NOTE: DISTRICT COURT AND HIGH COURT ORDERS PROHIBITNG PUBLICATION OF THE NAME OF THE APPELLANT'S MOTHER AND DETAILS OF HER TESTIMONY, AND THE NAMES OF THE APPELLANT'S COMPANY AND BRANDS REMAIN IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA302/2016
[2017] NZCA 576

BETWEEN	JAN ANTOLIK Appellant
AND	THE QUEEN Respondent

Hearing:	8 November 2017
Court:	Gilbert, Lang and Ellis JJ
Counsel:	D P H Jones QC for Appellant J C Pike QC and M L Wong for Respondent
Judgment:	8 December 2017 at 12 pm
Reissued:	11 December 2017 at 10 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] Following a trial by jury in the District Court at Auckland Jan Antolik was found guilty of importing five kilograms of the class B controlled drug MDMA

(commonly known as ecstasy). The MDMA was concealed in cartons of fruit juice imported from the Czech Republic in a shipping container that arrived in New Zealand in September 2014. Mr Antolik was convicted and sentenced by Judge Thomas to five years and nine months' imprisonment.[1]

[2] Mr Antolik appeals against his conviction on the grounds that the jury's verdict was unreasonable and a miscarriage of justice has occurred. He claims that the investigation carried out by Customs and Police was inadequate and led to late disclosure and errors in the Crown evidence. Mr Antolik contends that this resulted in the onus of proof effectively being reversed. He argues that proper enquiries would have revealed the reasonable possibility that someone put the drugs in the container without his knowledge in order to frame him. Mr Antolik applies to adduce further evidence from a private investigator in the Czech Republic. He contends that this further evidence fills some of the gaps the Crown ought to have addressed in its own investigations and supports his claim that he was framed.

[3] In order to understand Mr Antolik's criticisms and the potential significance of the further evidence he wishes to introduce, it is necessary to review the relevant facts in a little detail. We start by summarising the facts surrounding the drug importation before setting out the circumstances relied on by Mr Antolik to support his contention that he was framed. This will set the context against which both the appeal and the application to adduce further evidence must be considered.

The facts

[4] Mr Antolik is 36 years of age. His real name is Karel Sroubek. He was born in the Czech Republic and came to New Zealand under his assumed name of Jan Antolik when he was in his early twenties. The circumstances in which Mr Antolik changed his name and came to New Zealand are relevant to one of the possible framing scenarios he advanced. However, it will be convenient to detail those circumstances later.

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1 *R v Antolik* [2016] NZDC 10561.

Distribution agreement with Maspex

[5] In August 2008 Mr Antolik and his wife formed R Ltd.[2] Mr Antolik explained at the trial that he chose this name because it was the brand name of a fruit juice manufactured by Maspex Czech (Maspex) in the Czech Republic. However, his company did not commence importing juice from Maspex until January 2010 when it entered into a distribution agreement with that company.

[6] This distribution agreement was terminated one year later, in January 2011. Mr Antolik explained that he terminated the agreement because Maspex wanted to change the brand name of the juice to "Tymbark", the name of a village in Poland where Maspex has its head office. Mr Antolik said that this name was not suitable for the English-speaking market he was supplying. He says that his company has not imported any further Maspex products since that time for that reason. Nevertheless, it appears that Maspex continued to market fruit juice under the R brand name after this date because the MDMA was found concealed in R-branded fruit juice cartons in September 2014.

Distribution agreement with Linea Nivnice

[7] Mr Antolik's mother lives in the Czech Republic and acted as the Czech agent for Mr Antolik's company.[3] She operates under the business name "AGS Studio". Following termination of the agreement with Maspex, she entered into an agreement on behalf of R Ltd with another juice supplier in the Czech Republic, Linea Nivnice (Linea), which supplies juice under the N brand.[4] She also contracted with Tetra Pak to supply the N-branded packaging to Linea which then filled the cartons with juice. The juice would then be packed in shipping containers for collection by a transport company. The transport and shipments to New Zealand were arranged by CS Cargo, a major freight company in Central Europe.

