MEMORANDUM OF ADVICE ON EVIDENCE

R v Napier and Jones

Counsel has been briefed to advise the Director of Public Prosecutions in the prosecution of William NAPIER and Henry JONES, who have each been charged with two counts of aggravated burglary, the first incident occurring on 10 February 2004 and the second incident occurring on 18 February 2004. Both NAPIER and JONES have entered a plea of not guilty to these charges.

This memorandum of advice contains:

1. Factual Theory for the Prosecution Case
2. The Real Issues in the Case
3. Proof of the Prosecution Case Theory
4. Admissibility of the Evidence
5. Likelihood of Conviction

1. FACTUAL THEORY FOR THE PROSECUTION CASE

The Prosecution contends that the factual basis of the legal case against NAPIER and JONES is as follows:

William NAPIER, Henry JONES and Scott COLQUHOUN intended to break and enter into 3/23 Ellaswood Close, Berwick, believing that there were drugs and money on the premises. On the morning of 10 February 2004, NAPIER and COLQUHOUN entered the premises through a window armed with guns, while JONES waited outside. NAPIER entered first and forced one of the occupants, Warren RICE, to the floor. COLQUHOUN then followed and confronted Peter DAWSON and Daisy BOLTON in the bedroom, demanding drugs and money. NAPIER joined COLQUHOUN and repeated those demands. When DAWSON denied having any drugs or money, NAPIER demanded cash before he and COLQUHOUN returned to RICE and stole his wallet and mobile phone. NAPIER and COLQUHOUN then left the premises, and, along with JONES, fled the scene on foot to a nearby vehicle.

On realising that they had targeted the wrong property, NAPIER, JONES and COLQUHOUN planned to carry out the second burglary. On the evening of 17 February 2004, they drove to Legana Court, Endeavour Hills, in NAPIER's car. NAPIER was in the passenger seat carefully looking at the house at Number 12. On the morning of 18 February 2004, NAPIER, JONES and COLQUHOUN entered the premises through a window. COLQUHOUN was armed with a crossbow, while NAPIER and JONES each had a gun. The occupants, Anton and Sabina PERTRESCU, were bound and gagged and asked who else lived in the house. The men were told that the only other occupant was their son Luca. They then demanded money and jewellery as each took turns watching the PETRESCUs while the other two ransacked the house. NAPIER and COLQUHOUN dragged Anton to the kitchen and assaulted him to unconsciousness. JONES urged NAPIER and COLQUHOUN to leave when he realised that they had targeted the wrong property again. The men then left with money, jewellery, documents and mobile phones, fleeing via the parkland at the rear of the property to a nearby vehicle.

2. THE REAL ISSUES IN THE CASE

The Defence will not dispute that the acts described by the witnesses in both incidents occurred and that those acts constituted aggravated burglary.

It will be assumed that JONES validly exercised his right to silence in his record of interview.

The real issues of contention between the Prosecution and the Defence will focus on the Prosecution's propositions that:

1. The two incidents of aggravated burglary were committed by the same people

2. NAPIER and JONES were each one of the persons who committed the second incident of aggravated burglary on 18 February 2004

Each of these key factual propositions supports the legal case against the defendants that NAPIER and JONES committed both incidents of aggravated burglary.

3. PROOF OF THE PROSECUTION CASE THEORY

The following outline summarises the means by which the Prosecution will prove its factual theory. A detailed analysis of how the key factual propositions can be proved on the evidence follows this outline.

PROPOSTION 1:

That the two incidents of aggravated burglary were committed by the same people

1.1. A number of characteristics were common to both burglaries

1.1.1. There were three offenders

1.1.2. The offenders used similar firearms and wore similar clothing

1.1.3. The offenders used a similar modus operandi

1.2. Both burglaries occurred in a proximate time period

1.3. The conduct of the offenders in the second incident indicates that they had engaged in previous similar conduct

1.3.1. The offenders asked the occupants who else lived at the house

1.3.2. One offender said: "I can't believe we got the wrong fucking place again."

PROPOSTION 2:

NAPIER and JONES were each one of the persons who committed the second incident of aggravated burglary on 18 February 2004

