

*R v NAPIER AND JONES*

**MEMORANDUM OF ADVICE ON EVIDENCE**

## *R v Napier and Jones*

### Memorandum of Advice on Evidence

#### Introduction

Counsel has been briefed to advise the Director of Public Prosecutions on the prospects of successfully prosecuting William NAPIER and Henry JONES, who have both been charged with two counts of aggravated burglary, one on 10 February 2004, and the other on 18 February 2004. Counsel has been instructed that NAPIER and JONES have both pleaded not guilty with the defence of identity.

#### Contents

This memorandum contains Counsel's advice on the following:

1. Case theory for the Prosecution
2. Real issues in dispute
3. Proof of the Prosecution's case theory
4. Analysis of the admissibility of evidence
5. Likelihood of conviction of NAPIER and JONES

#### Sources of Evidence

Statements and reports were provided to Counsel from the following witnesses & interested parties and police & police aids (see also *Who's Who?* list in Appendix 1). References to their evidence will be indicated by a footnote. Their names have been abbreviated as follows:

#### Witnesses & Interested Parties

<b><i>Date</i></b>	<b><i>Name</i></b>	<b><i>Position</i></b>	<b><i>Abbreviation</i></b>
21/06/04	Scott Calquhoun	Charged separately for the same two counts of aggravated burglary as NAPIER and JONES	CALQUHOUN
10/02/04 2.18am	Warren Rice	Resident of 3/23 Ellaswood Close, Berwick	RICE
10/02/04 1.55am	Peter Dawson	Resident of 3/23 Ellaswood Close, Berwick	DAWSON
10/02/04	Daisy Bolton	Resident of 3/23 Ellaswood Close, Berwick	BOLTON
18/02/04 7.20am	Anton Petrescu	Resident of 12 Legana Court, Endeavour Hills	A PETRESCU
18/02/04 5.56am, 17/06/04 12.17pm	Sabina Petrescu	Resident of 12 Legana Court, Endeavour Hills	S PETRESCU
No statement taken	Luca Petrescu	Resident of 12 Legana Court, Endeavour Hills	L PETRESCU
20/02/04, 26/05/04	Kevin Porter	Youth Worker	PORTER
19/04/04	Bob Murdoch	Managing Director of All	MURDOCH

		Emergency Alarms	
02/06/04	Eva Frost	Ex-girlfriend of NAPIER	FROST
01/06/04	Annie Rae Burton	Girlfriend of NAPIER	BURTON
02/06/04	Richard Bush	Lawn mower, room mate of BURTON, friend of NAPIER	BUSH
01/06/04	Michelle Cathyrn Hinch	Girlfriend of CALQUHOUN	HINCH
01/06/04 8.52pm	Dorothy Edmond	Girlfriend of JONES	EDMOND

### Police & Police Aids

2/06/04	Ernie Chan	Sergeant of Police	CHAN
23/05/04 9.50pm	James Christie	Senior Constable of Police and handler of PD Rover	CHRISTIE
18/06/04 8.56am	Cal Jackson	Detective Senior Constable of Police, Lilydale CIU	JACKSON
19/05/04 7.40pm	Ray Devlin	Senior Constable, Victorian Police Forensic Services Centre (VPFSC)	DEVLIN
24/09/04	Phillip Grant Warne	Sergeant of Police, Northern Fingerprinting Branch	WARNE
08/07/04, 08/07/04	Sarah Barnes	Court Liaison & Administrative Officer, Telstra	BARNES
05/04/04	Desmond Naylor	Support Liaison Officer, Optus	NAYLOR
21/06/04 1.10pm	Sally Adamson	Liaison Officer, Optus	ADAMSON
22/06/04	Hillary Gilbert	LECAD Analyst, Vodaphone	GILBERT
03/06/04 10.56am	Phillip Andrews	Detective Sergeant of Police, Armed Offenders Squad	ANDREWS
03/06/04 11.57am	Graeme Wooster	Detective Senior Constable of Police, Armed Offenders Squad	WOOSTER
21/06/04	Charles Bradford	Detective Senior Constable of Police, Armed Offenders Squad	BRADFORD
21/06/04	Marcus Thompson	Detective Sergeant of Police, Armed Offenders Squad	THOMPSON

## CASE THEORY FOR THE PROSECUTION

### Legal Case and its elements

#### ***Legal Case***

The Prosecution contends that NAPIER and JONES were acting in concert and each committed two counts of aggravated burglary— one on 10 February 2004 at 3/23 Ellaswood Close, Berwick and other on 18 February 2004 at 12 Legana Court, Endeavour Hills.

#### ***Burden of Proof***

To establish its case, the Prosecution must prove beyond reasonable doubt:

1. NAPIER and JONES were each one of the persons who committed the aggravated burglary on 10 February 2004 (Burglary I)
2. NAPIER and JONES were each one of the one of the persons who committed the aggravated burglary on 18 February 2004 (Burglary II)

### Factual theory

Counsel advises that the following factual theory best satisfies the elements of the legal case:

#### ***Prior to the aggravated burglaries***

1. NAPIER, JONES and COLQUHOUN met through BUSH and became close friends.
2. In late 2003/early 2004 NAPIER, JONES and COLQUHOUN planned to act in concert to burgle houses.
3. Sometime before 10 February 2004 they chose a specific target house on Ellaswood Close in Berwick. They believed the house contained money and drugs.

#### ***Aggravated Burglary I: 3/23 Ellaswood Close, Berwick***

4. Early on the morning of Tuesday 10<sup>th</sup> February 2004, JONES drove NAPIER and COLQUHOUN in NAPIER'S car to Lawrence Drive at the rear of 3/23 Ellaswood Close, Berwick (*the residence*). All three were wearing black balaclavas and gloves, dark coloured clothing and blue and white runners.
5. Shortly before 12.30am JONES, NAPIER and COLQUHOUN disembarked the vehicle armed with weapons and came to the front of the residence.
  - a. NAPIER was armed with a long single barrel rifle
  - b. COLQUHOUN was armed with a double barrel sawn-off shotgun
  - c. It is uncertain if JONES was armed
6. Around 12.30am NAPIER tore the flywire off the front lounge window.
7. NAPIER entered the residence through the window and instructed RICE to lie face down on the floor.
8. COLQUHOUN came through the window and told JONES to "wait outside". JONES waited outside the residence during the course of the burglary.
9. COLQUHOUN ran down the hallway into bedroom of BOLTON and DAWSON. He demanded money and drugs.
10. BOLTON screamed. NAPIER left RICE in the lounge and went to bedroom.
11. BOLTON offered the assailants her money jar. NAPIER instructed COLQUHOUN to take the jar. BOLTON handed the jar to COLQUHOUN.

12. NAPIER and COLQUHOUN realised they are robbing 'the wrong house' – a different house to the one they planned to rob.
13. NAPIER demanded cash from DAWSON. DAWSON walked to the kitchen followed by NAPIER. COLQUHOUN stayed with BOLTON.
14. NAPIER went to the living room and put his rifle to RICE'S head demanding drugs and money. NAPIER took RICE'S wallet and phone. NAPIER yelled to COLQUHOUN 'let's go'.
15. NAPIER and COLQUHOUN exited the residence through the front door with the phone, wallet and jar. Either NAPIER or COLQUHOUN said to JONES 'hurry up we're leaving'.
16. The three proceeded to run with JONES along the pathway next to the premises back to NAPIER'S car parked on Lawrence Drive.

***Aggravated Burglary II: 12 Legana Court, Endeavour Hills***

17. On Tuesday 17<sup>th</sup> Feb 2004 between 6.00-6.30pm PORTER saw NAPIER'S car on Legana Ct in Endeavour Hills. JONES was the driver, NAPIER the front seat passenger, and COLQUHOUN the rear passenger.
18. NAPIER, COLQUHOUN and JONES were 'casing' 12 Legana Court with the intention of committing aggravated burglary over the next 24hrs.
19. Between 12pm-3am JONES drove NAPIER'S car with NAPIER and COLQUHOUN as passengers to Singleton Drive. All three were wearing black balaclavas, black woollen gloves, dark clothes and blue and white runners:
  - a. COLQUHOUN was additionally wearing blue faded overalls
20. JONES, NAPIER and COLQUHOUN disembarked the vehicle armed with weapons. They ran through the parkland and jumped the rear fence of 12 Legana Court, Endeavour Hills (*the residence*) to enter the backyard.
  - a. NAPIER was armed with a metal gun less than 30cm long and carrying duct tape
  - b. COLQUHOUN was armed with a crossbow and carrying a lighter
  - c. JONES was armed with a long single barrel rifle and carrying a yellow handled knife
21. COLQUHOUN smashed the lower window frame of the lounge rear window and entered the residence. COLQUHOUN instructed A PETRESCU to 'stop, don't move' or he would be killed. NAPIER and JONES entered the residence through the broken window.
22. S PETRESCU ran to the front bedroom of L PETRESCU and attempted to escape via the bedroom window.
23. NAPIER put down his gun and started taping A PETRESCU hands and mouth with duct tape. COLQUHOUN put down his crossbow to take out a cigarette lighter. He threatened A PETRESCU with the cigarette lighter.
24. JONES went to front bedroom of L PETRESCU. JONES escorted S PETRESCU from the bedroom back to the lounge and sat her on a chair facing the wall.
25. NAPIER duct taped S PETRESCU'S hands and mouth. COLQUHOUN walks around the lounge looking for money and gold. COLQUHOUN realised they have robbed 'the wrong house'.
26. JONES searched L PETRESCU'S bedroom for money and jewellery, waking L PETRESCU. JONES moved to search the lounge room.
27. NAPIER, JONES and COLQUHOUN repeatedly demanded money and gold, hitting A PETRESCU.
28. S PETRESCU retrieved her purse from the dining table and gave unknown assailant \$120 cash. S PETRESCU returned to lounge.

