IN THE SUPREME COURT OF NEW ZEALAND SC CRI 11/2004

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **ATIRUT SUNGSUWAN**

Appellant

AND **THE QUEEN**

Respondent

Hearing 15 December 2004

Coram Elias CJ
Tipping J

Counsel R M Lithgow, N Levy for Appellant
J C Pike for Crown

APPLICATION FOR LEAVE TO APPEAL

11.03 am

Lithgow If the Court pleases I appear with my learned friend Ms Levy for Atirut Sungsuwan.

Elias CJ Thank you Mr Lithgow, Ms Levy.

Pike I appear for the respondent if it pleases the Court.

Elias CJ Yes, thank you Mr Pike. Yes Mr Lithgow.

Lithgow Now the case is potentially a large one but I have attempted to contain it within the propositions necessary to seek leave to appeal.

Elias CJ Well there are only two that you're really advancing as justifying leave within the statutory criteria aren't there Mr Lithgow?

Lithgow Well that's if the Court sees them as each having to stand alone. But on re-reading the provision and comparing it with other appeal provisions, I see it says that the appeal involves a matter of general importance and involves a matter of public importance and therefore it will be my submission if leave is granted that it should be granted on very wide terms. It doesn't say that you can only appeal on a matter of general importance. Once the threshold test is met that the appeal involves such a matter, then that is the predominant consideration and the.

Tipping J Are you saying that once there's one qualifying point it's all on?

Lithgow Well that won't always be the case. But the rules provide that there can be quite a tight catechism almost like we used to have with the old Case Stateds but in my submission that.

Elias CJ That's not intended Mr Lithgow at least, no that's not intended.

Lithgow No, well if I just.

Elias CJ On the other hand, an attempt to narrow the questions for the appeal is intended.

Lithgow Thank you. What I see as the, and what I submit is the guts if you like of the problem with this case, what went wrong, and what demonstrates how wrong things have become, is that the Crown called evidence that the noises that the complainant made supported the proposition that there was no consent. However the defence were prevented from using the evidence which could show that those self-same noises, so the same material that the Crown depended on or used in support of their case, the defence were prevented from using evidence to show that those noises were noises of consent.

Elias CJ Well I read the evidence as being that the Crown called evidence which supported the defence contention from these two witnesses. It called evidence that they believed the noises were of consensual sex.

Lithgow The difficulty with that is that the Crown having called those people as witnesses of truth, and knowing that they had told the Police that they had heard those noises before from her, and knowing that the Police had told them not to refer to that because it was evidence of prior conduct.

Elias CJ Where do we get that?

Lithgow Well I was instructed that. I said that in the Court of Appeal. The Officer in Charge was sitting in the back of the Court and that was not disputed.

Elias CJ Right.

Lithgow That they were told not to say that, as would be perfectly normal, that would be one of the prosecutor's duties to warn the witnesses of areas that you couldn't go into.

Tipping J Was not that a fairly, well perhaps we'll come back to that Mr Lithgow, the correctness or otherwise of that stance, we'll come back to it.

Lithgow Yes. That the Crown then turn on their witnesses and say, another red herring you might be invited to chase is that you'll be asked to consider 'N' and 'J'.

Elias CJ Where are you reading from?

Lithgow I'm reading the summing up of the Crown which we were given at the appeal.

Elias CJ Well we haven't got that.

Lithgow We were only given that on the appeal itself. I thought that it had become part of the.

Elias CJ Well I've asked for the record and the only things that I've received were the Affidavit of Defence Counsel.

Lithgow We were given the typed version of the closing address for the Crown on the day. And I'm just reading from that and I can certainly provide that to the Court. And this is paragraph 50. Another red herring you might be invited to chase is that you'll be asked to consider 'N' (that's the sister) and 'J' (that's the flatmate), 'J''s evidence of there not being screaming and how they heard it, they would immediately have intervened and so when they heard 'E' scream when Noti was in the room. You might think all that evidence suggests to you is that 'N' and 'J' either mistook with tragic consequences for 'E' (that's the complainant) what they were hearing, or callously sat there and allowed 'N''s brother, 'J''s friend and business partner, to rape 'E' and 'J' only intervened when she realised there might be a second incident and she thought that was too much. And then he repeated that at paragraph 55.

Elias CJ Well we'll need this.

Lithgow Yes, 'N' and 'J' were either mistaken or they callously sat there and allowed 'E', whom they had only known for a few months, to be raped by their friend and 'N''s brother. Now my submission.

Elias CJ That's not the way the Judge summarises the Crown case. There's no reference to callousness.

Lithgow This is the Judge in the trial?

Elias CJ Yes. He says either they were mistaken or they did nothing, I suppose leaving open the inference that they were acting callously.

Lithgow Well he may have been reluctant to use that word in the circumstances.

Elias CJ How did that summing up get before the Court? Was it just handed in?