2.1. NAPIER and JONES had planned to commit the burglary

2.1.1. NAPIER and JONES were at the premises the day before the burglary in NAPIER's car

2.1.1.1 NAPIER and his car were seen and identified

2.1.1.2.COLQUHOUN admitted that he, NAPIER and JONES were there

2.2. JONES was present at the premises at the time of the burglary

2.2.1. JONES's fingerprints were on a knife found at the scene

2.3. NAPIER and JONES were conscious of their guilt

2.3.1. JONES had fled the jurisdiction

2.3.2. NAPIER and JONES had attempted to conceal that they were in contact with each other and COLQUHOUN

2.3.2.2.NAPIER had registered for mobile services with false details

2.3.2.3.JONES was using phone services that were not registered in his name

2.3.2.4.NAPIER, JONES and COLQUHOUN engaged in minimal contact with each other when using phone services registered in their names

2.4. NAPIER and JONES were associating with one of the offenders

2.4.1. COLQUHOUN was one of the offenders in the burglary

2.4.1.2.COLQUHOUN admitted his involvement

2.4.1.3.Items used in the burglary and the proceeds of the burglary were found at COLQUHOUN's house

2.4.2. NAPIER and JONES knew and were in contact with COLQUHOUN

2.5. NAPIER was in possession of the proceeds of the burglary

2.5.1. NAPIER was using a mobile phone that was stolen in the burglary

PROPOSITION 1:

That the two incidents of aggravated burglary were committed by the same people

1.1. A number of characteristics were common to both burglaries

1.1.1. *There were three offenders*

In the first burglary, when the second person entered the premises, he was heard saying "Wait outside".[1] It can be assumed that he was speaking to another person who was also associated with the commission of the burglary. Additionally, as the two people who had entered the premises ran out the door, one was heard shouting "Hurry up, we're leaving".[2] Again, this suggests that there was a third person, as the nature of the words indicates that they are directed to someone who is not aware of a change in the situation.

In the second burglary, three people had entered the premises.[3]

1.1.2. *The offenders used similar firearms and wore similar clothing*

In the first burglary, one of the offenders had a long rifle with a single barrel, while the other had a shorter sawn-off shotgun.[4] In the second burglary, one had a long gun with one barrel and another had a short gun.[5]

In the first burglary, the offenders were wearing black balaclavas and dark clothing,[6] with blue and white runners.[7] In the second burglary,

[1] Testimony of Warren Rice.
[2] Testimony of Daisy Bolton.
[3] Testimony of Anton Petrescu and Sabina Petrescu.
[4] Testimony of Warren Rice, Daisy Bolton and Peter Dawson.
[5] Testimony of Anton Petrescu and Sabina Petrescu.
[6] Testimony of Warren Rice, Daisy Bolton and Peter Dawson.
[7] Testimony of Daisy Bolton.

the offenders had black balaclavas and dark clothing,[8] and one was wearing white runners.[9]

1.1.3. The offenders used a similar modus operandi

In both burglaries, the offenders entered the premises via a window and fled on foot to a nearby vehicle.

In the first burglary, the offenders were heard running down the laneway next to the house.[10] A Police Dog Squad Unit tracked the offenders along the pathway until the scent was lost in the next street.[11]

In the second burglary, the offenders were tracked into the parkland at the rear of the property until the scent was lost at the next street.[12]

Generally, trained police dogs will follow a line of human scent and successfully locate the relevant persons.[13] Given that the relevant persons were not at the end of the line of scent, the persons must have left by means that do not leave a scent. The most likely explanation is that they had entered a vehicle and left the scene.

Therefore, the characteristics of both burglaries point to distinguishing factors that are common to both incidents, suggesting that the same people are responsible for both.

1.2. Both burglaries occurred in a proximate time period

The first and second burglaries occurred only one week apart, on 10 February 2004 and 18 February 2004 respectively.

[8] Testimony of Anton Petrescu and Sabina Petrescu.
[9] Testimony of Sabina Petrescu.
[10] Testimony of Daisy Bolton.
[11] Testimony of Ernie Chan, Sergeant of Police.
[12] Testimony of James Christie, Senior Constable of Police.
[13] Testimony of James Christie, Senior Constable of Police.

1.3. The conduct of the offenders in the second incident indicates that they had engaged in previous similar conduct

1.3.1. *The offenders asked the occupants who else lived at the house*

In the first burglary, the offenders repeatedly asked for drugs and money.[14] This indicates they had intended to steal these items and believed that they could be found at this property. The absence of these items would indicate to them that they had targeted the incorrect premises.