29. NAPIER stood guard over the PETRESCUS with crossbow, at times swapping with COLQUHOUN and JONES. The non-guarding assailants ransacked the remaining two bedrooms and dining area.
30. COLQUHOUN moved S PETRESCU and L PETRESCU to the front bedroom.
31. NAPIER asked A PETRESCU for his wallet and jewellery. A PETRESCU attempted to remove the tape on his mouth to answer.
32. NAPIER became violent and assaulted A PETRESCU. NAPIER retaped A PETRESCU'S bindings and dragged him to the kitchen.
33. COLQUHOUN took S PETRESCU from the bedroom and duct-taped her upper body to a chair in the dining room.
34. NAPIER kicked A PETRESCU in the head. A PETRESCU passed out.
35. COLQUHOUN said to NAPIER and JONES 'let's go' and 'I can't believe we got the wrong fucking place again'.
36. NAPIER asked S PETRESCU where the phones were in the house. NAPIER located and stole two mobile phones. JONES put down his gun, removed his gloves, and used a yellow-handled knife to cut the home phone wires.
37. NAPIER, COLQUHOUN and JONES exited via the rear lounge window and jumped over the backyard fence. The three assailants were carrying between them two mobile phones and various jewellery, documents and items owned by the PETRESCUS.
38. Within a minute JONES realised he has left his gun at the residence. Returned to the yard and dropped a yellow handled knife. He re-entered the residence through the broken window and retrieved the gun.
39. JONES exited through the window again, jumped over the fence and ran through the parkland with NAPIER and COLQUHOUN back to NAPIER'S car parked on Singleton Drive.

***After Burglary II (18 February 2004 onwards)***

40. NAPIER, COLQUHOUN and JONES used the stolen phones to communicate covertly and minimise a traceable association between them:
  - a. NAPIER put his personal SIM (336498321) in RICE'S stolen phone (IMEI 350638965297461) on 4 occasions to take incoming calls.<sup>1</sup>
  - b. COLQUHOUN put his personal SIM (336503745) in RICE'S stolen phone (IMEI 350638965297461) on 2 occasions to take incoming calls.<sup>2</sup>
  - c. NAPIER started using S PETRESCU'S stolen phone (IMEI 350779300689463) on 19 February 2004 under fake account 'Bob MURDOCH'. He used the phone for personal calls as well as covert communication purposes.
  - d. JONES started using S PETRESCU'S stolen phone (IMEI 350114301735927) on 19 February 2004 under fake account 'Alison SMITH', and took two incoming calls from this time up to 10 March 2004.

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<sup>1</sup> Note that Sarah Barnes' Testimony stipulates the incoming calls occurred during the period of 13 February 2004 to 10 March 2004 – it is unclear the exact dates of the calls, and whether they were before or after Burglary II.

<sup>2</sup> As above

## **REAL ISSUES IN DISPUTE**

The following factual propositions will be the key issues in dispute between the Prosecution and the Defence:

1. NAPIER was present at 3/23 Ellaswood Close, Berwick on 10 February 2004 and committed aggravated burglary
2. JONES was present at 3/23 Ellaswood Close, Berwick on 10 February 2004 and committed aggravated burglary
3. NAPIER was present at 12 Legana Court, Endeavour Hills on 18 February 2004 and committed aggravated burglary
4. JONES was present at 12 Legana Court, Endeavour Hills on 18 February 2004 and committed aggravated burglary

Defence will seek to deny NAPIER and JONES committed the burglaries. There is thus no need to prove the burglaries occurred as described by the witnesses. It will be enough for the Prosecution to show that NAPIER and JONES were present at the scene of the crimes.

The Prosecution's main challenge will be overcoming the Defence's arguments as to the low relevance, probative value and inferential force of the evidence, which is altogether too tenuous to satisfy the burden of proof.

## PROOF OF THE PROSECUTION'S CASE THEORY

COLQUHOUN'S record of interview is the strongest evidence tying NAPIER and JONES to the crime, however given that COLQUHOUN intends to plead not guilty, it is unlikely that he will testify to this prior interview in court. There is thus no direct evidence available to the Prosecution.

The Prosecution will therefore endeavour to marshal the available circumstantial evidence into a cable of proof, where several independent strands of evidence converge to prove the facts in issue. Possible Defence arguments that threaten the strength of this cable will we considered and overcome. The Prosecution may thus lower its burden of proof to below the criminal standard of 'beyond reasonable doubt'. However if only a single chain of inference can support a fact in issue, the court must be satisfied that no other rational hypotheses are consistent with innocence.<sup>3</sup>

The arguments are structured in prose form but are to be read *together* in according to their levels of formatting (ie. Level 'A' is supported by propositions '1', '2' and '3').<sup>4</sup>

### **Aggravated Burglary I, 10/02/04: 3/23 Ellaswood Close, Berwick**

A. NAPIER was present at 3/23 Ellaswood Close, Berwick on 10 February 2004 and committed aggravated burglary

1. ***An aggravated burglary committed by three assailants occurred on 10/02/04 at 3/23 Ellaswood Close, Berwick***

This proposition is not contentious as Counsel has been instructed that the Defence will not deny that the acts described by the witnesses occurred and that they constituted aggravated burglaries.

2. ***NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary***

a. **NAPIER, JONES and COLQUHOUN are close friends**

It can be inferred that NAPIER met JONES and COLQUHOUN through BUSH given that BUSH states that he and NAPIER are close friends and that he knows NAPIER, JONES and COLQUHOUN (see Appendix 2: *Relationship Map*).<sup>5</sup> BURTON states that NAPIER knows JONES,<sup>6</sup> HINCH states the NAPIER and COLQUHOUN are friends,<sup>7</sup> and HINCH states COLQUHOUN and JONES are friends.<sup>8</sup> The accused are thus all known to each other.

However just knowing each other does not immediately infer that they committed the crime together. Generally, people only commit crimes accompanied by others they know well and trust enough not to betray

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<sup>3</sup> *Chamberlain v R*

<sup>4</sup> Please read accompanied by Appendix 5: Structure of Prose Arguments.

<sup>5</sup> Richard Bush Testimony

<sup>6</sup> Annie Rae Burton Testimony

<sup>7</sup> Michelle Cathryn Hinch Testimony

<sup>8</sup> Michelle Cathryn Hinch Testimony

their identity and acts to the police. The inference is thus stronger if it can be established that the accused are close to each other. However the Defence will argue there is little evidence to support a close friendship. Whilst NAPIER and COLQUHOUN are friends,<sup>9</sup> and COLQUHOUN and JONES are friends,<sup>10</sup> none of accused's girlfriends describe their ties as strong.

It would be thought that if the accused were colluding to commit burglaries together that they would spend time together to plan the crime, however BURTON states COLQUHOUN is unknown to her and that NAPIER knows JONES but 'hasn't seen him n a while'.<sup>11</sup> As BURTON is NAPIER'S girlfriend of 5 months we can infer she would know JONES and COLQUHOUN better if NAPIER spent a lot of time with them.<sup>12</sup> However coupled conjunctively with the two other arguments below – that COLQUHOUN implicated NAPIER and JONES and that all three consciously minimised their traceable association, this argument can be bolstered.

**b. COLQUHOUN implicated himself, NAPIER and JONES on record**

In his record of interview COLQUHOUN made a full admission to the aggravated burglaries, including that that he and NAPIER entered 3/23 Ellaswood Close on 10 February 2004 while JONES waited outside.<sup>13</sup> This is strong evidence that all three were working in concert to commit the burglary.

*COLQUHOUN'S admission is reliable*

People do not generally admit to crimes that they do not commit. On this basis COLQUHOUN'S detailed confession is reliable given it was a full admission recorded in a police interview. After admitting his guilt, COLQUHOUN had nothing to gain from implicating others in the crime. However the Defence is likely to contest this on the basis that evidence from accomplices can be unreliable if the accomplice has something to gain. If the police offered COLQUHOUN a 'deal' he may have had a vested interest in the confession making it less credible. If COLQUHOUN testifies against NAPIER, COLQUHOUN'S own character could also be challenged by the Defence, further lowering his credibility.<sup>14</sup>

However the real evidence seized from COLQUHOUN'S house by police strengthens his admission through corroboration. Whilst this evidence relates mostly to burglary II and will be discussed under that heading, it is still an independent strand of evidence that corroborates COLQUHOUN'S admissions. It can be inferred that if COLQUHOUN is being truthful about the substance of the crime then he is also being truthful about who was involved.

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<sup>9</sup> Michelle Cathryn Hinch Testimony  
<sup>10</sup> Michelle Cathryn Hinch Testimony  
<sup>11</sup> Annie Rae Burton Testimony  
<sup>12</sup> Annie Rae Burton Testimony  
<sup>13</sup> Colquhoun's Record of Interview  
<sup>14</sup> *Evidence Act* s 106

**c. COLQUHOUN, NAPIER and JONES consciously minimised their traceable association**

There is little evidence to support this proposition for Burglary I, as the tracing of phone records has only been provided for Burglary II. Yet this argument can be asserted if the Prosecution proves that Burglary I and Burglary II were committed by the same set of assailants. From this it can be inferred that the accused used similar indirect communication techniques after Burglary I *and* II to avoid detection.

The covert communication scheme used by NAPIER, JONES and COLQUHOUN will be discussed below under Burglary II at C(2c). The coincidence argument linking the two crimes will be discussed below at E.

**3. NAPIER was one of the assailants**

**a. NAPIER was present at the scene of the crime**

*COLQUHOUN implicates NAPIER as an assailant*

In his record of interview COLQUHOUN made a full admission, including that that he and NAPIER entered 3/23 Ellaswood Close on 10 February 2004 and committed an aggravated burglary.<sup>15</sup> This is strong evidence that NAPIER committed the crime.

*COLQUHOUN'S admission is reliable*

As above at A(2b).

**b. NAPIER possessed and used a mobile phone stolen from the scene**

Evidence from Telstra phone records show a phone with the IMEI number 350638965297461 was used four times between 13 February 2004 and 10 March 2004 (see collation of evidence in Appendix 3: *Summary of Phone Details/Records of Interested Parties*).<sup>16</sup> This IMEI was shown by Telstra to match the handset of RICE.<sup>17</sup> Someone was thus using RICE'S phone after the robbery on 10 February 2008. The SIM card in use at the time of the calls was SIM 336498321 of mobile service 0438 582 271 leased under the name of William NAPIER.<sup>18</sup>

As IMEI numbers are unchangeable and computer generated. There is thus strong evidence that NAPIER possessed and used RICE'S phone after the robbery took place.<sup>19</sup> The only logical explanation is that NAPIER was the assailant who stole the RICE'S phone at the scene of the crime. The Defence is likely to point out that the account address '10 Lowing Close, Berwick' does not correspond to NAPIER, but even if this is an old or fake address, the account name is enough to match NAPIER to the handset. The call records additionally show that

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<sup>15</sup> Colquhoun's Record of Interview

<sup>16</sup> Sarah Barnes Testimony 1

<sup>17</sup> Sarah Barnes Testimony 1

<sup>18</sup> Sarah Barnes Testimony 1

<sup>19</sup> Desmond Naylor's Testimony

NAPIER and COLQUHOUN both used the handset with the IMEI 350638965297461. This bolsters the above argument at A(2a) that NAPIER and COLQUHOUN were close friends. It can be generalised that people only share expensive technology such as mobile phones with people they are close to.