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2 The name of this company was suppressed by order of Judge Thomas in the District Court (*R v Antolik*, above n 1, at [24]) and this order was confirmed by Duffy J on appeal to the High Court (*Solicitor-General v Antolik* [2016] NZHC 2643 at [67]). This Court declined leave to appeal: *A (CA605/2016) v R* [2017] NZCA 49.

3 Judge Thomas also suppressed the name and testimony of Mr Antolik's mother: *R v Antolik*, above n 1, at [11].

4 The name of this brand is also suppressed: *R v Antolik*, above n 1, at [24].

Store Rite Logistics

[8] Following clearance by Customs, containers imported by R Ltd were transported by Mainfreight International Ltd (Mainfreight) to the warehouse of Store Rite Logistics Ltd (Store Rite) in East Tamaki, Auckland. Store Rite personnel would remove the container seal with bolt cutters, open the container and unload the product. Any inspection required by the Ministry for Primary Industries would be carried out at this time. The product would then be distributed to customers, including supermarkets.

Container shipment — September 2014

[9] In July 2014 Mr Antolik's mother arranged with CS Cargo for a shipping container loaded with juice to be sent from Linea's premises to R Ltd in Auckland. The container was loaded by Linea personnel. CS Cargo arranged for a truck to collect the container and it left the Czech Republic on 28 July 2014. The container arrived at the port of Tauranga on 17 September 2014.

Vertex Property Investments Ltd

[10] In February 2011, following the change from importing R-branded juice from Maspex to N-branded juice from Linea, Mr Antolik incorporated N Trading Ltd.[5] He changed the name of this company to Vertex Property Investments Ltd (Vertex) in June 2014. He said he did this because he was investigating a new business venture to import into New Zealand prefabricated walls for use in the construction of houses. These walls were manufactured in the Czech Republic. Mr Antolik said he opened a bank account for this company and obtained GST registration for it in August 2014. Vertex signed an exclusive distribution agreement with the manufacturer, HK-Drestav, on 15 September 2014.

[11] On 5 September 2014 Mr Antolik opened a separate post office box in Shortland Street, Auckland for Vertex (he already had a post office box in Shortland Street for R Ltd). Mr Antolik said he did this because he was expecting to

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5 The name of this company is also suppressed: *R v Antolik*, above n 1, at [24].

receive samples of building materials for the prefabricated houses to determine whether these products would be suitable for use in New Zealand. He said he provided details of the new post office box to his mother so she could arrange for samples to be sent there.

Buffer machine arrives at Vertex's post office box with two shipping container seals hidden inside

[12] On 15 September 2014 a package arrived from the Czech Republic at the International Mail Centre at Auckland International Airport. The consignor's name was similar to, but not exactly the same as Mr Antolik's mother's name. The address of the consignor was the same as that of his mother except that the unit number was not shown, only the street number. The contents of the package were described as "car accessories". The consignee was Vertex and the address was the post office box Mr Antolik had recently opened.

[13] Upon inspection by Customs staff at the airport, the package was found to contain an electric car buffer machine. Concealed inside the motor cavity of this machine were two shipping container seals comprising two bolts and two cylinders each of a different type and with a different identification number. These are used to seal the doors of shipping containers and are designed so that once they are broken they cannot be reused. This enables Customs to detect whether a container has been tampered with or opened prior to clearance. A Customs officer at the airport made a cut in each of the bolts so that they could be subsequently identified and took a note of the numbers on the cylinders (one of these was CZ01118711). The buffer machine was then repackaged with the marked seals inside it and returned to the mail system for delivery.