In the second burglary, the offenders were asking who else lived at the house.[15] The fact that they were interested in this suggests that the occupants of the house they were targeting had a particular profile. That is, they wanted to make sure they were at the correct place. It is possible that this was because they did not want to repeat a previous mistake, namely, burgling the wrong house again.

Alternatively, the offenders in the second burglary may have simply wanted to know how many people were present so that they could account for everyone while they burgled the property. Even if they were intending to ascertain that they were at the correct property, it does not necessarily follow that they were doing this because they had made a mistake before. Thus it is possible that the offenders in both incidents were different. However, the statement by one of the offenders: "I can't believe we got the wrong fucking place again" [16] [see below: *1.3.2.*] eliminates these possibilities.

[14] Testimony of Warren Rice, Daisy Bolton and Peter Dawson.
[15] Testimony of Anton Petrescu and Sabina Petrescu.
[16] Testimony of Sabina Petrescu.

1.3.2. *One offender said: "I can't believe we got the wrong fucking place again."*

> This statement constitutes an acknowledgement by the offender that they had engaged in the same conduct before, and in both instances the target was incorrect.

Since the offenders in the first burglary had targeted the incorrect premises, and the conduct and words of the offenders in the second burglary indicates they had engaged in previous similar conduct, it is highly likely that the previous conduct was that engaged in while committing the first burglary. This provides a strong basis for saying that the same people were responsible for these two incidents.

PROPOSITION 2:

NAPIER and JONES were each one of the persons who committed the second incident of aggravated burglary on 18 February 2004

2.1. NAPIER and JONES had planned to commit the burglary

2.1.1. *NAPIER and JONES were at the premises the day before the burglary in NAPIER's car*

2.1.1.1. NAPIER and his car were seen and identified

On the evening of 17 February 2004, a red hatchback with three people was seen driving slowly on Legana Court.[17] The male front passenger had a distinctive tattoo on his left forearm, and was "casing" the house at Number 12.[18] Generally, people who "case" a house are carefully examining it with the intention to commit a robbery. Given that the house was burgled the next morning, it can be inferred that the people responsible are the same people who were "casing" the house. This is further reinforced by the fact that there were three offenders in the burglary and three people were seen in the car.

NAPIER's car was one of two possibilities subsequently identified in a booklet of photographs as the car that was seen.[19] A photograph of a tattoo on NAPIER's left forearm was identified as being very similar to the tattoo that was seen.[20] From this identification, it is likely that NAPIER was the person "casing" the house and that NAPIER's car was at the premises. This indicates that NAPIER was one of the people who planned to commit the robbery, from which it can be inferred that

[17] Testimony of Kevin Porter.
[18] Testimony of Kevin Porter.
[19] Testimony of Kevin Porter and Phillip Andrews, Detective Sergeant of Police.
[20] Testimony of Kevin Porter and Phillip Andrews, Detective Sergeant of Police.

he did subsequently carry out that intention and did commit the robbery.

2.1.1.2. COLQUHOUN admitted that he and NAPIER and JONES were there

COLQUHOUN's admission that he, NAPIER and JONES drove past the premises in NAPIER's car the day before the burglary is consistent with Kevin Porter's testimony that there were three people in the car. It also increases the likelihood that NAPIER was correctly identified by Porter. Importantly, the admission places JONES at the premises while the house was being "cased", indicating that he was also involved in planning to commit the robbery, thereby making it more likely that he was also one of the offenders.

2.2. JONES was present at the premises at the time of the burglary

2.2.1. *JONES's fingerprints were on a knife found at the scene*

A knife was found at the rear fence of the house shortly after the burglary when a police dog was tracking a human scent.[21] As it was found where the scent of the offenders was being tracked, it is likely that the knife was dropped or discarded by the offenders as they fled. The presence of JONES' fingerprints on the knife[22] indicates that he has contacted it, and is consistent with him being the owner of the knife who uses it. Thus it may be inferred that JONES was at the premises around the time of the burglary, thus putting him in a class of people that could potentially be one of the offenders.

[21] Testimony of James Christie, Senior Constable of Police.
[22] Testimony of Philip Grant Warne, Sergeant of Police.

2.3. NAPIER and JONES were conscious of their guilt

2.3.1. *JONES had fled the jurisdiction*

JONES had not been seen or heard from since late April,[23] and was arrested in Queensland in September 2004. From his conduct of fleeing, it can be inferred that he had engaged in illegal conduct and was attempting to avoid the consequences of being caught.