**c. NAPIER tried to hide his involvement with the crime**

Given A(3a) and A(3b) discussed above, NAPIER'S denial of all wrongdoing seems highly implausible.<sup>20</sup> The Prosecution can challenge NAPIER'S credibility as he has a motive to lie about his involvement to avoid conviction. Although tenuous, the Prosecution could also argue that FROST'S intervention order against NAPIER and his breaches of the order show NAPIER to be an intimidating character with a disregard for the law.<sup>21</sup> This would prove him more likely to lie. However the Defence is likely to strike this down as irrelevant and of low probative value.

The covert communication scheme used by NAPIER to contact COLQUHOUN and JONES suggests his consciousness of guilt or his concerted effort to avoid arrest. The covert communication scheme will be discussed under Burglary II at C(2c) and the coincidence argument linking the two crimes will be discussed below at E.

**d. NAPIER was unsurprised by his arrest and compliant with police**

This proposition relies on negative evidence. Generally, people that are arrested for a crime they did not commit will react with incredulity and anger. Neither ANDREWS nor WOOSTER suggest that NAPIER was in any way nonplussed or complaining of mistaken identity.<sup>22</sup> On the contrary, from their descriptions he appeared quite calm and compliant when the police forced entry into his house and announced his charge.<sup>23</sup> From this we can infer that NAPIER was unsurprised at the police presence and charge because he committed the crime.

**B. JONES was present at 3/23 Ellaswood Close, Berwick on 10 February 2004 and committed aggravated burglary**

***1. An aggravated burglary committed by three assailants occurred on 10/02/04 at 3/23 Ellaswood Close, Berwick***

As at A(1).

***2. NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary***

As above at A(2).

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<sup>20</sup> William Napier Record of Interview

<sup>21</sup> Eva Frost Testimony

<sup>22</sup> Graeme Wooster Testimony and Phillip Andrews Testimony

<sup>23</sup> Graeme Wooster Testimony

### **3. JONES was one of the assailants**

#### **a. JONES was present at the scene of the crime**

##### *COLQUHOUN implicates JONES as an assailant*

In his record of interview COLQUHOUN made a full admission, including that that he and NAPIER entered 3/23 Ellaswood Close on 10 February 2004 and committed an aggravated burglary whilst JONES waited outside.<sup>24</sup> Given argument B(2) above – that JONES, NAPIER and COLQUHOUN were acting in concert to commit the aggravated burglary, JONES' presence at the scene is enough to establish his guilt. COLQUHOUN'S admission is strong evidence that JONES committed the crime. COLQUOHOUN'S admission is reliable as discussed above at A(2b).

##### *JONES was the third assailant acting as a sentry during the burglary*

RICE'S testimony places a third assailant at the scene. Although RICE was face down on the floor he heard COLQUHOUN come through the broken window after NAPIER and instruct JONES to "wait outside".<sup>25</sup> It can be generalised that someone would only say this to someone who was outside the property, so there must have been someone outside the property. BOLTON also states that the 'second gunman' (NAPIER) yelled to the 'first' (COLQUHOUN) 'let's go' and then *after* running out the front door someone shouted something like 'hurry up we're leaving'.<sup>26</sup> It can be inferred that the person that said this was speaking to someone who had not previously heard NAPIER say 'let's go', as there would be no reason to repeat the assertion that they were leaving the scene. The Defence will challenge RICE'S evidence as inaccurate given that he was face down on the floor and could not gauge the number of burglars through observation. This is an ancillary issue that will be further analysed in 'Admissibility of Evidence'.

#### **b. JONES evaded police due to consciousness of guilt**

EDMOND is JONES' girlfriend and the pregnant with his child, yet she hasn't been in contact with him for a month (since 'the Saturday before... (her) birthday').<sup>27</sup> BUSH is a close friend of JONES yet has not heard from him in 5-6 months.<sup>28</sup> Given that JONES is not in contact with his close friends and is 'wanted by the police',<sup>29</sup> it can be inferred that he was concertedly trying to avoid arrest. His apprehension in Queensland shows he fled far from the scene of the crime. This evidence indicates a guilty conscience, and is corroborated by JONES' 'no comment' interview where he exercised his right to silence.<sup>30</sup>

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<sup>24</sup> Scott Colquhoun's Record of Interview

<sup>25</sup> Warren Rice Testimony

<sup>26</sup> Daisy Bolton Testimony

<sup>27</sup> Dorothy Edmond Testimony - Given that EDMOND'S birthday is 5 May, the Saturday before would be 1 May 2004

<sup>28</sup> Richard Bush Testimony

<sup>29</sup> Richard Bush Testimony convergent with Dorothy Edmond Testimony

<sup>30</sup> Henry Jones record of interview

The covert communication scheme used by JONES to contact COLQUHOUN and NAPIER further suggests his consciousness of guilt and concerted effort to avoid arrest. The covert communication scheme will be discussed below under Burglary II and the coincidence argument linking the two crimes will be discussed below at E.

### **Aggravated Burglary II, 18/02/04: 12 Legana Court, Endeavour Hills**

C. NAPIER was present at 12 Legana Court, Endeavour Hills on 18 February 2004 and committed aggravated burglary

1. ***An aggravated burglary committed by three assailants occurred on 18/02/04 at 12 Legana Court, Endeavour Hills***

As above at B(1).

2. ***NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary***

a. **NAPIER, JONES and COLQUHOUN are close friends**

As above at A(2a).

b. **COLQUHOUN implicated himself, NAPIER and JONES on record**

In his record of interview COLQUHOUN made a full admission to the aggravated burglaries, including that that he, NAPIER and JONES drove past 12 Legana Court in NAPIER'S car on 17 February 2004. On 18 February they entered 12 Legana Court and committed aggravated burglary.<sup>31</sup> This is strong evidence that all three were working in concert to commit the burglary.

*COLQUHOUN'S admission is reliable*

As above at A(2b), and in addition - real evidence seized from COLQUHOUN'S house by police strengthens his admission through corroboration. Duct tape from his house was matched from that used at the scene,<sup>32</sup> and it can be inferred that the black balaclava in the closet the one COLQUHOUN wore during the crime. The men's Citizen watch, gold bracelet, two ladies' necklaces, ladies ring and SIM card also correspond roughly to items described as stolen by S PETRESCU.<sup>33</sup>

This is an independent and consistent strand of evidence shows COLQUHOUN was at the scene and re-establishes his reliability. It can be inferred that if COLQUHOUN is being truthful about the substance of the crime then he is also being truthful about who was involved.

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<sup>31</sup> Colquhoun's Record of Interview

<sup>32</sup> Ray Devlin Testimony

<sup>33</sup> Sabin Petrescu Testimony 1 in conjunction with Charles Bradford Testimony

**c. COLQUHOUN, NAPIER and JONES consciously minimised their traceable association through a strategy of covert communication**

*NAPIER, JONES and COLQUHOUN did not use their own personal mobile phone accounts often*

The account registered under NAPIER (number 0438 582 271) using SIM 336498321 only received 4 incoming calls between 13 February–10 March.<sup>34</sup> The account registered under COLQUHOUN (0417 018 302) using SIM 336503745 only received 2 incoming calls between 13 February–10 March.<sup>35</sup> This is generally a very low number of calls to receive in a month to a personal mobile. We can thus infer that NAPIER and COLQUHOUN did not use their personal accounts as their main phone accounts. JONES did not even have an account registered under his name.

*NAPIER used phone stolen from S PETRESCU under 'Bob MURDOCH' fake account*

A Nokia handset with the IMEI number 350779300689463 was stolen from the PETRESCU'S residence on 18 February 2004 (See Appendix 3).<sup>36</sup> Evidence from Telstra and Vodaphone phone records show that Bob MURDOCH used a mobile phone with the IMEI number 350779300689463 between 18 February – 25 February 2004.<sup>37</sup> These IMEI numbers match up and prove that the handset was stolen and used after the burglary. To tie NAPIER to the crime the Prosecution must argue that he was the actual user of the MURDOCH account.

Firstly, MURDOCH states that he has 'no mobile phones or Digital Sim cards registered in his name'.<sup>38</sup> MURDOCH can be considered credible as he has no obvious motive to lie. Thus it can be inferred that someone else is using MURDOCH'S account. NAYLOR shows that the account information registered under MURDOCH'S name is:<sup>39</sup>

- a. Date of Birth: 14/05/1979
- b. User Address: 10 Hazeldene Crt, Berwick

The date of birth can be identified as NAPIER'S<sup>40</sup> and the address as that of NAPIER'S parents Bob and Nancy.<sup>41</sup> The most logical inference to draw from these facts is that NAPIER registered the account under MURDOCH'S name. NAPIER knows MURDOCH through his father and would have access to his personal details.<sup>42</sup> BURTON further states that the service number 0431 427 329 looks 'familiar' as being one of NAPIER'S in the past.<sup>43</sup>

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<sup>34</sup> Sarah Barnes Testimony 1

<sup>35</sup> Sarah Barnes Testimony 1

<sup>36</sup> Sarah Barnes Testimony 1 in conjunction with Sabina Petrescu Testimony 2

<sup>37</sup> Desmond Naylor Testimony

<sup>38</sup> Bob Murdoch testimony in convergence with account listings provided to police

<sup>39</sup> Desmond Naylor Testimony

<sup>40</sup> Phillip Andrews Testimony

<sup>41</sup> Convergent evidence from Testimony's of Bob Murdoch and Annie Rae Burton. Richard Bush notes the street name 'Hazeldence Court' only.