Lithgow Well I don't know, if you haven't got it perhaps it wasn't handed up and that I'm mistaken. We were certainly given it and we had read bits of it, so if it hasn't been handed up and the Court wants it and the Crown has no objection to you having it, that can be done.

Elias CJ Yes, Mr Pike, do you have a copy of it?

Pike We're speaking of the Prosecutor's closing?

Elias CJ Yes.

Pike Yes. But only by reason of the fact that we have the prosecutor's file.

Elias CJ Yes.

Pike It was on there, it was never suggested it became part of the record. It's only serendipitous.

Elias CJ Yes, I see, perhaps Madam Registrar we can get the full file from the Court of Appeal. Thank you. Yes carry on Mr Lithgow. We'll need it now so if you could advise the Registry to get it.

Lithgow Now I seem to have sort of ended up at the end again. I could follow the matrix of the legislation and start that now and get back to what we were talking about if you would prefer or we can just take everything as it goes and see where it leads.

Elias CJ Well we're not anxious to take everything as it goes because we could end up anywhere Mr Lithgow so follow the, direct yourself to the question that we have to address, which is whether it falls within the criteria in the Supreme Court Act.

Tipping J Is the key point, or one of the two key points, the suggestion that the error of Counsel in not eliciting this evidence, or at least attempting to, should be examined in the Supreme Court against what is the correct test to mesh Counsel error or default with miscarriage of justice?

Lithgow Yes, well I have to say that the Court of Appeal neatly side-stepped that by finding **Paparahi** (**R v Paparahi** (1993) 10 CRNZ 293) not

providing it to us. I don't accept that **Paparahi** has any relevance on the facts of that case. They then.

Tipping J Just before we move onto the detail, have I essentially got it correct?

Lithgow Yes.

Tipping J One of the points?

Lithgow That's one of the main points.

Tipping J Yes.

Elias CJ What's the test that you say should be applied?

Lithgow In relation to, we're talking now about the.

Elias CJ Counsel error.

Lithgow Counsel error. Counsel error, the test, the whole matrix of radical error should be abandoned and the test that is set out in **Labrador and Bernadetto** (**Bernadetto and Labrador v Queen** [2003] 1 WLR 545) which is not a capital case, so doesn't have those requirements, which is quoted by the Court of Appeal at paragraph [65] of **Labrador and Bernadetto** and the touchstone should be the proposition which the Court of Appeal left off their quotation, a defendant should be punished for the crimes he has committed.

Tipping J At paragraph what of **Bernadetto**?

Lithgow [65] of **Labrador and Bernadetto**.

Tipping J Thank you.

Lithgow And it's the last sentence.

Tipping J [65].

Lithgow On page 29 of that case.

Tipping J Yes thank you.

Elias CJ For the crimes he committed, not.

Lithgow Not for the failure of his representatives to conduct the defence as they ought.

Elias CJ Yes, well I think everyone could accept that proposition.

Lithgow Well I thought they had at the hearing but I don't see that they have in the decision. I mean they did accept it at the hearing.

Elias CJ Mr Lithgow, that's not a test. What do you say the test should be if it's not radical error? Surely it has to be error which is material?

Lithgow It has to be material to a miscarriage of justice.

Elias CJ Yes.

Lithgow And be the source of a miscarriage of justice.

Elias CJ Yes.

Tipping J Would it not be something like failure or error of Counsel giving rise to a real risk of a miscarriage of justice?

Lithgow Something like that.

Tipping J Something like that. But the real risk test is a familiar one in the miscarriage of justice jurisprudence.

Lithgow In fairness to the Crown, in this Court they provided a reference to a decision of the Privy Council from an appeal from Jamaica, **Palmer v The Queen** [1997] UK Privy Council 27, 26/6/97. And although they don't articulate it exactly, as I understand it the Crown are accepting here that the overall interests of justice would ultimately be the test. I think that's what they're saying. And I originally had difficulty finding **Palmer** and persuaded myself it wasn't so important just because I couldn't find it. But I've now got a copy of **Palmer** and I would like to add **Palmer** to the cases because it actually is a very basic case in which defence Counsel failed to press the issue of a written statement that could have arguably been before the Court and which put a verbal statement into a better context for the accused. The Privy Council remind the prosecutor of their duty not to let these things occur even if defence Counsel don't press them. But the interests of justice are the ultimate determinate.

Tipping J What's the citation for **Palmer**?

Lithgow Well, I'll take it, it's **Palmer v R** [1997] UK Privy Council 27, 26/6/97 and I've managed to get it downloaded and I could hand up copies now, I'm not asking Your Honours to read it now. But it's perhaps more useful than just the point that the Crown refer to. (Judgment handed up). I don't believe it has, for reasons unclear, doesn't appear to have become a so-called official report.

Tipping J Is there some particular passage that you wish us to refer to Mr Lithgow? On the question of Counsel error and miscarriage of justice?

Lithgow Well it's really just the whole of paragraph [15] to the end.