2.3.2. *NAPIER and JONES had attempted to conceal that they were in contact with each other and COLQUHOUN*

2.3.2.1. NAPIER had registered for mobile services with false details

A mobile phone with the number 0431 427 329 was registered in the name of Bob Murdoch, with 14 May 1979 as the date of birth, and 10 Hazeldene Court, Berwick as the address.[24]

Bob Murdoch, who has a close relationship with the NAPIER family, has never registered any mobile phones in his name and does not know this number.[25] The date of birth supplied is NAPIER's date of birth.[26] The address supplied is NAPIER's parents' address.[27] Given these inconsistencies, this mobile number has clearly been registered using false personal details. Since the details all have a connection to NAPIER, it is likely that he is the person who registered this mobile number.

Additionally, a number of people who have been contacted on this number[28] are not familiar with Bob Murdoch, but have been

[23] Testimony of Dorothy Edmond.
[24] Testimony of Desmond Naylor, Optus Support Liaison Officer. (Naylor)
[25] Testimony of Bob Murdoch.
[26] Testimony of Graeme Wooster, Detective Senior Constable.
[27] Testimony of Bob Murdoch.
[28] Naylor.

contacted by NAPIER.[29] Several people have identified this number as NAPIER's.[30] These pieces of evidence provide a strong basis for saying that NAPIER owned and used a mobile number registered with false details.

Generally, people do not register for mobile phone services using false personal details. The only plausible reason for doing so is to enable the user to make communications that can not be traced back to them. It is likely that people who do not want their communications to be traced are those who are intending to, or have engaged in, illegal conduct, where their communications would implicate them. Phone records indicate that NAPIER's communications included contact with JONES.[31] Thus it may be inferred that NAPIER did not want his communications with JONES to be traced as they would be implicated in illegal conduct they had engaged in.

2.3.2.2. JONES was using phone services that were not registered in his name

A mobile phone with the number 0415 409 625 was registered in the name of Alison Smith.[32] Two people have identified this as JONES's number.[33] Additionally, JONES sometimes used Dorothy Edmond's phone but she has never spoken to NAPIER on it.[34] Phone records indicate that the number registered in Bob Murdoch's name that is being used by NAPIER has contacted her number.[35] Thus it may be inferred that NAPIER has contacted JONES on her phone. The same reasons for why NAPIER would use phone services that are not registered in his name [see above:

[29] Testimony of Annie Rae Burton, Richard Bush and Michelle Hinch.
[30] Testimony of Dorothy Edmond, Michelle Cathryn Hinch and Annie Rae Burton.
[31] Naylor.
[32] Testimony of Hillary Gilbert, Vodafone LECAD Analyst. [Gilbert]
[33] Testimony of Dorothy Edmond and Richard Bush.
[34] Testimony of Dorothy Edmond.
[35] Naylor.

2.3.2.1.] also applies to why JONES would do the same – he did not want his communications traced as he had engaged in illegal conduct.

2.3.2.3. NAPIER, JONES and COLQUHOUN engaged in minimal contact with each other when using phone services registered in their names

Around the time of the burglary, mobile number 0438 582 271 registered in NAPIER's name was only used 4 times.[36] Mobile number 0417 018 302 registered in COLQUHOUN's name was only used 2 times.[37] JONES's phone registered in Alison Smith's name was only used 2 times,[38] and both calls were received from the number registered in Bob Murdoch's name and being used by NAPIER.[39]

This reinforces the argument that NAPIER, JONES and COLQUHOUN did not want their communications to each other to be traced as they were aware that it would implicate them in illegal conduct.

2.4. NAPIER and JONES were associating with one of the offenders

2.4.1. *COLQUHOUN was one of the offenders in the burglary*

2.4.1.1. COLQUHOUN admitted his involvement

In his admission, COLQUHOUN stated that he entered the property on 18 February 2004.

[36] Testimony of Sarah Barnes, Telstra Court Liaison Officer. [Barnes]
[37] Barnes.
[38] Gilbert.
[39] Naylor.

2.4.1.2. Items used in the burglary and the proceeds of the burglary were found at COLQUHOUN's house

Items found at COLQUHOUN's house included a pair of blue overalls and a black balaclava,[40] matching the description of what one of the offenders was wearing.[41] Various items of jewellery, including a men's Citizen watch, a gold bracelet and necklace and Nokia mobile phones[42] are also consistent with the items stolen. Thus it is highly likely that these were the actual items used and taken during the burglary, and their presence at COLQUHOUN's house suggests that he was involved in the burglary, or he is aware of who was involved and is associating with them.