<sup>42</sup> Bob Murdoch Testimony

<sup>43</sup> Annie Rae Burton Testimony

While this is no means conclusive, this statement is convergent with call charge record evidence that indicate all calls made between 19 February - 20 February 2004 and 9 March – 10 March 2004 have been made to friends of NAPIER (see Appendix 4: *Call Charge Records for 0431 427 329* and Appendix 2: Relationship Map):<sup>44</sup>

Summary 19/02/2004	Summary 20/02/2004
Eva Frost, 4 x SMS Michelle Hinch, 1 x call Dorothy Edmond, 1 x SMS Richard Bush 3 x SMS Annie Burton, 4 x SMS	Eva Frost, 1 x SMS Alison Smith, 1 x call Annie Burton, 2 x call; 1 x SMS

Summary 09/03/2004	Summary 10/03/2004
Eva Frost, 1 x call Michelle Hinch, 1 x call Richard Bush 2 x call Annie Burton, 1 x SMS	Dorothy Edmond, 2 x call Alison Smith, 1 x call William Napier, 1 x SMS Rhonda Burton, 1 x call Richard Bush, 2 x call

It can be generalised that people only call others that they know and want to speak to, and that NAPIER is conforming with this generalisation. Testimonies from BUSH, FROST, HINCH and BURTON further corroborate that it is common for NAPIER to contact them by phone.<sup>45</sup> This is with the notable exception of EDMOND,<sup>46</sup> SMITH, BUSH'S 'lost phone' and NAPIER'S own number. These anomalies are due to the covert communication scheme discussed below at '*NAPIER, COLQUHOUN and JONES called other people and used fake mobile accounts to speak with each other*'.

Aside from these discrepancies, the account details registered under Bob MURDOCH as well as the recipients to which outgoing calls have been traced suggest NAPIER is the common factor. It is thus highly likely that NAPIER was using the MURDOCH account. Accordingly, he was also using a phone stolen from S PETRESCU due to the matching IMEI numbers.<sup>47</sup>

*JONES used phone stolen from S PETRESCU under 'Alison SMITH' fake account*

A Nokia handset with IMEI number 350114301735927 was stolen from the PETRESCU'S residence on 18 February 2004 (See Appendix

<sup>44</sup> This evidence has been adduced by cross referencing Appendix 3: *Summary of Phone Details/Records of Interested Parties* and Appendix 4: *Call Charge Records for 0431 427 329*.

<sup>45</sup> Richard Bush Testimony in convergence with Eva Frost Testimony, Michelle Cathryn Hinch Testimony and Annie Rae Burton Testimony

<sup>46</sup> Dorothy Edmond Testimony

<sup>47</sup> Appendix 3: *Summary of Phone Details/Records of Interested Parties*

3).<sup>48</sup> Vodaphone records show that Alison SMITH (phone number 0415 409 625, SIM 336529750) used a mobile phone with IMEI number 350114301735927 from 17 February onwards.<sup>49</sup> IMEI numbers are computer generated and unchangeable. As these IMEI numbers match up, they prove that the handset was stolen and used after the burglary. To tie JONES to the crime the Prosecution must argue that he was the actual user of the SMITH account. The clearest evidence available is that both BUSH and EDMOND have the number 0415 409 625 listed as JONES.<sup>50</sup> Although the name Alison SMITH and the address '22 Fountain Drive, Narre Warren' are obviously not JONES', he would have had the opportunity to meet SMITH and gather this information through EDMOND'S sister Mary.<sup>51</sup> JONES' smashing of the 'SMITH' SIM and mobile phone may also support a consciousness of guilt argument.<sup>52</sup>

*COLQUHOUN used phone and account taken from BUSH*

BUSH states that he lost the mobile with the number 0439 312 954 'earlier in the year' and thus started using 0400 162 376.<sup>53</sup> However call records indicate that *both* these numbers were active and operational between 19 February – 10 March 2004.<sup>54</sup> From this we can infer someone else was using BUSH'S phone after it was 'lost'. Given that NAPIER and COLQUHOUN are friends (see Appendix 2: *Relationship Map*), it can be generalised that they would ring each other regularly (or at least once a month). They would be particularly likely to be in contact after the burglary. However in the month of the call tracing (from 19 February) of NAPIER'S 'MURDOCH' account, calls made to COLQUHOUN are notoriously absent. From this negative evidence we can infer that it is COLQUHOUN that is using BUSH'S lost phone. However the Defence will seriously challenge this on the grounds that only negative evidence ties COLQUHOUN to the 0439 312 954 number, and that this proposition is thus seriously weak.

*NAPIER, COLQUHOUN and JONES called other people and used fake mobile accounts to speak with each other*

Appendix 4: *Call Charge Records for 0431 427 329* shows that NAPIER (using MURDOCH'S account) smsed EDMOND'S phone once on 19 February and called her phone twice on 10 March 2004.<sup>55</sup> However EDMOND claims called or received calls from NAPIER and if NAPIER did call JONES must have answered.<sup>56</sup>

Given contact was made three times and EDMOND was not aware of any of these despite it being her phone, the Prosecution can infer that the communication was strategically planned for a time EDMOND was absent and JONES had sole access to the phone. Similarly, the above

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<sup>48</sup> Sarah Barnes Testimony 1 in conjunction with Sabina Petrescu Testimony 2

<sup>49</sup> Hillary Gilbert Testimony

<sup>50</sup> Richard Bush Testimony convergent with Dorothy Edmond Testimony

<sup>51</sup> Dorothy Edmond Testimony

<sup>52</sup> Dorothy Edmond Testimony

<sup>53</sup> Richard Bush Testimony

<sup>54</sup> Desmond Naylor Testimony

<sup>55</sup> Based on Desmond Naylor Testimony

<sup>56</sup> Dorothy Edmond Testimony

mentioned infrequency of communication on their personal accounts, reception of incoming calls only, use of fake account names and multiple accounts converges towards the suggestion that NAPIER, COLQUHOUN and JONES deliberately devised a covert communication scheme to minimise their association and evade arrest.

**d. COLQUHOUN, NAPIER and JONES planned to burgle 12 Legana Court**

On Tuesday 17 February 2004 around 6-6.30pm PORTER saw three people outside 12 Legana Court in a 'Japanese' 'sports type' 'metallic red' 'hatchback' car.<sup>57</sup> He states that they were 'casing' the house, a slang term for 'observing the residence with the intention to commit a crime'. He identified the front passenger had a large, highly distinctive tattoo of dark lettering running down the full length of his left outer forearm.<sup>58</sup>

On the 12 May NAPIER was arrested and the tattoo on his left forearm photographed.<sup>59</sup> On 26 May PORTER identified NAPIER'S tattoo (picture 11) from an identification booklet of 12 tattoo photographs prepared by ANDREWS.<sup>60</sup> From this identification we can infer that NAPIER was indeed the front passenger in the car that day. The Defence may attack this evidence on the basis that PORTER'S identification is unreliable. The long time passed between 17 February and 26 May 2004 could have diluted PORTER'S capacity for accurate recollection, and his statement that the tattoos were 'very similar' may not be enough to constitute a positive identification.<sup>61</sup> However PORTER'S first statement taken 20 February shows him to be an accurate, concise observer with a keen memory.

Given that ANDREWS was careful to include similar tattoo designs in the booklet,<sup>62</sup> it seems that PORTER'S selection of NAPIER'S tattoo is reliable and that NAPIER was in the car. From NAPIER'S presence we can further infer the presence of JONES and COLQUHOUN if we use this identification evidence in conjunction with COLQUHOUN'S admission.<sup>63</sup>

The reliability of PORTER'S evidence is reinforced by his identification of NAPIER'S car. Police seized NAPIER'S red hatchback Holden Vectra (OTS 942) on 12 May 2004.<sup>64</sup> ANDREWS photographed the car and inserted it as 'photo 5' into an identification booklet,<sup>65</sup> of which PORTER chose alongside photo 9.<sup>66</sup> The presence of NAPIER'S car at Legana Court alongside the tattoo identification makes an almost

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<sup>57</sup> Kevin Porter Testimony 1

<sup>58</sup> Kevin Porter Testimony 1

<sup>59</sup> Phillips Andrews Testimony

<sup>60</sup> Kevin Porter Testimony 2

<sup>61</sup> Kevin Porter Testimony 2

<sup>62</sup> Half Celtic and half tribal design tattoos, and six tattoos with letters

<sup>63</sup> Scott Colquhoun Record of Interview

<sup>64</sup> Phillip Andrews Testimony

<sup>65</sup> Phillip Andrews Testimony

<sup>66</sup> Kevin Porter Testimony 2

watertight argument that NAPIER was at the scene before the crime. Given all the evidence it is unlikely that NAPIER had any other rational reason to be observing the PETRESCU'S house apart from to plan the burglary. COLQUHOUN and JONES were present as co-conspirators to the plan.

### **3. NAPIER was one of the assailants**

#### **a. NAPIER was present at the scene of the crime**

In his record of interview COLQUHOUN made a full admission to the charges, including that on 18 February NAPIER entered 12 Legana Court and committed aggravated burglary.<sup>67</sup> This is strong evidence that NAPIER committed the burglary.

*COLQUHOUN'S admission is reliable*  
As above at C(2b).

#### **b. PORTER sees NAPIER 'casing' 12 Legana Court the previous day**

As discussed at 2c above, PORTER makes a positive identification of NAPIER and his car outside 12 Legana Court the day before the burglary. Given all the evidence it is unlikely that NAPIER had any other rational reason to be observing the PETRESCU'S house apart from to plan the burglary.

#### **c. NAPIER possessed and used a mobile phone stolen from the scene**

As discussed above at C(2b) '*NAPIER used phone stolen from S PETRESCU under 'Bob MURDOCH' fake account*'

#### **d. NAPIER'S character tends towards intimidation and violence**

FROST states that she has an intervention order against NAPIER.<sup>68</sup> Although the details are not provided, we can infer that the order was granted because FROST was fearful of violence or harassment. This character evidence may contribute to increasing the likelihood of NAPIER being involved in the violent crime of aggravated burglary, and establish that he was the assailant who beat and kicked A PETRESCU. However the Defence will challenge this proposition on the basis of low relevance and probative value. It will be difficult for the Prosecution to overcome this objection as this chain of inference is quite weak.