[14] Mr Antolik was expecting a package to arrive. His mother had sent him the track and trace number for it. Mr Antolik said he expected the package to contain samples of building materials for his proposed new business. On Thursday 18 September 2014 Mr Antolik collected the package from Vertex's post office box. He said he did not notice that the Customs declaration described the contents as "car accessories" and he was not expecting a buffer machine. He removed the buffer

machine from the box after he got home. He said he heard a rattling noise indicating that something was loose inside it. He said he plugged the machine in but it did not work. He said that he became "curious" and opened the machine up to see what was causing the rattling. He found the two seals inside. He said he thought these may have "got in there by accident", "maybe in the factory". Although he "found it weird", he said he "didn't pay much attention". He put the buffer machine back together and left it in his garage. He initially said he put the seals into a drawer in his office and "just forgot about it". However, Mr Antolik later retracted this and said that he threw the seals in the bin with the packaging. He claimed that he did not draw any link between the seals and any shipping container at that time.

Shipping container arrives in New Zealand

[15] On 17 September 2014 the shipping container with the fruit juice consigned to Mr Antolik's company arrived at the port of Tauranga. The waybill showed Mr Antolik's mother of AGS Studio in Prague as the shipper. R Ltd was shown as the consignee. The container number on the waybill was correctly shown as MRKU7568932 but the seal number was incorrectly recorded as CZ01118711. This matched the number on one of the seals that was found hidden in the buffer machine. However, the seal number recorded on the waybill and on the seal found in the buffer machine did not quite match the seal on the container because both had an additional "1" (the seal number on the container was CZ0118711). This discrepancy between the number on the waybill and the number on the seal of the container was noted by a Customs officer at Tauranga.

[16] After the seals were found in the buffer machine, a Customs officer was assigned to the task of ascertaining whether the seal numbers matched any container arriving from the Czech Republic over a three-month period. On Friday 19 September 2014 this Customs officer established that a container with a matching seal number had recently arrived at the port of Tauranga. On checking at that port she found that the container had already been dispatched to Metroport, a Customs bonded area at Onehunga, Auckland. She immediately directed two other Customs officers to go to Metroport but on arrival they discovered that the container had just been collected by Mainfreight and was on its way to Store Rite's premises in

East Tamaki. Instructions were then given to the driver to take the container, which had not yet been opened, to a secure inspection facility at the Auckland wharf.

[17] Just after 7.30 that evening, Customs officers opened the container and found that it contained pallets of juice cartons, all but 10 of which were branded "N". Seven of the other cartons were branded "R" and three were branded "H". The R-branded cartons were stacked on the top layer nearest to the doors of the container with the H-branded cartons underneath. Twelve one-litre Tetra Pak juice "bottles" were packed into each of the seven R-branded cartons. Six of these cartons had a single Tetra Pak bottle with a zip lock bag containing MDMA powder concealed inside.

[18] Mr Antolik's evidence was that he received a telephone call from a person at Mainfreight at about 5 pm that day advising him that the container had been redirected to the Port of Auckland to be examined by Customs. He was told that there was an issue with the seal. Mr Antolik said that his biggest concern was that he would not be able to make his scheduled delivery of juice to a supermarket client the following Monday. He said he decided to retrieve the seals that had arrived inside the buffer machine from his bin and check the numbers against the shipping documents he had saved on his computer. He said this was when he discovered that the number on one of the seals matched the seal number on the shipping documents. He said he found this "really strange and bizarre" and he decided to take the seals to Customs the following day to "find out what's happening with the container".

[19] Mr Antolik was under police surveillance on Saturday 20 September 2014 when he drove to the main entrance and security checkpoint for the Port of Auckland. He got out of his car and was seen observing the security checkpoint for approximately three minutes. He then drove to the secondary port entrance before driving off. Mr Antolik was arrested later that day as he was driving with his wife in the vicinity of the Auckland airport near the Customs office. Police found the two shipping container bolts in the pocket of Mr Antolik's trousers. The cylinders were in Mr Antolik's jacket pocket on the back seat of the car. Police also found a "post-it" note on the front passenger seat recording the container number

matching the shipping documents and the seal found in the buffer machine — CZ01118711.