Tipping J Thank you.

Lithgow Sorry, and my learned friend also, looking at the top of that page, dealing with the basic proposition, contrary to this expectation neither the judge nor the jury ever saw his written statement. Their Lordships do not propose to dwell on the failure of the defence Counsel or of the prosecuting Counsel, who is after all a minister of justice, to deal.

Elias CJ Is this where that expression comes from?

Lithgow What's that?

Elias CJ That's in the Submissions, minister of justice.

Lithgow Minister of justice comes from I think a Canadian case in the 50's I think.

Elias CJ Oh right. Yes, yes it does, you cited it.

Lithgow We used to have it stuck to our wall at Crown Law. Their Lordships do not propose to dwell on the failure etc of prosecuting Counsel, who is after all a minister of justice, to deal with the unfair position that has arisen. They simply deal with the result. And in this case the result is important. We can analyse it in various ways and I've started with the proposition that the appeal, I've split 13(2)(a) into the first proposition, the appeal involves a matter of general importance. And I say that.

Tipping J The ultimate conclusion Mr Lithgow I think, to try and cut through this, is that in the last paragraph but one, Their Lordships say that the app'E'nt was deprived of the substance of a fair trial. It's a fair trial combination of points giving rise to a trial that Their Lordships did not see as fair.

Lithgow Yes well I don't think Mr Sungsuwan got a fair trial and I think the system could have provided a fair trial, even with all the rules and material that we have.

Elias CJ Well I'm prepared for the purposes of this argument to accept what you say about the correct test. But you will need to persuade me of that last proposition that there was any material error which bears upon risk of miscarriage of justice.

Lithgow Well I've split it, dealing first, I will get to that, but firstly dealing with general importance. The general importance heading as it relates to this case being something that will come up in other cases and not be wholly restricted to this case.

Elias CJ What passage from the Court of Appeal Judgment do you say is in error? Can you just remind me of that?

Lithgow Well in relation to, this is in error, in relation to s.23(a).

Elias CJ No, I just mean in terms of the wrong test you would say to Counsel error.

Lithgow Well the first, at paragraph 21, we're dealing with 23A, Ms Ord did not apply for leave to call the evidence. There can therefore be no criticism of either the Judge or the prosecutor that this evidence was not called. Now I don't accept that as a commencing proposition. The potential evidence was known to defence Counsel but she did not make the application. It was also known to the Crown. This ground of appeal can succeed only if it is shown that defence Counsel, in failing to apply, made a radical mistake or blunder (see **Pointon** (**R v Pointon** [1985] 1 NZLR 109 (CA)), I don't accept that. Mr Lithgow shied away from accusing Ms Ord of having made an error of that sort. Now that's because, as I discussed with the Court and I had understood they accepted at the appeal, that the question was simply the interests of justice. But that must be in truth the focus on this ground of appeal. It is not a recognised ground of appeal simply to point to other evidence which might have been called. Well that's alright as far as it goes. It doesn't deal with the interests of justice question. At least in circumstances where such evidence was known to Counsel at the time of the trial.

Accordingly this ground of appeal raises the issue of whether defence Counsel's failure to seek leave under s.23A amounted to a radical error. It appeared, and Ms Ord deposed, that she had assumed that it wouldn't be allowed in, as had the Crown. Because there'd been a previous trial and the Judge assumed that such material wouldn't be allowed in because at a place in the evidence where a witness looks like saying such a thing, the Judge stops them.

Elias CJ Well she does say it clearly doesn't she, the first witness. She gets it out.

Lithgow That's page 120 I think.

Elias CJ I heard this sort of sound before.

Lithgow Yes, but she isn't allowed to say the critical thing is that she has heard this woman make these noises previously when she had her live-in boyfriend and lived in the flat.

Tipping J You mean it was left because of a perceived difficulty with admissibility? It was left on the general rather than the particular basis?

Lithgow Yes we don't know whether she'd been watching Mobil Masterpiece Theatre or watching adult videos or she had an exciting life of her own. But it wasn't made on the basis that the flat considered her, not as a criticism, but extremely noisy having sex and that they would have to make themselves otherwise occupied to.

Elias CJ Well it really doesn't go that far, you're embellishing.

Lithgow Well I'm embellishing it because the Police were provided with material that said exactly that. And they refused to use it.

Elias CJ Well it doesn't. This witness talks about moaning and groaning and says that what she did.

Lithgow Well this witness is limited to having, she wanted to say she'd heard her like this before.

Elias CJ Well she gets out the evidence that supports the defence contention. What you're talking about is subsidiary or collateral evidence which might make it more believable.

Lithgow Well it's not.

Elias CJ If it were challenged.

Lithgow Well it's not collateral because.

Elias CJ Well it's not directly an issue.

Lithgow The Crown made it an issue in their final address that these people heard the noises and knew jolly well that she was being raped and did nothing about it, let it happen.