#### **e. NAPIER tried to hide his involvement with the crime**

Given that the evidence discussed above at a-d converges to prove the proposition that NAPIER was an assailant at Burglary II, NAPIER'S denial of all wrongdoing seems highly implausible.<sup>69</sup> The Prosecution

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<sup>67</sup> Colquhoun's Record of Interview

<sup>68</sup> Eva Frost Testimony

<sup>69</sup> William Napier Record of Interview

can challenge NAPIER'S credibility as he has a motive to lie about his involvement to avoid conviction.

The covert communication scheme used by NAPIER to contact COLQUHOUN and JONES further his consciousness of guilt or his concerted effort to avoid arrest. See above discussion at B-2b.

**f. NAPIER was unsurprised by his arrest and compliant with police**

As above at A(3d).

**D. JONES was present at 12 Legana Court, Endeavour Hills on 18 February 2004 and committed aggravated burglary**

**1. *An aggravated burglary committed by three assailants occurred on 18/02/04 at 12 Legana Court, Endeavour Hills***

As above at C(1).

**2. *NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary***

As discussed above at C(2).

**3. *JONES was one of the assailants***

**a. JONES was present at scene of the crime**

*COLQUHOUN implicates JONES as an assailant*

In his record of interview COLQUHOUN made a full admission to the charges, including that on 18 February JONES entered 12 Legana Court and committed aggravated burglary.<sup>70</sup> This is strong evidence that JONES committed the burglary. *COLQUHOUN'S admission is reliable* - as above at C(2b).

*JONES' fingerprints were found at the scene*

CHRISTIE'S testimony shows that PD ROVER was present during the investigation and indicated recent human scent along the rear fence, leading CHRISTIE to a yellow handled knife.<sup>71</sup> WARNE then analysed the knife and revealed two fingerprints.<sup>72</sup> These fingerprints were found to match the right index and right ring finger of JONES.<sup>73</sup> Since this knife was at the scene with JONES' fingerprints, it can be inferred that JONES was also at the scene. The most logical explanation was that he was present at the burglary and dropped the knife when escaping over the back fence. JONES had no other rational reason to be on the PETRESCU'S property.

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<sup>70</sup> Colquhoun's Record of Interview

<sup>71</sup> James Christie Testimony

<sup>72</sup> Phillip Grant Warne Testimony

<sup>73</sup> Phillip Grant Warne Testimony

**b. JONES possessed and used a mobile phone stolen from the scene**

See above at C(2c) '*JONES used phone stolen from S PETRESCU under 'Alison SMITH' fake account*'

**c. JONES evaded police due to consciousness of guilt**

As above at B(3b).

**E. The Same Set of Assailants Committed Aggravated Burglary I and II**

Altogether, the circumstantial evidence for burglary I is not as strong as the evidence for burglary II. Yet the Prosecution can bolster both sets of evidence by running a coincidence argument to prove that the same set of assailants committed both burglaries. Therefore if one set of evidence does not satisfy the burden of proof, placing the accused at one crime may be enough to ensure conviction for both.

To satisfy the court using coincidence reasoning, the Prosecution must prove that the elements of each burglary are so similar that it is improbable that different people committed them.

Burglary I and II had many common elements:<sup>74</sup>

- a. Three were three assailants
- b. Each wore dark clothing, black balaclavas and gloves
- c. In both burglaries entry was forced through a window
- d. The physical descriptions of the burglars coincide:
  - i. At Burglary I there was a 'fat' burglar about 5"10-5"11 and a 'smaller' burglar about 5"7-5"9.
  - ii. At Burglary II there was a 'large build'/4 months pregnant/'big'/'fat' burglar about 6" and a two burglars described as 5"8 with a thin build
- e. The burglaries occurred in nearby suburbs within the span of a week and a day - they also occurred at similar times (between midnight and 3am)
- f. A long single barrel rifle was used in both burglaries
- g. Both houses were burgled by mistake:
  - iii. In Burglary I the assailants were specifically looking for drugs. From this it can be inferred that they believed drugs were in the house. They were mistaken, there were no drugs – DAWSON asserted 'they were in the wrong house'
  - iv. In Burglary II the assailants were specifically looking for money and gold. They were mistaken - S PETRESCU asserted she 'had the feeling they were in the wrong house'
  - v. S PETRESCU hears one assailant say 'I can't believe we got the wrong fucking place again'. From this we can infer that the assailants believed the robbed the wrong house twice
- h. The three phones stolen in Burglaries I and II were all traced to either NAPIER, JONES or COLQUHOUN

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<sup>74</sup> All these similarities are taken from Warren Rice, Daisy Bolton and Peter Dawson's Testimonies corroborated by Anton Petrescu and Sabina Petrescu's Testimonies

However the Defence will challenge this coincidence argument based on elements of the crimes which are very different:<sup>75</sup>

- a.** Burglary II was a violent crime with the assault of A PETRESCU. No one was hurt in Burglary I
- b.** Burglary II included a ransacking of the house and the witnesses were restrained and tied up with duct tape
- c.** A crossbow was used in Burglary II – this is an unusual weapon and reduces the similarity of the crimes
- d.** The physical descriptions of the assailants do not match completely – witnesses give different height descriptions

On balance it is improbable that two sets of burglaries display such similar characteristics, especially within such a short time frame. It should thus be inferred that Burglary I and II were committed by the same group of assailants and that these assailants were NAPIER, JONES and COLQUHOUN.

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<sup>75</sup> All these dissimilarities are taken from a comparison of Warren Rice, Daisy Bolton and Peter Dawson's Testimonies and Anton Petrescu and Sabina Petrescu's Testimonies

## **ANALYSIS OF THE ADMISSIBILITY OF EVIDENCE**

The relevance of the evidence used so far is inherent in the Proof discussed above. Yet the Defence will seek to have certain uses of evidence excluded, limiting the capacity of the Prosecution to prove its case. A discussion of admissibility has been categorised under the main items of evidence that support the Prosecution's case that are likely to cause contention:

### **Real Evidence**

#### ***Recorded interview of COLQUHOUN'S admission***

Counsel has been instructed that COLQUHOUN'S record of interview will be ruled admissible. This recording could thus be tendered through THOMPSON and authenticated. However COLQUHOUN'S implication of NAPIER and JONES will be subject to section 83 as evidence of an admission against third parties. The hearsay rule will thus need to be overcome. COLQUHOUN'S allegations that NAPIER and JONES were assailants at Burglary I and II is first-hand hearsay relying on what he saw, heard and perceived at the scene of the crime.<sup>76</sup> As it is unlikely COLQUHOUN will testify we must turn to s 65, where the most appropriate exception is (2)(d). COLQUHOUN'S admission was definitely against his interests given that he confessed to a crime. Reliability is harder to establish as it is not disclosed exactly under what 'circumstances' COLQUHOUN made his admission and implications.

The Defence is likely to challenge the generalisation that admissions made to police on record are reliable. They would likely argue the admission is so unfair<sup>77</sup> and prejudicial<sup>78</sup> to the defendants that the Court should exercise an exclusionary discretion. The Prosecution could counter this through arguing that the admission is highly relevant, probative and key to proving the case. These seem to be fairly evenly weighted arguments, however the Court tends to impose stricter constraints on Prosecution attempts to establish hearsay exceptions.

#### ***Knife found in yard of 12 Legana Court, Endeavour Hills***

This knife is real evidence that can be tendered through and authenticated by CHRISTIE in testimony. It is highly relevant to the Prosecution's case as it places JONES at the scene of burglary II. However the Defence is likely to challenge the admissibility of the fingerprint evidence on the basis that it is an opinion procured by WARNE.<sup>79</sup> However WARNE'S opinion can be said to satisfy the expert opinion exception under section 78(1). His fingerprint analysis is clearly based on 16 years experience in the fingerprints field. The knife is likely to be ruled admissible.

### **Witness Testimony**

#### ***The Phone Records***

The testimonies of BARNES, ADAMSON and GILBERT are prima facie excluded by the hearsay rule given that they are evidence of previous representations made by telecommunications companies that intend to assert the existence of particular

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<sup>76</sup> *Evidence Act 2008*, s 62(1)

<sup>77</sup> *Evidence Act 2008*, s 90

<sup>78</sup> *Evidence Act 2008*, s 135

<sup>79</sup> Prima facie inadmissible under *Evidence Act 2008*, s 76

phone account details.<sup>80</sup> Yet the Prosecution can rely on the second hand hearsay exception of business records.<sup>81</sup> The keeping of account details and call records by Telstra, Optus and Vodaphone is clearly for a 'business purpose' satisfying section 69(1)(a). The 'personal knowledge' requirement is harder to satisfy, but it can be argued that s69(2)(b) is fulfilled because all account information has to be input onto the companies' database by a sales representative when customer first sign up for accounts. They would thus have personal knowledge by seeing the customer's details,<sup>82</sup> and indirectly supplied this information to BARNES, ADAMSON and GILBERT. It is likely these testimonies would be admissible.

However there may be an extra step in the admissibility of NAYLOR'S testimony given that there is also commentary on the production of IMEIs.<sup>83</sup> This treads a fine line between fact and opinion. It is likely an opinion given that NAYLOR infers the infallibility of IMEIS. Yet NAYLOR could fall under the opinion exception of s 79, as his 5 years of experience with Optus has endowed him with specialised knowledge as to SIM cards and IMEIS. However the Defence may challenge this on the grounds that NAYLOR'S Support Liaison Officer role is primarily concerned with the provision of record to law enforcement agencies. However similar to *Leung and Wong v R*, it can be argued that NAYLOR'S expertise is 'ad hoc' and developed over the course of his provision of records where he has to continually examine SIM and IMEI numbers.

### ***PORTER Testimony 1 and 2***

PORTER'S description of NAPIER 'casing' the house is a damaging inference of fact drawn from his observation of NAPIER'S behaviour.<sup>84</sup> The Defence will challenge this opinion on the basis that it is not necessary to obtain an adequate account of PORTER'S perception.<sup>85</sup>

PORTER could arguably use more neutral language to separate the inference of wrongdoing from the perception. 'Casing' could be alternatively described as 'observing suspiciously' or 'examining'. The Defence is further likely to strike this opinion down on the basis that it is prejudicial and should be excluded under s 137. The Court is unlikely to admit this evidence.