Crown case

[20] The Crown's case was that Mr Antolik was knowingly involved in the importation of the MDMA. The Crown contended that Mr Antolik's explanation about the buffer machine with the seals hidden inside it was implausible. The Crown suggested that the seals were sent by Mr Antolik's mother to enable him to open the container, remove the drugs and reseal it without anyone knowing.

Defence case

[21] Mr Antolik and his mother gave evidence. Both denied having any knowing involvement in the importation of the MDMA or the buffer machine with the hidden seals. They suggested that Mr Antolik must have been framed. Two unrelated scenarios were suggested as providing the potential motivation for someone to seek revenge against Mr Antolik by framing him as the importer of the MDMA.

[22] The first arose out of an incident in September 2003 in which a man was shot dead in Mr Antolik's presence. Mr Antolik said the shooter had been a passenger in his car after they had been socialising in a bar in central Prague. After stopping at the passenger's request, Mr Antolik said the passenger struck a man over the head with a beer bottle. This led to a fight during which the passenger shot the other man. Mr Antolik said he did not see the shooting because he was running back to his car at the time this occurred. The passenger got back into the car and instructed Mr Antolik to drive away, saying "I think I shot the guy". Mr Antolik observed that the passenger had a gun in his hand.

[23] Mr Antolik claimed he was visited two days later by two Czech policemen. He said the policemen must have been bribed by the shooter because they pressured him to give a false account that he had seen the incident and could confirm that the gun had discharged accidentally. Mr Antolik claimed that when he declined to give such false evidence, he was threatened with being charged as an accessory to murder.

He said the police told him that if he went into hiding, he would be declared a fugitive from justice and could be shot on sight.

[24] Fearing for his safety, Mr Antolik said he fled to New Zealand. He said his friend, Jan Antolik, had two passports and gave him one of these. He entered New Zealand using this false name and passport.

[25] In late 2011 Mr Antolik was found guilty by a jury in the District Court at Auckland of four charges of supplying false or misleading information contrary to the provisions of the Immigration Act 1987 and one charge of possessing a false passport contrary to s 31 of the Passports Act 1992. Judge Wade accepted Mr Antolik's explanation about the background circumstances described above and discharged him without conviction on each of these charges.[6]

[26] During the course of the trial for the present offending Mr Antolik's mother produced a Czech newspaper article relating to this prosecution which included a photograph of Mr Antolik and referred to his assumed and real names. This article also referred to the murderer who had been a passenger in Mr Antolik's car and stated that he had been sentenced to 10 years' imprisonment. Although Mr Antolik's mother was not able to say whether the murderer would have served his full sentence, the implication was that he might have been motivated to seek revenge against Mr Antolik for failing to provide false evidence and the timing of his release may have coincided with the timing of the drug shipment. Further, the evidence was that although in 2014 five kilograms of MDMA would sell for over $350,000 in New Zealand, it could be purchased in Europe for a small fraction of that price at that time. The cost of framing Mr Antolik by this means would therefore have been considerably less than $350,000.

[27] The second scenario described in evidence as potentially providing a motivation to frame Mr Antolik arose out of his mother's purchase of a diamond from a merchant in the Czech Republic, TrustWorthy Investment CZ (TrustWorthy). Mr Antolik said his mother purchased this diamond on his behalf for an engagement ring. The purchase agreement was between R Ltd and TrustWorthy and is dated

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6 *R v Antolik* DC Auckland CRI-2009-004-25486, 21 December 2011.