Elias CJ Well that's a slightly different point I think. But just dealing with it on the basis of the evidence not coming in, leaving aside the question of what prosecuting Counsel made of it, the evidence that mattered came in. Their belief that this was consensual sexual activity. They may have had a number of reasons they could have used to substantiate their experience and their qualification to express that opinion that may not have been confined to having heard the complainant on the previous occasion.

Lithgow Well that's fine and that's no doubt what may have been pondered, but they had told the Police the reason why they thought those noises were consensual sex is because they'd heard her making those noises having consensual sex before.

Elias CJ I know, I accept that.

Lithgow So that's the, the evidence they wanted to give. They didn't want to give evidence that they'd seen this on TV or that someone else they knew carried on like this.

Elias CJ It's still a makeweight. It's still something that may, if that evidence were challenged, give some substantiation for their opinion. But their opinion was given in evidence.

Tipping J The opinion was challenged.

Lithgow Yeah.

Tipping J And they were actually accused in part anyway of lying.

Lithgow They were accused of lying, they were accused of allowing a rape to take place in circumstances where it was obvious they had authority over the people involved because on the Crown theory the moment the girls walked into the room a second rape stopped.

Elias CJ But that's prosecutorial misconduct perhaps, not, I'm trying to identify the different aspects. One is whether there was defence Counsel error in not cross-examining on this. Another might be that the prosecution, knowing that there was further substantiation of the opinion, should not have made that submission.

Lithgow If we just go back to the essential harmlessness of simply telling the jury the truth. The simple proposition that we know it, she's our flatmate, she was our friend, something bad's happened.

Elias CJ The second witness doesn't say anything like that. The second witness says she's met her twice.

Lithgow Yes.

Elias CJ And the second witness says she heard screaming. The first witness says she heard moaning and groaning and that that was consistent with consensual intercourse and that she'd heard those sounds before. There's actually quite a variation on the witnesses' accounts.

Tipping J Presumably the second.

Lithgow All in other languages of course. And bits of it.

Elias CJ That's a different point Mr Lithgow. You must be distinct. If you're asking us to say that there are grounds for granting leave to appeal, address them. They may be cumulative but don't make it too much of a mess or we won't be able to follow it.

Lithgow Well the point I want to make Your Honour is that there was this, there were two people there who were ear witnesses and who knew the

people involved. And they were available to just give evidence. For some reason that evidence was constrained and sculpted because of a perception that saying that this woman was noisy having sex, that there was something inherently wrong in our system with letting that little piece of fact sneak out.

Elias CJ Well even accepting that proposition that there was no harm in letting that come in, why is it such an error? Why is it an error that gave rise to miscarriage of justice?

Lithgow Because the Crown was saying those noises meant she was being raped and the defence was saying, if you knew the full story.

Elias CJ No, but the Crown wasn't saying that. The Crown led evidence that these witnesses believed it was consensual sex and then made the submission that they were mistaken.

Lithgow No they led these witnesses to, well we don't know why they led them, we know what they used them for in the end. But they led them because they were directly involved in all the surrounding events. And their very knowledge of the parties was critical to understand the social interaction of young people in a multi-cultural flat where the lingua franca was English but they all spoke, mainly spoke other languages. So they get them there for that purpose. They're happy with these witnesses except when they say something which the Crown don't want to believe might be true. And suddenly they are attacked and that evidence is all wrong and they're not allowed to, and they rely on, as a shield, s.23A and then use it as a sword to attack both the witnesses and the accused.

Tipping J If it had been confined to mistaken, I think I might have been a little more relaxed Mr Lithgow. But if the Crown, as appears to have been the case, added for good measure that these witnesses were lying, inferentially if not directly, then there does seem something inherently problematical in not permitting to give evidence which might have shed a light on it that the jury would have benefited from. Who knows what the jury would have made of it but at least, they're being claimed to be liars in circumstances where they haven't been allowed to tell their full evidence.

Lithgow Well exactly. Now if the defence had done that the Crown would quite rightly at the end of the defence closing asked the Judge and the Judge would almost certainly tell the jury, none of this was put to these poor witnesses, he's accusing them of this that and the other, none of this was put, they weren't given an opportunity to answer that, and that's exactly what's happened here. And I say that is a matter, the treatment of witnesses in that way, is a matter of public importance because we drag these people from the.

Elias CJ That's the separate issue of prosecutorial misconduct. I'm still bothered about, because you were lumping it all together.

Tipping J Well I may have contributed to that.

Elias CJ I'm still bothered about it, and I'm interested in that. I actually think it is probably the better point you have. But I'm still trying to understand where the miscarriage of justice arises simply in the conduct of the defence case in not seeking leave to cross-examine on this point.

Lithgow Without that evidence.

Elias CJ But the defence had the evidence. The defence had the evidence that these two witnesses believed it was consensual sex.

Lithgow But the jury did not have the evidence as to why their opinion was worth anything.

