the date on which the photograph was taken as being of any real significance given the way in which the issue was dealt with by both sides at trial. It follows that any failure by Mr Horsley to adduce evidence of the date stamp could not have had a material effect on the outcome of the trial.

Failure to provide Mr Papps with details of ESR test results

[50] Mr Papps acknowledges that, as Mr Horsley received disclosure of material from the ESR tests, he would forward it to Mr Papps. However, Mr Papps says that Mr Horsley would often not summarise the ESR tests' findings. This hampered Mr Papps' ability to understand the significance of the material he was receiving from Mr Horsley.

[51] Mr Papps also complains that some of the information Mr Horsley gave him about the ESR test results was incorrect. By way of example, Mr Horsley wrongly advised him that the ESR test had not found any traces of drugs on one of the glass flasks and on the electric fry pan. It was not until shortly before the trial that Mr Papps became aware that the ESR test had found drug-related residues on both items. Mr Papps contends that the late discovery of these results meant that his defence had to be reformulated at the last minute.

[52] We accept that Mr Horsley ought to have advised Mr Papps of these test results much earlier than he did. Mr Papps' preparation for trial may well have been disrupted by the late discovery of the true position. However, Mr Papps' argument overlooks the fact that the jury found him not guilty on the charge relating to the flask. Further, the ESR evidence about the residue found on the fry pan did not cause Mr Papps to alter his defence in relation to that item. His draft brief of evidence recorded that he had found the fry pan at the refuse transfer station a few weeks before the police came to his address and he had never used it. The late discovery of the existence of residue on the fry pan did not affect the viability of that defence, even though the jury ultimately must have rejected it. We therefore do not consider the late disclosure of ESR testing results could have influenced the outcome of the charge relating to the fry pan.

Failure to ensure Mr Papps had early access to the trial booklet of text messages

[53] Mr Papps and Mr Horsley prepared for the trial using a text message booklet the Crown had provided during the disclosure process. Shortly before the trial, however, the Crown produced a further booklet. This contained some text messages that had not been in the earlier booklet and omitted others that had been in the earlier version.

[54] Mr Papps says he was not aware of the changes that had been made to the booklet until he was giving evidence at trial. He took us to an exchange that occurred during his cross-examination by the prosecutor in which he was clearly being taken to text messages he had not seen before. He says this placed him at a significant disadvantage in answering the prosecutor's questions. He also believes it is likely to have significantly undermined his defence because his confusion about the text messages created a poor impression for the jury. He says Mr Horsley ought to have ensured he was given a copy of the trial booklet well before the trial began. If necessary, Mr Horsley ought to have applied for an adjournment to give Mr Papps time to consider the text messages.

[55] We accept that Mr Papps was placed at a disadvantage by the fact that he saw the trial booklet for the first time during the trial. The transcript of evidence makes it

clear that he found it difficult to answer some of the prosecutor's questions because he was being referred to text messages he had not seen before. This would obviously have not helped advance Mr Papps' defence.

[56] However, the issues Mr Papps raises need to be placed in context. Mr Papps began giving his evidence at about 4 pm on the third day of the trial and finished giving evidence at 3 pm the next day. His cross-examination lasted for several hours and a considerable portion of it related to the text message booklet. In total Mr Papps' evidence occupies 99 pages of the trial transcript. For the most part he was able to respond readily and robustly to questions put to him by the prosecutor. He was steadfast in rejecting propositions that he did not accept and in maintaining his version of events. We therefore do not accept the difficulties caused by the late production of the trial booklet would have adversely affected the jury's assessment of Mr Papps' credibility.

Putting the wrong document to Mr Papps during his evidence-in-chief

[57] When Mr Papps gave evidence, he explained that he had been subject of a burglary during 2016. He had installed security cameras after this as a means of deterring burglars in the future. The purpose of this evidence was to negate the Crown's theory that the security cameras were designed to deter others from entering the property and discovering his drug manufacturing operation.

[58] Mr Papps says he was expecting Mr Horsley to provide him with a document from the police confirming that Mr Papps had reported a burglary at his address to the police in 2016. Instead, Mr Horsley provided him with a copy of a letter from an insurance company that he was not familiar with. He says this would also have created a poor impression for the jury.

[59] The trial transcript confirms that Mr Papps appears to have been slightly confused when Mr Horsley gave him the letter from the insurance company. However, the letter confirmed that a burglary had occurred at Mr Papps' address during 2016 and this had been reported to the police. It follows that the evidence Mr Papps wished to place before the jury was adduced even though it took a slightly different form to that which he was expecting. We do not consider any confusion Mr Papps may have

displayed when the letter was initially put to him would have adversely affected his overall credibility.