20 March 2014. Mr Antolik's mother claimed that TrustWorthy supplied a diamond that was substantially inferior to the one she had purchased. She said that when she sought return of her money she was referred to Michal Spurny, the principal of TrustWorthy. She said that during a telephone conversation in May 2014, Mr Spurny threatened her by saying words to the effect that she needed "to be careful with [her] decision making" and "that [she] and [her] son could end up in a jail". Mr Antolik's mother said she responded by saying that if anyone was going to end up in jail it would be Mr Spurny and his associates. She engaged lawyers to write on her behalf and they made a formal complaint of fraud against TrustWorthy to the District Attorney's office in Prague on 30 June 2014. The defence implied these events could also fit with the timing because the container left the Czech Republic by ship one month later, on 28 July 2014.

[28] Mr Antolik's mother denied any involvement in sending the buffer machine with the seals to her son. She acknowledged sending him the tracking details for this package but claimed those details were given to her over the telephone by a woman she did not know and whose name she could not recall. She said this woman telephoned her and introduced herself as a broker or agent of Czech Trade, a company that assists other Czech companies "to make business contacts". She said this woman asked her whether she exported to New Zealand and if so whether she would be interested in exporting building products for houses. Mr Antolik's mother confirmed her interest in this and gave the woman Vertex's post office box number expecting she would send brochures and samples of building materials to that address. She claimed that the only other time she spoke to this woman was when she rang back a few days later to give her the tracking details for the package which she passed onto her son.

[29] Mr Antolik's mother acknowledged that the sender's address on the package was her address although the unit number was missing. However, she said she does not know anyone with the same name as that shown on the package as the sender. Mr Antolik also confirmed that he does not know anyone by this name.

[30] Mr Jones QC represented Mr Antolik at the trial as well as on this appeal. In his closing address to the jury, he submitted that the Crown case fell well short of

establishing that Mr Antolik was knowingly involved in the importation of the MDMA. He described the Crown's investigations and evidence as inadequate and incomplete in many respects. He suggested that the Crown's explanation of the purpose of the seals found hidden in the buffer machine made no sense because Customs would not have allowed Mr Antolik to access his container before it was cleared. Mr Jones also reminded the jury that Mr Antolik's mother was not challenged on her evidence about the threat made by Mr Spurny that she and her son could find themselves in jail.

Verdict

[31] In unanimously finding Mr Antolik guilty, the jury must have been satisfied that the Crown's evidence was sufficient to prove the elements of the charge beyond reasonable doubt. The jury plainly rejected the evidence of Mr Antolik and his mother and must have been satisfied that the Crown had excluded the reasonable possibility that someone else had planted the MDMA in the container without Mr Antolik's knowledge in order to frame him.

Application to adduce further evidence

[32] Mr Antolik applies to adduce further evidence in support of his appeal, being an affidavit from Vaclav Kratochvil, a private investigator in the Czech Republic. Mr Kratochvil was hired by R Ltd in May 2016, some three months after Mr Antolik was convicted.

Further evidence

[33] Mr Kratochvil says in his affidavit that he was told by CS Cargo that container seals can be made to appear as though they have been locked when this is not the case. He was told that this can easily be done by placing a piece of cardboard between the two main parts of the seal to prevent the seal from locking. Mr Kratochvil says that this was demonstrated to him. This technique enables a container that appears to be sealed to be opened. Mr Kratochvil says that if this was done to the container consigned to R Ltd, it would have been possible to manipulate

the seal and the cargo at any time after the container was loaded at Linea. He says that there are many petrol stations and parking places between Linea and the port terminal where this could have occurred without anyone noticing. Mr Kratochvil also states that security at the port terminal is "almost non-existent" and he was able to get in "without any problems". He says that the area is not secured by a fence and there is no security service. Mr Kratochvil concludes that it is "very easy" to "manipulate cargo during its transport within the Czech Republic" and "there is no risk for anyone who chooses to do so".

[34] Mr Kratochvil says that the shipping company, Maersk Line, confirmed that the seal on the container — ML CZ0118711 — is a legitimate Maersk seal but the seal number on the shipping documentation and on the seal found in the buffer machine — ML CZ01118711 — is not. His enquiries reveal that the seals are issued by a dispatcher in a Maersk office to the contracted shipping company, in this case CS Cargo. The seals are then given to the drivers who are responsible for locking them on the doors of the containers at the time of collection.