2.4.2. *NAPIER and JONES knew and were in contact with COLQUHOUN*

NAPIER and JONES knew and associated with COLQUHOUN. It is stated that COLQUHOUN is friends with NAPIER and JONES.[43] Additionally, they had contacted each other by phone [see above: *2.3.2.3.*].

As they were in contact with each other and were friends, then NAPIER and JONES were associating with one of the offenders. Since three people were involved in the burglary, it is likely that NAPIER and JONES were the other two offenders, as COLQUHOUN is likely to commit burglaries with people he is associating with.

[40] Testimony of Marcus Thompson, Detective Sergeant of Police.
[41] Testimony of Sabina Petrescu.
[42] Testimony of Charles Bradford, Detective Senior Constable of Police.
[43] Testimony of Michelle Cathryn Hinch.

2.5. NAPIER was in possession of the proceeds of the burglary

2.5.1. *NAPIER was using a mobile phone that was stolen in the burglary*

One of the mobile phones stolen in the burglary was registered in Sabina PETRESCU's name, with the mobile number 0417 705 800 and the International Mobile Equipment Identifier (IMEI) number 350779300689463.[44] To make and receive calls, a mobile handset must have a SIM card which is removable and is linked to a unique mobile number.[45] Each mobile handset has a unique IMEI number that can not be altered and is part of the data that is transmitted to the Digital Mobile Network each time a call is made or received.[46]

On 19 February, 2004, one day after the PETRESCU burglary, the IMEI number of Sabina's phone appeared on the Optus network linked to the mobile number 0431 427 329.[47] As this is different to Sabina's mobile number, it can be inferred that the SIM card in Sabina's handset was removed and replaced. It has been established that this mobile number was being used by NAPIER (see above: 2.3.2.1. NAPIER had registered for mobile services with false details).

Thus it can be inferred that NAPIER was using Sabina's phone, indicating that he was in possession of the stolen phone. This is consistent with NAPIER being one of the offenders who committed the burglary, and is equally consistent with NAPIER being associated with the people who had committed the burglary and from whom he received the stolen goods.

[44] Barnes.
[45] Naylor.
[46] Naylor.
[47] Naylor.

4. ADMISSIBILITY OF THE EVIDENCE

There are a number of items of evidence on which the Prosecution case relies that may be affected by the rules of evidence or may reasonably be challenged by the Defence. These issues will now be assessed, structured as they arise in the reasoning above.

Proposition 1: That the two incidents of aggravated burglary were committed by the same people

- **Coincidence reasoning**

The Defence will argue that the Prosecution's reliance on evidence from the two burglaries to prove that the same people were responsible due to the similarities between the incidents, such that it is improbable that they occurred coincidentally, falls foul of the coincidence rule.[48] Thus in order to use this evidence, the Prosecution must demonstrate that it falls within the scope of the inclusionary exceptions to the rule.

To lead this evidence, the Prosecution must give the Defence reasonable notice,[49] and the probative value of the evidence must substantially outweigh any prejudicial effect.[50] The Prosecution may argue that the similarities in the two incidents – the same number of people, the same clothing and firearms and the same means by which the offenders entered the premises and fled the scene, and the proximity in time in which they occurred, is such that it renders it improbable that they were committed by different people. That is, it is highly probative because it is so similar.

However, the Defence may counter that the differences are more pertinent than the similarities: only two people entered the first premises, the offenders' demanded different things and the conduct in the second incident was more extreme. Also, the dark clothing and balaclavas, the firearms, and the means of entering and leaving the premises are not distinctive to these incidents of

[48] *Evidence Act 2008* (Vic), s 98.
[49] *Evidence Act 2008* (Vic), s 98(1)(a).
[50] *Evidence Act 2008* (Vic), s 101(2).

aggravated burglary only. That is, it does not necessarily follow that the same people must have been responsible here.

In this context, the evidence may have a prejudicial effect as the jury may overestimate the improbability of these similar events occurring independently, but it may still be sufficiently probative in identifying NAPIER and JONES as the people who committed the first burglary. If admitted, a judicial warning may accompany this evidence.