There are also problems with PORTER'S identification evidence, a category of evidence that is notoriously unreliable and that must be prefaced with a judicial caution.<sup>86</sup> Section 114 creates an exclusionary rule which demands the use of an identification parade to corroborate visual identification evidence. PORTER'S sight of NAPIER on 17 February 2004 would thus have to be confirmed by an identification parade to satisfy Section 165 (2)(a). No such parade was held. The Prosecution will have to overcome this deficiency through arguing that it would not have been reasonable to hold a parade.<sup>87</sup> Given that PORTER'S identification was made primarily through NAPIER'S tattoo it may be argued that it was near impossible to gather people of similar looks to NAPIER with similar tattoos. However the defence

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<sup>80</sup> As per *Evidence Act 2008*, s 59(1)

<sup>81</sup> *Evidence Act 2008*, s 69

<sup>82</sup> *Evidence Act 2008*, s 69(5)

<sup>83</sup> Desmond Naylor Testimony

<sup>84</sup> *Evidence Act 2008*, s 76

<sup>85</sup> *Evidence Act 2008*, s 78(b)

<sup>86</sup> *Evidence Act 2008*, s 165

<sup>87</sup> *Evidence Act 2008*, 114(2)(b)

may point out that ANDREWS was able to produce 11 pictures of tattoos and thus should have been able to produce the persons also.

Section 115 further excludes PORTER'S positive identification of the tattoo in a photo as the picture identification evidence is not admissible if 'when the pictures were examined, the defendant was in the custody of (the police)'.<sup>88</sup> As NAPIER was arrested on 12 May 2004 and PORTER examined the photos on 26 May 2004 the picture identification is not admissible. The Prosecution may have to fall back on section 114(3)(a) and (b) in arguing that PORTER'S identification is key in supporting the Prosecution's case against the serious offence of aggravated burglary. It is also highly probative. On balance however, it is unlikely that the court will admit PORTER'S identification evidence of NAPIER'S tattoo.

### ***Witnesses' descriptions of the assailants***

DAWSON, BOLTON, A PETRESCU and S PETRESCU'S description of the assailants are inferences of fact drawn from observation. They are thus opinions under section 76. However they can be admitted under the lay opinion exception of section 78. Their opinions are clearly based on their perceptions of the burglaries and it would be very difficult for them to describe the physical characteristics of the assailants as bare perceptions without personal interpretation (as in *Van Dyk*).<sup>89</sup>

### ***S PETRESCU Testimony 1***

S PETRESCU'S statement that an assailant said "I can't believe we got the wrong fucking place again" is prima facie a previous representation excluded by s 59. However this can be overcome by drawing an inference about another factual proposition from the evidence to establish a non-hearsay purpose.<sup>90</sup>

Although the representation is being intended to assert that the burglars were robbing the wrong house again, it can also be inferred that there was more than one burglary from the word 'again'. This non-hearsay purpose means the evidence can now be admitted for hearsay purposes.<sup>91</sup> It can be used as evidence that there were two or more mistaken burglaries committed by the assailants.

### ***RICE/BOLTON Testimony***

RICE'S statement that he heard an assailant say "wait here" is hearsay. However the possible non-hearsay use is already implicit in the Proof – although the representation is an instruction for someone to stay in one spot and 'wait', it can be used to infer that a third person was present at Burglary I. This places JONES at the scene. BOLTON'S assertion she heard "hurry up we're leaving" faces the same issues and resolution as RICE above.

### ***JONES' Record of Interview***

In the above Proof, the Prosecution asserted JONES' guilty conscience through an inference drawn from his 'no comment' interview. However this is expressly disallowed under s 89. The Court will not admit this use of evidence.

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<sup>88</sup> *Evidence Act 2008*, s 114(3)(a)

<sup>89</sup> *Evidence Act 2008*, s 78(a) and 78(b)

<sup>90</sup> *Evidence Act 2008*, s 60

<sup>91</sup> *Evidence Act 2008*, s 60

### ***FROST Testimony***

FROST'S evidence of the Intervention Order against NAPIER is likely to be excluded under section 97. This is because the intervention order does not indicate a tendency that can be relevantly linked to the crime. An Intervention order is a single, unconvincing indicator of character from which only a weak inference can be drawn. The prejudicial effect far outweighs the probative value.<sup>92</sup> It is likely to be ruled inadmissible, but this will not greatly affect the Prosecution's case.

### ***BURTON'S Testimony***

BURTON'S statement that the number '0413 427 329' looks 'familiar' is likely to be attacked by the Defence as inconclusive, misleading and confusing. They will move to strike this evidence down under s 136(b). The Prosecution can rebut that this evidence is of high relevance and probative value given that it is the only testimony which ties NAPIER to MURDOCH'S account. It is likely to be rule admissible on this basis.

### **Admissibility of coincidence reasoning**

#### ***Coincidence Reasoning connecting Burglary I and II***

Section 98 governs coincidence reasoning. Generally, the fact that the two burglaries occurred is not admissible to prove identity on the basis that it is improbable the events occurred coincidentally.<sup>93</sup> However the evidence of the similarities strongly tend toward proving that the same assailants committed the crimes. Although the Defence will argue that the coincidences here are not particularly strong compared to cases like *R v Smith*, the evidence still has significant probative value in that it is highly improbable that the similarities occurred by chance.<sup>94</sup> The persuasiveness of these similarities should thus be privileged over the possible prejudice to the accused.<sup>95</sup>

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<sup>92</sup> *Evidence Act 2008*, s 101(2)

<sup>93</sup> *Evidence Act 2008*, s 98(1)

<sup>94</sup> *Evidence Act 2008*, s 101(2)

<sup>95</sup> *Evidence Act 2008*, s 101(2)

## LIKELIHOOD OF CONVICTION OF NAPIER AND JONES

These aggravated burglary charges rely on the Prosecution being able to prove NAPIER and JONES' presence at the crime scene. This depended on the ability to link weak circumstantial evidence together to create a convergent chain of proof. This proved difficult given that each chain of inference was far removed from the preceding fact in issue, and that admissibility issues destroyed many 'links' in the chains.

The main evidence in the case to support NAPIER'S presence at Burglary I were:

- a. NAPIER was implicated by COLQUHOUN
- b. NAPIER owned and used a mobile phone stolen from the scene
- c. NAPIER tried to hide his involvement with the crime
- d. NAPIER was unsurprised by his arrest and compliant with police

The main evidence in the case to support NAPIER'S presence at Burglary II were:

- a. NAPIER was implicated by COLQUHOUN
- b. PORTER sees NAPIER 'casing' 12 Legana Court the previous day
- c. NAPIER owned and used a mobile phone stolen from the scene
- d. NAPIER'S character tends towards intimidation and violence
- e. NAPIER tried to hide his involvement with the crime
- f. NAPIER was unsurprised by his arrest and compliant with police

The main evidence in the case to support JONES' presence at Burglary I were:

- a. JONES was implicated by COLQUHOUN
- b. JONES evaded police due to consciousness of guilt

The main evidence in the case to support JONES' presence at Burglary II were:

- a. JONES was implicated by COLQUHOUN
- b. JONES possessed and used a mobile phone stolen from the scene
- c. JONES evaded police due to consciousness of guilt

It can be seen that NAPIER'S case for Burglary I and II is quite strong. JONES' case for Burglary I is weaker than Burglary II. However the above analysis of admissibility impacts quite negatively on the whole of the Prosecution's proof. It is doubtful that COLQUHOUN'S admissions and PORTER'S identification evidence will be admissible. Without these, the strongest proof of NAPIER and JONES' involvement in the crime is their possession and use of stolen mobile phones.

This alone may not satisfy the burden of proof, but bolstered with the Prosecution's association and coincidence arguments there may still be enough inferential force to carry the case:

- a. NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary
  - i. COLQUHOUN, NAPIER and JONES are close friends
  - ii. COLQUHOUN implicates himself, NAPIER and JONES on record
  - iii. COLQUHOUN, NAPIER and JONES consciously minimised their traceable association through a strategy of covert communication
- b. The Same Set of Assailants Committed Aggravated Burglary I and II

Considering all the elements of this advice on evidence, the overall chances of conviction are slim to average.

## Appendix 1: *Who's Who?*

### *R v NAPIER AND JONES*

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#### **The Accused**

- Defendants: William NAPIER and Henry JONES
- Accomplice: Scott COLQUHOUN

#### **Witnesses and interested parties**

- BOLTON, Daisy: Renter and resident of 3/23 Ellaswood Close, Berwick, de facto partner of Peter
- BURTON, Annie Rae: William Napier's girlfriend
- BURTON, Rhonda: Annie Rae Burton's mother
- BUSH, Donald: Father of Richard Bush
- BUSH, Gloria: Mother of Richard Bush
- BUSH, Richard: Friend of Annie Burton
- DAWSON, Peter: Renter and resident of 3/23 Ellaswood Close, Berwick, de facto partner of Daisy
- EDMOND, Dorothy: Henry Jones' girlfriend
- FROST, Eva: William Napier's ex-girlfriend
- HINCH, Michelle Cathryn: Scott Colquhoun's girlfriend
- MURDOCH, Bob: Managing Director of All Emergency Alarms
- NAPIER, Boris: Father of William Napier
- NAPIER, Nancy: Mother of William Napier
- PETRESCU Luca: Resident of 12 Legana Court, Endeavour Hills, Son of Anton and Sabina Petrescu
- PETRESCU, Anton: Resident of 12 Legana Court, Endeavour Hills, husband of Sabina Petrescu
- PETRESCU, Sabina: Resident of 12 Legana Court, Endeavour Hills, wife of Anton Petrescu
- PORTER, Kevin: Youth Worker
- RICE, Warren: Resident of 3/23 Ellaswood Close, Berwick
- SMITH, Alison: Friend of Dorothy Edmond's sister Mary
- SWAN, Dylan: Resident of 3/23 Ellaswood Close, Berwick