[35] Mr Kratochvil says he managed to track down the driver who collected this particular container but the driver refused to comment. Mr Kratochvil says the driver was employed as a contract driver by Maersk in the Zlin region in the Czech Republic which is where Linea is located. However, Mr Kratochvil says the driver left his employment approximately two weeks after the container was shipped.

[36] Mr Kratochvil also states that a man by the name of Matous Kozumplik was a member of the board of TrustWorthy at the time Mr Antolik's mother had her discussion with Mr Spurny. Mr Kratochvil says he has ascertained that prior to joining TrustWorthy, Matous Kozumplik worked in a senior position in two companies founded in Zlin by a group of local entrepreneurs. He claims that these entrepreneurs are "controversial businessmen" who were investigated by the police about the sale of fake diamonds. Mr Kratochvil suggests that there could be a connection between Matous Kozumplik and a person by the name of Pavel Kozumplik, who is the owner of a transport company where the Maersk driver is said to have worked at some unspecified time in the past. Mr Kratochvil says that "Kozumplik" is not a very common name in the Czech Republic. He says that

"further enquiry" revealed that Matous Kozumplik from TrustWorthy and the driver knew each other. Mr Kratochvil says that members of Matous Kozumplik's family "are highly influential in the Zlin region due to their involvement in the regional politics and their close ties to the police and customs authority of the region".

Legal principles

[37] The test to be applied in considering whether to admit new evidence was set out by the Privy Council in *Lundy v R*:[7]

> The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[38] Ultimately, the question is whether the new evidence that has been presented might reasonably have led to an acquittal.[8]

Analysis

[39] We do not consider that the further evidence should be admitted. For the reasons that follow, we have concluded that it is neither fresh nor cogent. In our assessment the further evidence would have made no material difference and could not reasonably have led to an acquittal.

[40] Mr Antolik was charged in September 2014. The trial did not commence until February 2016. No explanation has been given as to why Mr Kratochvil was not engaged until May 2016 or why, with reasonable diligence, his evidence could not have been obtained before the trial. The evidence is not fresh.

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7 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].
8 At [150].

[41] The Crown did not contend at the trial that it would have been impossible for the cartons containing the drugs to have been placed in the container at any stage between the time it left Linea's premises in July and the time it arrived in New Zealand in September 2014. The Crown did not seek to prove when, how or who actually did this and it was not required to do so. Rather, the Crown's case was that at some stage prior to the container being opened at the Auckland port, the cartons containing the MDMA were placed there and that Mr Antolik was knowingly involved in this. Therefore, even accepting Mr Kratochvil's evidence that it is possible to use cardboard to prevent a seal from locking, this could not materially assist Mr Antolik's case.

[42] Similarly, the Crown did not suggest at the trial that even if Mr Spurny from TrustWorthy had been so minded, it would have been impossible for him to have arranged for the drugs to be placed in the container at some stage prior to its arrival in New Zealand. For that reason, the new evidence suggesting a possible connection between Pavel Kozumplik, the owner of the company that employed the driver at some earlier unspecified time, and Matous Kozumplik, a director of TrustWorthy at the time the diamond complaint was made, is not only tenuous and speculative, it is of little assistance.

[43] In any case, the new evidence cannot help Mr Antolik overcome the principal difficulties he faces. It appears that Mr Antolik's mother was only one of many who complained about the quality of diamonds supplied by TrustWorthy. It seems unlikely that she would be singled out for retaliation. Nevertheless, if Mr Spurny was motivated to seek revenge against Mr Antolik's mother for pursuing her complaint, it might be expected that she would have been targeted rather than her son who was on the other side of the world.