Failure to object to irrelevant and prejudicial text messages

[60] This issue arises because the text message booklet contained a series of abusive emails from a person with whom Mr Papps had had a dispute about a vehicle. Mr Papps had become frustrated with this person and had blocked her from being able to send him further text messages. After he had done so she sent him further text messages, including a message referring to him as a “meth cook”.

[61] Mr Horsley accepts that he ought to have objected to the admission of the text messages sent to Mr Papps after he had blocked the sender from sending him further communications. Mr Papps did not receive any of the messages sent after that point so he had no opportunity to respond to them.

[62] The text messages were plainly unfairly prejudicial to Mr Papps because they included the accusation that Mr Papps was a “meth cook”. This had direct implications not only for the charge of manufacturing methamphetamine but also the remaining charges. We therefore agree that Mr Horsley should have objected to the text messages being produced prior to the commencement of the trial. However, Mr Horsley told the jury to put them to one side in his closing address and the Judge reiterated this in the following passage in his summing up:

[18] As you know there are messages from unknown subscribers and because they are messages to Mr Papps and he is responding to them you can use those messages as evidence that you can properly consider when you are assessing each of the charges, but you need to be cautious about the messages from subscriber ending 37005 detailed at the bottom of page 12 and over to page 13 after [she] was blocked. Mr Horsley has made some comment about that. Those communications were clearly made after Mr Papps had blocked that number and so you do not know what Mr Papps’ response is. Frankly, because of the fact that you do not have Mr Papps’ response you cannot consider that content reliable. You may find that the best way to deal with that is to simply put that evidence to one side and consider the text messages that Mr Papps has responded to if you are satisfied that the response has come from Mr Papps.

[63] We consider it likely the jury adopted the Judge’s suggestion because the nature of their verdicts suggests they were careful to base them on the evidence relevant to

each charge. We therefore have no concern that the introduction of the text messages may have affected the outcome of the trial.

Conclusion

[64] We accept that Mr Papps is justified in feeling aggrieved about aspects of Mr Horsley's performance prior to the commencement of the trial. However, the transcript reveals that Mr Horsley challenged the Crown case with considerable vigour and delivered a persuasive closing address. Mr Papps also had the opportunity to place his explanations before the jury regarding the items found in his garage. This allowed the jury to weigh these against the arguments advanced by the Crown. His evidence obviously left the jury in a state of reasonable doubt on several of the charges. The defence advanced on the manufacturing charge was also sufficient to prevent the jury from being able to reach a verdict and we understand the Crown has elected not to seek a retrial on that charge. Notwithstanding the identified shortcomings in Mr Horsley's performance before the trial we therefore do not consider there is any prospect a miscarriage of justice has occurred.

[65] The appeal against conviction on the remaining charges is accordingly dismissed.

Sentence

[66] Mr Papps acknowledged that the sentence of home detention was fair given the convictions he had sustained but contended that the sentence of community work should not have been imposed because it ran the risk of bringing him into contact with persons having criminal tendencies.

[67] We do not accept this submission because a sentence of community work may be completed in a multitude of ways, many of which will not bring the offender into contact with persons having criminal convictions or tendencies. However, we consider the sentence of home detention ought to be adjusted to reflect the fact that the Crown now accepts that Mr Papps should not have been convicted on charges 10 and 11. Mr Papps contends that in fixing any revised sentence, the extended period he spent on bail should also be taken into account. However, the Judge allowed an

appropriate discount for this factor at sentencing and no further adjustment is required.¹⁵

[68] The appeal against sentence is accordingly allowed and the sentence of home detention is reduced from seven months to five months. The sentence of 100 hours' community work remains intact.

Result

[69] The appeal against conviction is allowed to the extent that the convictions on charges 10 and 11 are set aside. We direct that a judgment of acquittal be entered on these charges.

[70] The appeal against conviction on the remaining charges is dismissed.

[71] The appeal against sentence is allowed to the extent that the sentence of seven months' home detention is set aside and a sentence of five months' home detention is substituted.

[72] The sentence of community work remains intact.

[73] The appellant must report to a probation officer on 25 August 2023 and the sentence of home detention will resume on that date subject to the following conditions:

- (a) The sentence is to be served at [address redacted].
- (b) To abstain from the consumption and/or possession of alcohol, non-prescription drugs and synthetic cannabis unless prescribed by a medical practitioner.
- (c) To undertake any appropriate assessment, treatment, counselling or programme as directed by a probation officer.

¹⁵ Sentencing notes, above n 1, at [10]–[11].

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