Elias CJ Well where's the, that's what you have to convince me of, that this subsidiary issue amounts, this subsidiary issue going to their credibility in the matter that, leaving aside the submissions on prosecuting Counsel, wasn't challenged. It was evidence that suited the defence to have.

Lithgow Well if it was in truth her way of having consensual sex then it went directly to actual consent. Not what Sungsuwan thought or didn't think.

Elias CJ I think. Alright, that's probably as far as you can take it as an assertion. I would have been assisted by some consideration of principles on evidence on this point Mr Lithgow but if you're not able to advance it any further, that's fine, I understand your argument.

Lithgow Well I don't know that I can't advance it, but I'm just struggling to get clear exactly. There's two possibilities, that it's evidence about them, the witnesses.

Tipping J Isn't it this, Mr Lithgow, trying to assist your position without expressing a view? That this was a significant piece of evidence for the defence obviously. And what has happened is that the defence has been deprived of what some might say was a good opportunity to enhance the credibility of the opinion that was being expressed. And that might have meant something to the jury.

Lithgow Well if these witnesses' credibility can be enhanced, then it also relates to other parts of the evidence. It's very important that these witnesses are believed on the critical issues from the defence point of view.

Tipping J But you can't put it any higher can you? There's no, with respect, no sort of point of evidence law involved other than that your client was

deprived by the failure of his Counsel as it is put of improving his defence.

Elias CJ Well I think I preferred it the way you put it before, deprived of enhancement of the credibility of witnesses who assisted the defence.

Lithgow Well I think the answer to Your Honour's question, and if I'm getting it right, and that is I've called them ear witnesses, that's because someone else called them ear witnesses in the Court of Appeal. They're ear witnesses because their closest analogy is eye witnesses. And if an eye witness is to be challenged, doesn't matter when, challenged as to why they believe a person is such a person or why a thing is such a thing or a place is such a place, they are entitled to say why. And it may be that they have to refer to other events. Now it's exactly the same here. Except the Crown didn't make the challenge until after the witness had left the witness box. But, knowing that he wanted to undermine that aspect of their evidence or those witnesses in total, that evidence should have been there. That's the evidence point, that it's analogous to eye witnesses and with eye witnesses. For example, an eye witness of let's say a minor sexual assault in the street, in a normal case they'd only be allowed to say, well that was the man that did that to me on that day. But if they're challenged on that they're entitled to say, and he did it to me yesterday as well and the day before and I know who he is because he comes to our house.

Elias CJ Well but that's the point, if it's challenged. And that's why I am having difficulty understanding why you say this was defence Counsel error.

Tipping J Because with respect it was inherently challenged by the nature of the case against him. In other words, any evidence that it was consensual sex emanating from the Crown was bound to be challenged. Because it was inimical to the Crown case. That's the perception I have on it.

Elias CJ But the evidence, well anyway, I understand it all.

Tipping J Is an example this, Mr Lithgow? That say the question is whether A can identify a particular woman. And he says, yes, I know who that woman was. Why? Oh, I've been having sex with her for three months.

Lithgow Yes.

Tipping J On this thesis you wouldn't be allowed to say that.

Lithgow No, no. Or if I recognise the voice. How do you recognise the voice? Because she sleeps in the room next to me and when she makes love I hear her say that strange word.

Tipping J Don't get confused I'm necessarily with you Mr Lithgow, but I'm just trying to sort of tease it out as we go along.

Lithgow No that's correct, it is exactly that and Your Honour puts it correctly that some things are challenged specifically and some things are challenged inherently by the nature of the allegation. And that is correct in this case. So I say that a look at that is, a look at 23A in those terms, and the way in which the District Court Judge has perhaps in particular.

Elias CJ I'm just trying to think practically. How would the prosecution have challenged its witnesses on this point?

Tipping J Well they couldn't cross-examine them because they were obviously not hostile. So all they could do would be to ask the jury to disavow them as they're entitled to do. But it's going a long step further to say you must disavow them because they are lying as opposed to mistaken. I've never heard of a case frankly where a prosecutor has actually accused their own witness of lying. I've heard plenty of cases where the Crown tries to get round difficult witnesses by saying they're mistaken. If they're actually going to allege that they're lying, the question emerges as to whether they should have called them in the first place and not turned them over to the defence.

Elias CJ Which is why I see the best point is the prosecution misconduct. But I can see that it can be turned around because the, well I don't know that the defence could fairly have assumed that the prosecution would have come up with the submission that they had lied.

Lithgow Well if we just start the case again from the beginning, the trial. Because of being an experienced trial lawyer and the Judge was a very experienced and straightforward trial Judge. And yet everyone appears to have assumed that this was verboten. Now if that assumption is held by experienced people who do trials just as a daily work, then it's my submission that is a matter of general importance and this Court should say something about it because it's gone too far to say that you somehow need to protect the woman from the information that they make a bit of noise having sex in a flat where they all live together.