[44] If Mr Spurny had selected Mr Antolik as the appropriate target for revenge, it seems extraordinary that he would have chosen this elaborate method which was not only difficult, expensive and risky, it had only a modest chance of succeeding. He would need to determine that R Ltd was in the business of importing fruit juice, find out who supplied the juice and who was involved in packing and transporting it. He would also need to ascertain when the particular container was due to be packed,

collected and shipped. He would have to incur the significant cost of purchasing the drugs, which was far more than was paid for the diamond.[9] He would then need to find a way of concealing the drugs inside the juice cartons either before or after they were loaded into the container. He would also have had to arrange for someone to impersonate a broker from Czech Trade and telephone Mr Antolik's mother to find out where to send the buffer machine with the seals hidden inside. Having gone to these lengths, he would have to leave it to chance that New Zealand Customs would examine the package containing the buffer machine at Auckland Airport, find the seals hidden inside and then make the connection to the container arriving by sea at the port of Tauranga in sufficient time to find the well-hidden drugs. As was pointed out to the jury, there was no evidence that anyone tipped off Customs in relation to either the buffer machine shipment or the container shipment.

[45] Mr Kratochvil's evidence also cannot help overcome the implausibility of Mr Antolik's evidence of his reaction when he received the buffer machine and what he did thereafter. It strains credibility that Mr Antolik could have thought that the seals had been placed in the buffer machine by accident during assembly in the factory and that he threw them in the bin without giving it a further thought. The jury was entitled to reject Mr Antolik's evidence and that of his mother as simply not credible.

[46] For these reasons, even if the new evidence had been available at the trial, we are satisfied that it would not have made any material difference and could not reasonably have led to an acquittal. The application to adduce the further evidence must accordingly be declined.

Ground 1 — unreasonable verdict?

[47] We are satisfied that there was ample evidence from which a properly directed jury could conclude that Mr Antolik was knowingly involved in the importation of the drugs.

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[9] Mr Antolik's mother said she paid the equivalent of approximately NZD10,000 for the diamond.

[48] It is not disputed that Mr Antolik and his mother arranged for the container to be shipped to New Zealand and his company was the consignee.

[49] The jury would have been entitled to reject as wholly implausible Mr Antolik's mother's account of the two telephone calls she claimed to have received out of the blue from a woman she did not know, whose name she could not recall, and who happened to be interested in exporting building materials from the Czech Republic for use in the construction of houses in New Zealand. The jury would have been entitled to infer that Mr Antolik's mother sent the buffer machine containing the seals to her son addressed to the post office box he had recently opened, the details of which he had just provided to her. This would explain how she obtained the track and trace details for the package and why she sent them to her son. This would also explain why Mr Antolik dismantled the buffer machine, extracted the seals and placed them in a desk drawer in his office instead of immediately contacting his mother to ask why she had sent him these items rather than the brochures and samples of building materials he claimed to have been expecting.

[50] The potentially incriminating contents of the buffer machine could explain why minor discrepancies in the sender's particulars may have been deliberately recorded on this package. The discrepancy between the seal number on the container and the number shown on the shipping documents may also have been deliberate so as to match the number on one of the seals hidden inside the buffer machine.

[51] Mr Antolik's actions on the day he was arrested, having been advised that there was a problem with the seal on the container, also support the conclusion that he knowingly participated in the importation of the drugs. This ground of appeal fails.

Ground 2 — miscarriage of justice?

Late disclosure and mistakes in the Crown evidence

[52] Mr Jones submits that the Crown ought to have enquired whether the seal on the container was real or fake. He claims that this was critical evidence because it

would have demonstrated when the drugs could have been put into the container, who locked it and when this occurred. We disagree.

[53] The suggestion that the seal on the container may have been fake appears to have been made by Mr Antolik for the first time during the course of his evidence at the trial. The Crown had no reason to enquire into this possibility prior to the commencement of the trial. To the extent that the authenticity of the seal might have been open to doubt, Mr Antolik was able to exploit this gap in the prosecution evidence. We are unable to see how the Crown can be criticised for failing to make these enquiries let alone how a miscarriage of justice could have resulted.