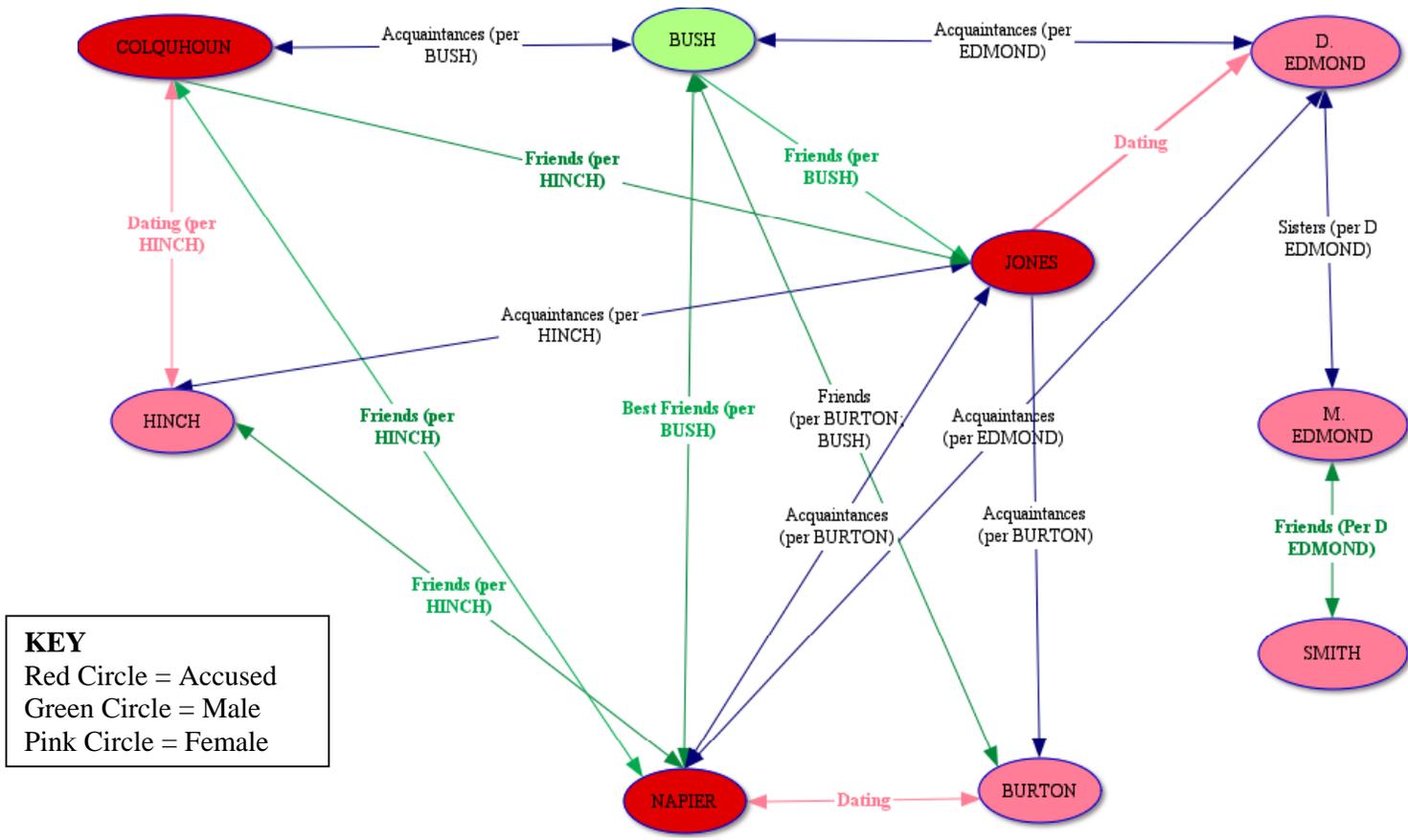
## Police and Police Aids

- 3/23 Ellaswood Close, Berwick aggravated burglary
  - o CHAN, Ernie: Sergeant of Police
  - o Constable MITCHAM: Member of Narre Warren Unit 321
  - o Constable SCOTT: Accompanied Chan to Ellaswood Close
  - o Detective HARDING: Member of Crime Unit 344
  - o Detective SINGH: Member of Crime Unit 344
  - o Senior Constable WRIGHT: Member of Narre Warren 321
- 12 Legana Court, Endeavour Hills aggravated burglary
  - o CHRISTIE, James: Senior Constable of Police and handler of Rover
  - o Constable BISHOP: Member of Crime Unit 233
  - o Constable CAGNEY: Member of Pakenham Unit 288
  - o Constable SAMUELS: Member of Crime Unit 233
  - o Detective Sergeant ROBINSON: Title unknown
  - o Detective WONG: Title unknown
  - o JACKSON, Cal: Detective Senior Constable of Police, Lilydale CIU
  - o PD Rover: Police Dog trained in obedience, tracking and searching
  - o Sergeant Constable CAMERON: Member of Pakenham Unit 288
  - o Sergeant DALY: Member of Pakenham Unit 533
- Forensic Investigators
  - o DEVLIN, Ray: Senior Constable, Victorian Police Forensic Services Centre (VPFSC)
  - o Phillip Grant WARNE: Sergeant of Police, Northern Fingerprinting Branch VPFSC
  - o Police Sergeant BECKHAM: Title unknown, VPFSC
- Armed Offenders Squad
  - o ANDREWS, Phillip: Detective Senior Sergeant of Police, Armed Offenders Squad
  - o BRADFORD, Charles: Detective Senior Constable of Police, Armed Offenders Squad
  - o THOMPSON, Marcus: Detective Sergeant of Police, Armed Offenders Squad
  - o WOOSTER, Graeme: Detective Senior Constable of Police, Armed Offenders Squad
- Telecommunications Officers (various companies)
  - o ADAMSON, Sally: Liaison Officer, Optus
  - o BARNES, Sarah: Court Liaison & Administrative Officer, Telstra

- GILBERT, Hillary: LECAD Analyst, Vodaphone
- NAYLOR, Desmond: Support Liaison Officer, Optus

## Appendix 2: Relationship Map

### R V NAPIER AND JONES



### Appendix 3: Summary of Phone Details/Records of Interested Parties

#### *R v NAPIER AND JONES*

Registered Owner	Phone Number	Registered Address	SIM card number	IMEI number	Probable User/s if different from owner	Notes
Sabina PETRESU <sup>96</sup>	0417 773 891	12 Legana Ct, Endeavour Hills	231899372	3501143017359 27	-	Mobile phone stolen from Burglary II IMEI matches phone of Allison SMITH <sup>97</sup>
Alison SMITH <sup>98</sup>	0415 409 625	22 Fountain Dr, Narrewarren	336529750	3501143017359 27	Henry JONES <sup>99</sup>	Activated on 17/10/2003-present Used twice (incoming calls only) between 19 Feb 2004 - 10 March 2004 BUSH and EDMOND contacted JONES using this number
Dorothy EDMOND <sup>100</sup>	0410 547 682	17 Loders Way, Berwick			Dorothy EDMOND/	EDMOND claims she's never spoken to NAPIER on her phone, but JONES may

<sup>96</sup> Sarah Barnes Testimony 1, Sabina Petrescu Testimony 2

<sup>97</sup> Sarah Barnes Testimony 1 in conjunction with Hillary Gilbert Testimony

<sup>98</sup> Hillary Gilbert Testimony, Dorothy Edmond Testimony

<sup>99</sup> Richard Bush Testimony, Dorothy Edmond Testimony

<sup>100</sup> Sally Adamson Testimony, Dorothy Edmond Testimony

		(EDMOND'S father's address)			Henry JONES <sup>101</sup>	have <sup>102</sup>
Sabina PETRESCU <sup>103</sup>	0417 705 800	12 Legana Ct, Endeavour Hills	333121759	3507793006894 63	-	Mobile phone stolen from Burglary II IMEI matches phone of Bob MURDOCH <sup>104</sup>
Bob MURDOCH <sup>105</sup>	0431 427 329	10 Hazeldene Ct, Berwick <sup>106</sup>		3507793006894 63	William NAPIER <sup>107</sup>	Account registered 13/01/04 First seen on IMEI database 19/02/04, first used 21/02/04 MURDOCH says no mobiles are registered in his name and he has no knowledge of this number <sup>108</sup> BURTON says this number looks familiar as NAPIER'S <sup>109</sup>
Warren RICE <sup>110</sup>	0408 851 732	3/23 Ellaswood Cl,	368987592	3506389652974	-	Mobile phone stolen in Burglary I

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<sup>101</sup> Dorothy Edmond Testimony

<sup>102</sup> Dorothy Edmond Testimony

<sup>103</sup> Sarah Barnes Testimony 1, Sabina Petrescu Testimony 2

<sup>104</sup> Sarah Barnes Testimony 1 in conjunction with Desmond Naylor Testimony

<sup>105</sup> Desmond Naylor Testimony

<sup>106</sup> Address of William Napier's parents according to Annie Rae Burton Testimony

<sup>107</sup> Michelle Cathryn Hinch Testimony, Dorothy Edmond Testimony

<sup>108</sup> Bob Murdoch Testimony

<sup>109</sup> Annie Rae Burton Testimony

<sup>110</sup> Sarah Barnes Testimony 1

		Berwick		61		IMEI matches phone of William NAPIER and Scott COLQUHOUN <sup>111</sup>
William NAPIER <sup>112</sup>	0438 582 271	5 Lowing Cl, Berwick	336498321	3506389652974 61	William NAPIER	4 calls (incoming only) between 13 Feb 2004 – 10 March 2004
Scott Peter COLQUHOUN <sup>113</sup>	9706 7189	4/25 Grant St, Dandenong			-	
Scott COLQUHOUN <sup>114</sup>	0417 018 302	22 Webb St, Fitzroy	336503745	3506389652974 61	Scott COLQUHOUN	2 Calls (incoming calls only) 13 Feb 2004 - 10 March 2004
Dorothy EDMOND <sup>115</sup>	9704 3358	2/62 Avebury Dr, Berwick			-	
Boris NAPIER <sup>116</sup>	9769 8736	10 Hazeldene Ct, Berwick			William NAPIER/The NAPIERS	EDMOND has this number listed for William NAPIER
Richard BUSH <sup>117</sup>	9873 5266	72 Lucknow St, Mitcham			-	Might also be connected in dad's name, Donald BUSH
	0400 162 376				-	Telstra prepaid, connected in his mate's