Elias CJ Well plenty of other things touching on her previous sexual experience did come out in the evidence. The fact that she was on contraception and the fact that she was living with her boyfriend in the flat and many other allegations. So it was hardly earth shattering in context.

Lithgow But I submit that that is the prissiness that's going on in the real world and this Court is in the position now to say something about it.

Elias CJ We don't have a Ruling on it though Mr Lithgow, you're really asking us to speculate as to what was done there.

Tipping J I can't imagine Mr Lithgow, if this point had been put at issue and defence Counsel had asked for leave precautionally to cross-examine along these lines, trying to put myself into the position of the trial Judge, in the context of what the key issue was, I would have been surprised if this had been ruled out.

Lithgow Alright, well let's just take that point.

Tipping J Is that, I just put it forward for debate, but it seems.

Lithgow Well I'd like to think so but how does that sit with what the Court of Appeal did and said we won't even look at that issue and yet you see it as one which probably could be answered with a few moments' thought.

Tipping J But did the Court of Appeal actually say they would have let it in?

Lithgow No.

Elias CJ No.

Lithgow They refused to look at it.

Tipping J They wouldn't look at it?

Lithgow No.

Tipping J Well surely it's fundamental to whether Counsel made this egregious error. But if it was definitely going to be excluded then obviously there was no error.

Lithgow That's just my fantasy. If it's definitely going to be excluded then it's a nice point but it's not going to work.

Tipping J But I would have thought the premise was that if this evidence was good for the defence, there should have been at least an attempt made to elicit it and if the Judge had ruled against it, that could have been a point on appeal and so forth.

Lithgow Yes. Alright well I put that under the heading of general importance because that's something which has general application, a bit of a think through on all that.

Elias CJ But can you just direct us to the passage in the Court of Appeal Judgment where you say they wouldn't engage on this point? It's because they don't consider that there is Counsel error is it?

Lithgow What they do is, and without calling a spade a spade, I blame the appellant Counsel in the Court of Appeal for this. Because the trial Counsel set out why she didn't make the application. But appellant

Counsel apparently successfully persuades the Court of Appeal that there was a downside to the admission of this evidence which is bewildering. Quite apart from the fact that defence Counsel never suggested that that came into her thinking at all. But there was a downside and that therefore it was a classic Counsel decision such as in **Paparahi** (**R v Paparahi** (1993) 10 CRNZ 293) where, this is starting at paragraph 37, where Mike Bungay made a decision in relation to.

Elias CJ Sorry, what are you saying, what's this in aid of? You're saying that trial Counsel made what determination? She says in her affidavit she just doesn't think she would have got leave.

Lithgow Yes, now the Court of Appeal invent or adopt the invention by the Crown of downsides to a successful application, therefore making it appear as if she'd made some kind of decision based on the pluses and minuses of having evidence in. Now she made no such deposition.

Elias CJ Oh I see yes. What paragraph reference is that.

Lithgow Well we start at 37 and we deal with, there's a reference to **Paparahi**. Now in **Paparahi** defence Counsel had an opinion about the law that may well have been correct. That is that if a person gave, if an accused gave evidence, they may be able to be cross-examined on a statement that had been excluded.

Elias CJ I'm sorry, I've found the reference, it's in paragraph 44.

Lithgow Yes. So then that case was very very different. And they then say the jury may well have been unimpressed by this line of cross-examination etc. These were no doubt important considerations which an experienced Counsel such as Ms Ord would carefully weigh before going down this track. Which is all conjured up out of nothing.

Tipping J Well to say there was no doubt when she didn't actually say it, seems a little odd.

Lithgow Well she was available, the Crown spoke to her, the Crown could have deposed to that. The Crown could have had her there to discuss it. That comes from nowhere. And is unfair and that is a matter of general, sorry, no I'm not making that a matter of general importance, but the applicability of **Paparahi** is. But what is of general importance is the Court of Appeal's refusal to consider whether or not a 23A application would have been likely to have been successful using that excuse. And my submission is the appeal Court should have faced up to that. They should have faced up as to whether or not the 23 application was a likely goer.

Tipping J Mr Lithgow, this is all wrapped up with the proper test isn't it? If the proper test is radical error, then what the Court of Appeal are saying is that it wasn't a radical error because you know it's not sort of an open

and shut point. But if the test is the one that you're suggesting then one has to look at this question through a different lens. Therefore you can't really quite entirely separate this issue from what the correct test is can you? If the correct test is as you assert then obviously this approach in paragraph 45 is hardly correct. But if it is the correct test then it's a relatively conventional way of applying the test. But you're not going to succeed unless we think it is reasonably arguable that the test should be revisited. On this point I mean. So you have to say, don't you, that on what I assert to be the test, that is not a proper approach.

Lithgow Yes, but there's two points to it. One as to whether or not there were pluses and minuses to a 23A application and that just came from nowhere as against the radical error decision.

Tipping J Yes, I understand that point.

Lithgow Now.