[54] In any event, Mr Kratochvil's evidence is that the seal was an authentic Maersk seal. Further, he claims that by using a piece of cardboard an authentic seal can easily be prevented from locking. Moreover, the Crown did not seek to prove when the drugs were placed in the container or who placed them there. It follows that it is immaterial whether the seal was real or fake and any enquiries the Crown could have made about this would not have assisted Mr Antolik.

[55] Mr Antolik next complains that the actual seal number on the container was not confirmed until part-way through the trial when photographs were produced. Up until then, the Crown was relying on notebook entries which accurately recorded the seal number. We are unable to see how the late provision of the photographic confirmation of the accuracy of this evidence could have led to a miscarriage of justice.

[56] Mr Antolik also complains that a Customs officer incorrectly noted the website address for the "H" branded boxes in the container as ending in ".co.nz" whereas the photographs that were obtained during the trial showed that the website address ended in ".cz". This error was inconsequential. The jury was not left in any doubt about the correct position and we are satisfied that the error did not prejudice Mr Antolik. If anything, it helped his case. Mr Jones placed heavy emphasis on the errors and other alleged gaps in the prosecution evidence in support of his submission in his closing address to the jury that the prosecution was "superficial", "inadequate and incomplete".

[57] The next complaint arises out of the Crown's reliance on an instruction in a Mainfreight "cartage advice" form which accompanied the container shipment. This document contained the following instruction in a section entitled "warehousing facilities and loading/unloading constraints":

> PLEASE PHONE JAN BEFORE DELIVERY [Mr Antolik's cellphone number] AS HE NEEDS TO BE PRESENT AT UNPACK

[58] Mr Antolik explained that he gave this instruction to Mainfreight at the time he first engaged Store Rite's services in late 2013 but after the first two or three months he did not attend when containers were unpacked. Mr Jones says that the Crown abandoned reliance on this evidence as a result. We see nothing improper in the Crown referring to this evidence. It is not unusual for some evidence to lose its potency or to be discredited through cross-examination or by the introduction of other evidence at trial. It seems that this is what occurred here because this part of the evidence assumed no importance by the end of the trial. It was not referred to by Crown counsel in his closing address nor was it referred to by the Judge in his summing-up. In his closing Mr Jones highlighted the Crown's retreat from this evidence as another illustration of the flaws in its case. We cannot see how a miscarriage of justice could have resulted from this.

[59] Finally, Mr Antolik complains that a Customs officer initially gave incorrect evidence by producing photographs that did not relate to the subject container. This error was acknowledged at the trial and corrected. Again, we see no risk of a miscarriage of justice resulting from this error.

Reversal of the burden of proof

[60] Mr Jones submits that the Crown has "sat on its hands" leaving the defence with the burden of attempting to prove Mr Antolik's innocence. We do not accept this. Crown counsel repeatedly emphasised throughout the trial that the burden remained at all times on the Crown to prove Mr Antolik's guilt to the requisite standard and that he was entitled to the presumption of innocence. The Judge also emphasised these points in the standard and appropriate directions he gave in his opening remarks and in his summing-up. The jury could not have been in any doubt

that the burden of proof rested with the Crown at all times and there was no onus on Mr Antolik to prove his innocence.

Conclusion

[61] We conclude that both grounds of appeal must fail. The jury's verdict cannot be said to be unreasonable and we are far from satisfied that there is any risk that justice has miscarried. There is no suggestion of any error in the Judge's directions to the jury. That Mr Antolik was convicted following the jury's unanimous verdict simply reflects that the Crown had a strong case and the jury was entitled to conclude that the defence theory was far-fetched.

Result

[62] The application to adduce further evidence is declined.

[63] The appeal is dismissed.

Solicitors:
Barter & Co, Auckland for Appellant
Crown Law Office, Wellington for Respondent