- **The testimony of Warren Rice and Daisy Bolton that the offenders had said "Wait outside" and "Hurry up, we're leaving"**

This testimony is relevant to proving that three people were involved in the first burglary in order to establish that they were the same people involved in the second burglary. The Defence will argue that these statements are inadmissible as they fall under the hearsay rule.[51] They are previous representations as they are out of court statements made by the offenders. However, they will only be inadmissible if this evidence is adduced for a hearsay use, that is, to prove the existence of a fact that it can reasonably be supposed that the offenders intended to assert.

Rice and Bolton's testimony is being used for a non-hearsay purpose in the Prosecution case. They are not being used for their truth, that is, that the person did wait outside or that they were leaving at the time. Rather, the speaking of these words is being used to provide the basis for an inference that there was a third person involved in the first burglary, other than the two that entered the premises.

- **The testimony of Sabina Petrescu that one of the offenders said "I can't believe we got the wrong fucking place again."**

The Defence will argue that this testimony is inadmissible because it is hearsay. It is a previous representation being used to prove the truth of the fact that the offenders had burgled the wrong premises again. Thus in order to lead

[51] *Evidence Act 2008* (Vic), s 59.

this evidence the Prosecution must establish a non-hearsay use of the evidence, or that it falls under an exception to the hearsay rule.

The Prosecution may be able to rely on the exception for firsthand hearsay.[52] The previous representation was made by the offender who had personal knowledge of the asserted fact, and Sabina heard the previous representation being made. Assuming that the offender will not testify at trial, the relevant provision to apply is s 65 for criminal proceedings where the maker of the representation is not available. There are two possible exceptions that may apply in these circumstances:

- s 65(2)(b): the representation was made when or shortly after the asserted fact in circumstances that make it unlikely that the representation is a fabrication
  - The representation was made in the course of the burglary and it is unlikely to be a fabrication as the event was still dominating the offender's thoughts and he was frustrated at their error
- s 65(2)(d): the representation was against the interests of the person making it and made in circumstances that make it likely that it is reliable
  - The representation was clearly against the interests of the offender as it shows that he has committed another criminal offence that he has not been convicted for.[53] That is, he has been involved in at least one other burglary. It is likely to be reliable as it was made while the events were still occurring.

Thus it is likely that the evidence will be admissible under the firsthand hearsay exception, subject to a discretion to exclude it under s 137 – while it is highly probative, it may be deemed to be unfairly prejudicial as it suggests that the offenders repeatedly engage in criminal activity.

[52] *Evidence Act 2008* (Vic), s 62.
[53] *Evidence Act 2008* (Vic), s 65(7)(b).

Proposition 2: NAPIER and JONES were each one of the persons who committed the second incident of aggravated burglary on 18 February 2004

- **Kevin Porter's identification of NAPIER's car and tattoo**

The Defence will argue that evidence of Porter's picture identification of NAPIER's car and tattoo should be excluded[54] as an identification parade was not held. However, the Prosecution can argue that an identification parade is unreasonable in the circumstances as he was being asked to identify a car and tattoo.

Nevertheless there are concerns about its reliability, particularly since the picture identification occurred more than three months after the event and Porter is unlikely to clearly remember the details of what he saw.

If admitted, the Court will give a caution pursuant to s 116 that identification evidence is unreliable.

- **Kevin Porter's testimony – "casing"**

The Defence will seek to exclude Porter's testimony that NAPIER was "casing" 12 Legana Court the day before the burglary on the basis that it falls foul of the opinion rule and is highly prejudicial.[55] It is an inference that he has drawn from observed and communicable data that is being used for its truth, that is, to prove that NAPIER was "casing" the property, so it is prima facie inadmissible. However, the Prosecution may be able to use the evidence if it falls under the exception for lay opinion evidence.[56]

Porter's testimony is based on what he saw, and evidence of his opinion is necessary to give an adequate account of his perception as it would be impossible for him to otherwise describe NAPIER'S conduct and behaviour properly. Thus it may meet the requirements of the exception. However, the court is almost certain to exclude the evidence in the exercise of its discretion

[54] *Evidence Act 2008* (Vic), s 115.
[55] *Evidence Act 2008* (Vic), s 76.
[56] *Evidence Act 2008* (Vic), s 78.

under s 137 as it is highly prejudicial – NAPIER would almost certainly be convicted as the statement conveys the impression that he was examining the property intending to burgle it.