Tipping J They've ascribed to Ms Ord a process of reasoning which she herself does not espouse.

Lithgow Exactly. But then.

Tipping J Which is odd.

Lithgow And then they have refused to look at the interests of justice issue because they wouldn't look at whether or not this material would have been in if someone had asked. Now until you've faced that, until a Court faced that, they were in no position to decide whether there were interest of justice issues or not. The radical, Counsel radical error which applies only to defence Counsel is, I would like to argue on appeal, and to this Court, an unnecessarily dainty drafting mechanism, I mean as in drafting sheep. They just try to make quite unnecessary obstacles and create unnecessary tensions with defence Counsel who are forced to defend their own, or are naturally inclined to defend their own processes. Otherwise they're criticised, rather than simply looking at what happened. Did that create an injustice? Now this doesn't mean that all these defence A and defence B second thoughts can suddenly succeed. If people go about the trial in an orderly way and they decide on plan A and if plan B looks better because they're convicted, they don't get a second chance simply because they chose the one that didn't succeed. You still have to show that it may well have led to a miscarriage of justice. And I say that that's what the Privy Council are doing.

Elias CJ Why is the radical error test not simply to be seen as requiring appreciable risk of miscarriage of justice?

Lithgow If it is accepted as meaning that, and I think the Crown would accept that as from their submissions as I understand it, then there's nothing the matter with that if that's all that radical error means. But here they've, well by various application of street skills, the lack of a decision by Counsel has by an absorption process of what would be likely to succeed, is suddenly treated as a decision based on weighing the downside of succeeding. That's what you get into if you're trying to judge the Counsel rather than the point.

Elias CJ Mm.

Lithgow And I would as a defence Counsel I suppose, and also having had to deal with defence Counsel in this position for the Crown and for the defence, my submission would be that the defence Counsel should simply provide their evidence to the Court directly and not on behalf of one or other party, both parties have access to them, and that it be dealt with on a what happened basis, not on a blame game basis.

Tipping J Well presumably the high threshold of radical error was adopted, and I'd say deliberately high because I think at least unconsciously it is higher than real risk of miscarriage of justice, was adopted out of a fear that it would open the floodgates to retrials because Counsel can always be seen as having made a bit of a blue or to have done something better etc. But you're saying that your argument will be that it doesn't have to be that way. That it is capable of framing a less dramatic test to do justice while at the same time serving the public interest. That's really what we're going to have to look at isn't it? If the case goes forward on this point.

Lithgow Yes, well if it becomes a feature of a Supreme Court case, I would like to, I would intend to raise the more general argument that the appeal courts in relation to trials are just so out of date with the obligations they impose on other professions. They allow the most wide range of competencies to be justified when severe ramifications occur and yet the same courts impose quite detailed obligations on other professions to get things right. So I think this is a protective mechanism against accepting the human and very rough and ready nature of criminal jury trials. It's a mechanism which has passed its use by date. But this appeal doesn't depend on that.

Tipping J If it goes forward, we would have to look at obviously the Privy Council. We'll have to look at Canada, Australia. You haven't got any material that suggests that our present approach is seriously out of international line or anything. It may be, I don't know. But there's nothing before us about that is there?

Lithgow If they, well I had understood that from the appeal because they appear to accept that. But then when what's happened happened with the decision and when they leave off what I consider to be the critical part of **Labrador and Bernadetto** which was quoted to them and they had

in front of them, that the critical issue is the trial of the accused, the fair trial of the accused, not what Counsel managed to achieve or failed to achieve.

Elias CJ If you get there on miscarriage of justice though, you don't need to establish trial Counsel error. If evidence should have been before the jury, the appeal point will be good won't it?

Lithgow Well I agreed, I was just provoked into giving my views about what the problem with that test is. And that is that I believe it's a barrier to determining appeals on the basis of what happened at the trial without getting personal about it to individual Counsels' behaviour. And for the Court to have to characterise, as they would have had to in this case, someone that some of the Judges knew as making a radical error, creates a mental obstacle that is totally unnecessary.

Tipping J The question ultimately must be in terms of section, what is it, 385, whether there has been a miscarriage of justice on any other ground.

Lithgow And that covers every part of it and yet this subset of little rules to avoid ordering retrials has somehow developed as though it's in the statute. Whereas the only thing in the statute is miscarriage of justice. Anyway, I get a bit excited about that but there you go.

Tipping J By judicial decision it is real risk of a miscarriage of justice isn't it? You don't have to show an actual miscarriage of justice.

Lithgow It's risk.

Tipping J You have to show a real risk.

Lithgow Yes, may have occurred.

Tipping J May have occurred.

Lithgow And I say that the Privy Council, and **Bernadetto** is interesting. **Labrador and Bernadetto** because it wasn't a death penalty case although **Palmer** I suspect was from Jamaica. They see a much simpler way through all this.

Elias CJ If though the real question is the objective one of whether there is a real risk of miscarriage of justice, it is open to the Court to look at presumably some of the issues canvassed in paragraph 44.