<sup>111</sup> Sarah Barnes Testimony 1

<sup>112</sup> Sarah Barnes Testimony 1

<sup>113</sup> Sarah Barnes Testimony 2, Michelle Hinch Testimony

<sup>114</sup> Sarah Barnes Testimony 1

<sup>115</sup> Dorothy Edmond Testimony

<sup>116</sup> Annie Rae Burton Testimony, Richard Bush Testimony

<sup>117</sup> Annie Rae Burton Testimony, Richard Bush Testimony

Richard BUSH <sup>118</sup> (Clive RUDD/ 'Debbie')						name
Richard BUSH <sup>119</sup>	0408 327 955	26 Eagle Dr, Pakenham			-	BUSH claims this is his previous number registered under his parents address – but slight mistake in address
Richard BUSH <sup>120</sup>	0439 312 954	22 Eagle Dr, Pakenham			Henry JONES/Scott CALQUHOU N	BUSH claims he lost this phone and sim 'earlier in the year', however number still in use between 19/02/04-02/03/04
Michelle Cathryn HINCH <sup>121</sup>	0408 376 791	33 Normanby St, Cranbourne			-	This was HINCH's number until May 2004 registered under her old address - she changed over because sim wasn't working
Annie Rae BURTON <sup>122</sup>	0422 778 362	Unknown address			-	Previous number, Optus prepaid, seized by police on 12/05/04
Annie Rae BURTON <sup>123</sup>	0438 391 553	18 Mallory Ct, Cranbourne			-	

<sup>118</sup> Richard Bush Testimony

<sup>119</sup> Sarah Barnes Testimony 2, Richard Bush Testimony

<sup>120</sup> Sarah Barnes Testimony 2, Richard Bush Testimony

<sup>121</sup> Sarah Barnes Testimony 2, Michelle Cathryn Hinch Testimony

<sup>122</sup> Annie Rae Burton Testimony

<sup>123</sup> Annie Rae Burton Testimony

Eva FROST <sup>124</sup>	5941 3754	42 Jacaranda Way, Pakenham			-	
Eva FROST <sup>125</sup>	0413 441 987	42 Jacaranda Way, Pakenham			-	
Rhonda BURTON <sup>126</sup>	5995 9372	18 Mallory Ct, Cranbourne			-	

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<sup>124</sup> Eva Frost Testimony

<sup>125</sup> Sally Adamson Testimony, Eva Frost Testimony

<sup>126</sup> Sarah Barnes Testimony 2, Annie Rae Burton Testimony

**Appendix 4: Call Charge Records for 0431 427 329 – based on Desmond Naylor Testimony**

***R v NAPIER AND JONES***

**This phone number was used from 19/02 – 02/03 for outgoing purposes:**

CDR's for MSISDN 61431427329 between 2004/02/19 and 2004/03/02

B number	Date	Time (NSW)	Event	Dur (Secs)	Price	
61413441987	19/02/04	00:02:00	SMS	0	\$ 0.25	FROST
0408376791	19/02/04	00:05:29	VOICE	35	\$ 0.30	HINCH
61439312954	19/02/04	01:02:46	SMS	0	\$ 0.25	BUSH
61413441987	19/02/04	01:31:17	SMS	0	\$ 0.25	FROST
61413441987	19/02/04	01:31:21	SMS	0	\$ 0.25	FROST
61413441987	19/02/04	01:31:23	SMS	0	\$ 0.25	FROST
61422778362	19/02/04	15:38:41	SMS	0	\$ 0.25	BURTON
61439312954	19/02/04	16:19:33	SMS	0	\$ 0.25	BUSH

B number	Date	Time (NSW)	Event	Dur (Secs)	Price	
61408327955	19/02/04	16:27:13	SMS	0	\$ 0.25	BUSH
61410547682	19/02/04	16:31:57	SMS	0	\$ 0.25	EDMOND
61422778362	19/02/04	16:37:04	SMS	0	\$ 0.25	BURTON
61422778362	19/02/04	16:37:07	SMS	0	\$ 0.25	BURTON
61422778362	19/02/04	16:37:09	SMS	0	\$ 0.25	BURTON
0415409625	20/02/04	10:20:26	VOICE	29	\$ 0.57	SMITH
61413441987	20/02/04	10:49:21	SMS	0	\$ 0.25	FROST
61422778362	20/02/04	11:42:23	SMS	0	\$ 0.25	BURTON
0422778362	20/02/04	15:42:59	VOICE	72	\$ 1.31	BURTON
0422778362	20/02/04	16:33:26	VOICE	24	\$ 0.57	BURTON

Summary 19/02/2004	Summary 20/02/2004
Eva Frost, 4 x SMS Michelle Hinch, 1 x call Dorothy Edmond, 1 x SMS Richard Bush 3 x SMS Annie Burton, 4 x SMS	Eva Frost, 1 x SMS Alison Smith, 1 x call Annie Burton, 2 x call; 1 x SMS

This phone number was used from 09/03 – 10/03 for outgoing purposes:

CDR's for MSISDN 61431427329 between 2004/03/09 and 2004/03/10

B number	Date	Time (NSW)	Event	Dur (Secs)	Price	
0408376791	09/03/04	18:42:22	VOICE	10	\$ 0.57	FROST
0359959372	09/03/04	18:42:50	VOICE	110	\$ 1.68	HINCH
0408327955	09/03/04	18:44:58	VOICE	167	\$ 2.42	BUSH
0400162376	09/03/04	20:10:13	VOICE	61	\$ 0.30	BUSH
61422778362	09/03/04	22:30:55	SMS	0	\$ 0.25	BURTON
0397043358	10/03/04	14:00:53	VOICE	1	\$ 0.57	EDMOND
0397043358	10/03/04	14:43:19	VOICE	1	\$ 0.57	EDMOND
61438582271	10/03/04	15:53:03	SMS	0	\$ 0.25	NAPIER
0359959372	10/03/04	17:45:16	VOICE	47	\$ 0.94	R BURTON
0400162376	10/03/04	20:01:08	VOICE	48	\$ 0.30	BUSH
0415409625	10/03/04	20:16:20	VOICE	88	\$ 0.30	SMITH
0400162376	10/03/04	22:55:02	VOICE	12	\$ 0.30	BUSH

Summary 09/03/2004	Summary 10/03/2004
Eva Frost, 1 x call Michelle Hinch, 1 x call Richard Bush 2 x call Annie Burton, 1 x SMS	Dorothy Edmond, 2 x call Alison Smith, 1 x call William Napier, 1 x SMS Rhonda Burton, 1 x call Richard Bush, 2 x call

## **Appendix 5: *Structure of Prose Arguments***

### ***R v NAPIER AND JONES***

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#### **Aggravated Burglary I, 10/02/04: 3/23 Ellaswood Close, Berwick**

- A. NAPIER was present at 3/23 Ellaswood Close, Berwick on 10 February 2004 and committed aggravated burglary
1. An aggravated burglary committed by three assailants occurred on 10/02/04 at 3/23 Ellaswood Close, Berwick
  2. NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary
    - a. NAPIER, JONES and COLQUHOUN are close friends
    - b. COLQUHOUN implicated himself, NAPIER and JONES on record
    - c. COLQUHOUN, NAPIER and JONES consciously minimised their traceable association
  3. NAPIER was one of the assailants
    - g. NAPIER was present at the scene of the crime
    - h. NAPIER owned and used a mobile phone stolen from the scene
    - i. NAPIER tried to hide his involvement with the crime
    - j. NAPIER was unsurprised by his arrest and compliant with police
- B. JONES was present at 3/23 Ellaswood Close, Berwick on 10 February 2004 and committed aggravated burglary
1. An aggravated burglary committed by three assailants occurred on 10/02/04 at 3/23 Ellaswood Close, Berwick
  2. NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary
    - a. COLQUHOUN, NAPIER and JONES are close friends
    - b. COLQUHOUN implicates himself, NAPIER and JONES on record
    - c. COLQUHOUN, NAPIER and JONES consciously minimised their traceable association
  3. JONES was one of the assailants
    - c. JONES was present at the scene of the crime
    - d. JONES evaded police due to consciousness of guilt

#### **Aggravated Burglary II, 18/02/04: 12 Legana Court, Endeavour Hills**

- C. NAPIER was present at 12 Legana Court, Endeavour Hills on 18 February 2004 and committed aggravated burglary
2. An aggravated burglary committed by three assailants occurred on 18/02/04 at 12 Legana Court, Endeavour Hills
  3. NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary
    - a. NAPIER, JONES and COLQUHOUN are close friends
    - b. COLQUHOUN implicated himself, NAPIER and JONES on record
    - c. COLQUHOUN, NAPIER and JONES consciously minimised their traceable association through a strategy of covert communication
    - d. COLQUHOUN, NAPIER and JONES planned to burgle 12 Legana Court
  4. NAPIER was one of the assailants
    - a. COLQUHOUN implicates NAPIER as an assailant

- b. PORTER sees NAPIER 'casing' 12 Legana Court the previous day
  - c. NAPIER owned and used a mobile phone stolen from the scene
  - d. NAPIER'S character tends towards intimidation and violence
  - k. NAPIER tried to hide his involvement with the crime
  - l. NAPIER was unsurprised by his arrest and compliant with police
- D. JONES was present at 12 Legana Court, Endeavour Hills on 18 February 2004 and committed aggravated burglary
- 2. An aggravated burglary committed by three assailants occurred on 18/02/04 at 12 Legana Court, Endeavour Hills
  - 3. NAPIER, JONES and COLQUHOUN were acting in concert to commit the aggravated burglary
    - a. COLQUHOUN, NAPIER and JONES are close friends
    - b. COLQUHOUN implicates himself, NAPIER and JONES on record
    - c. COLQUHOUN, NAPIER and JONES consciously minimised their traceable association through a strategy of covert communication
    - d. COLQUHOUN, NAPIER and JONES planned to burgle 12 Legana Court
  - 4. JONES was one of the assailants
    - d. JONES was present at scene of the crime
    - e. JONES possessed and used a mobile phone stolen from the scene
    - f. JONES evaded police due to consciousness of guilt
- E. The Same Set of Assailants Committed Aggravated Burglary I and II