- **COLQUHOUN's record of interview**

COLQUHOUN's record of interview is assumed to be admissible. The Prosecution is relying on the following statements in the interview, which must also satisfy the requirements of admissibility:

  - COLQUHOUN, NAPIER and JONES drove past 12 Legana Court in NAPIER's car the day before the burglary
  - All three of them entered the property on 18 February 2004

The Defence will argue that these statements are subject to the hearsay rule as they are previous representations used for their truth. Generally admissions are admissible as an exception to the hearsay rule,[57] but the hearsay rule may apply here as the admission is being used in respect of the case of a third party.[58]

The Prosecution may be able to rely on the exception for firsthand hearsay. The previous representation was made by COLQUHOUN who had personal knowledge of the asserted facts. Assuming that COLQUHOUN will not testify at trial, s 65 will apply. The exception that is most relevant in the circumstances is as follows:

  - s 65(2)(d): the representation was against the interests of the person making it and made in circumstances that make it likely that it is reliable
    - The representations are clearly against the interests of COLQUHOUN as it implicates him in criminal activities, making them particularly reliable.

Thus the admissions may be admissible, subject to the discretion in s 90 to exclude it if it would be unfair to use it against the defendant – there may be an argument that it would be too prejudicial.

[57] *Evidence Act 2008* (Vic), s 81.
[58] *Evidence Act 2008* (Vic), s 83.

- **The reports of phone records from Telstra, Optus and Vodafone**

The phone records of mobile numbers, personal details and call records may fall under the hearsay rule. The witnesses who prepared the documents will be available to give sworn testimony in court, so the real issue is whether the evidence of the phone records will be subject to the hearsay rule. The witnesses will give evidence that the company's records state that particular phone numbers are registered to certain people, and that certain phone communications were made. This is hearsay as it is evidence of a previous representation made by a person, the telephone company, asserting the truth of those details in the records, so it is prima facie inadmissible.

However, the Prosecution can use the business records exception[59] to adduce this evidence. The phone records are documents that form part of the business records of the telephone company, and they were made in the course of the business as it is part of the employment duties of these witnesses to provide such records when requested by law enforcement agencies. It can be assumed that the particular representations in the testimony were compiled from information directly or indirectly supplied by someone who had personal knowledge of the asserted facts from the company's records.

Therefore, the business records exception to the hearsay rule applies and the Prosecution can lead evidence of various phone registration and communication details.

- **The report of Desmond Naylor, Optus Support Liaison Officer**

The testimony of Naylor in relation to IMEI and SIM card numbers and the operation of a Digital Mobile Network are subject to the opinion rule as they are inferences that he has drawn from observed and communicable data that is being used for their truth. Therefore it is prima facie inadmissible.

However, the Prosecution may be able to adduce the evidence under the exception for opinions based on specialised knowledge.[60] Naylor has been the

[59] *Evidence Act 2008* (Vic), s 69.
[60] *Evidence Act 2008* (Vic), s 79.

Support Liaison Officer at Optus since 1999 so it may be assumed that he has specialised knowledge based at least on his experience, if not any study and training as well. His opinion is wholly or substantially based on that knowledge as it relates to his field of expertise – telecommunications. Thus it is likely that the exception will apply and the evidence is admissible.

5. LIKELIHOOD OF CONVICTION

The conviction of NAPIER and JONES is dependent on the Prosecution establishing beyond reasonable doubt that they were each one of the persons who committed the aggravated burglaries on 10 February 2004 and 18 February 2004.

Other than COLQUHOUN's admissions in his record of interview, there is little direct evidence connecting NAPIER and JONES to the first burglary. The Prosecution case thus heavily relies on proving that the same people committed both burglaries and that NAPIER and JONES committed the second burglary in order to establish that they had in fact committed both burglaries.

Although some of the reasoning is weakened, the evidence that the Prosecution case relies on is generally admissible. The case against NAPIER for the second burglary is strong as he has the proceeds of the crime and has tried to avoid having his communications with COLQUHOUN and JONES traced. If the identification evidence is admitted, the chances of convicting NAPIER are very good. The case against JONES largely relies on his association with COLQUHOUN and NAPIER which can really only be evidenced by minimal phone contact between them. The only other clues are a knife at the crime scene that may be linked to him, and his fleeing the jurisdiction.

Thus for the second burglary, the prospects of convicting NAPIER are better than that of convicting JONES. The prospects of convicting either of them for the first burglary will largely depend on whether a coincidence-based argument that the same people were involved in both incidents is admitted and accepted.