Lithgow Well that's where it's a clear, where it's a decision, a choice is made between plan A and plan B. But this wasn't that sort of situation. It was in **Paparahi** arguably but it wasn't in this case.

Elias CJ It's not a tactics question.

Lithgow No.

Tipping J No.

Lithgow I mean sometimes Counsel may have to face criticism of their tactical decisions and the Court may look at, or they had to make one decision, the case required a decision and tactical decisions have to be made and we don't revisit every tactical decision. But if the tactical decision or whatever label you give it could have led to a serious miscarriage of justice or whatever precise wording, then the Court should think long and hard about it.

Tipping J Your knowledge of the background to this radical error test would be much better than mine Mr Lithgow. But am I right in thinking, and I'm not confident about this, but the radical error test developed out of an anxiety not to allow tactical choices if you like to be revisited after trial. And that in a sense it's spilled over into the whole jurisprudence if you like. I may not be right on this but I just have a feeling. Some of those very early cases, **Pointon** of course was quite an old one now but anyway, we can perhaps look at that if we need to.

Lithgow I think that, and this Mr Pike would know a lot more about the history of the expression radical error, but I'm accepting what Your Honour says. But I think it has to be seen against what nostalgically is called an older and simpler period of trials where the accused, and I look at **Paparahi**, and having acted as second Counsel to Mr Bungay, the idea that the accused would be actively involved in decision-making about the trial was a very different scenario. The accused did what they were told. And the amount of material that you were given, the disclosure was completely different. The amount of technical rules in relation to sex cases was completely different. And I just wonder if it is something which belongs to an era that has gone. Because so many of those trials were conducted with very limited preparation which also reflected legal aid at the time. You might only see the client on the day before the trial and that would be considered unremarkable but absolutely unacceptable now. You'd go in and you'd bat a few witnesses around and you'd then make a very moving closing address. That's not the kind of trial, that's not the trial process now. It's a different thing. Ms Levy no doubt speaking from the heart says, and appellants didn't have word processors in prison so they could write down everything you'd done wrong.

So 23A, the appeal process itself which I said should have faced up to it. **Paparahi**'s got nothing to do with it and shouldn't have been used and if it did have anything to do with it, we should have been sent it. And there's also of general importance the issue of the recent complaint.

And it also is important to see the way in which the Crown used it. Now she was a Chinese woman living in a mixed cultural language flat

with her boyfriend and there was a person who was a nominal head of the flat and she'd been intending to travel up north with them the following day. She chose to make her first complaint to, attempted to contact one man and did contact another man. Now that's just what happened. The judge determined that the recent complaint was, that that complaint had inherent complications because it was just uncertain exactly what she was complaining of. But she certainly felt able to say to her male flatmate that there was blood in her pussy, is the expression she used. So whatever else there was, she wasn't shy of being explicit. The inconsistency contained in that interchange was the proposition that she complained about two men coming into her room and somehow, and doing something to her. Now so the Judge disallowed that complaint and allowed a later complaint which was a nice tidy complaint which was made almost as she was heading to the Police Station.

Tipping J You mean he disallowed the first in time but allowed the second in time?

Lithgow Allowed the second in time which was no more than a, she went off with a girlfriend who had in the car her boyfriend who they all knew was going to be a Policeman and they all went off to the Police Station and they told, she told her complaint to them and repeated it at the Police Station within a short time.

Tipping J Sorry, I'm being a bit slow here Mr Lithgow. Why did he disallow the first in time which you would have thought would have been the one that, did it not amount to a complaint?

Lithgow Well he wasn't sure that it was clear what exactly had happened. Alright. Now the Court of Appeal come up.

Elias CJ Which Ruling is it?

Tipping J Ruling Number 4 I think. Might have been Number 3.

Elias CJ Yes it's 3 I think.

Tipping J Is it?

Lithgow Is it 2? It's Ruling Number 2.

Tipping J Oh, if A was proceeding on an assumption then it may have been the complainant did not in fact make any complaint of rape or of sexual assault at all. Did he hold a voir dire to find out?

Elias CJ Yes he did.

Tipping J He held a voir dire later. I can't quite follow it from the Court of Appeal.

Elias CJ I can't quite follow it from the Rulings. I think it's this one.

Lithgow He held a voir dire after one witness, before another.

Tipping J Was this the complaint to the male who was the second person she spoke to because she couldn't get hold of the first?

Lithgow Yes.

Tipping J And the tenor of it was what? I've been raped? Or was there some debate about, was she complaining of any sort of sexual attack?

Lithgow She was complaining about two men coming into her room and there was blood in her pussy so she was clearly talking about.

Elias CJ And he made the assumption that she was complaining of rape from that. Was that right?

Lithgow Well if you put it like that. They lived together. They flatted together. They knew each other and they had a telephone conversation and he got the guts of what it was she was complaining about which was right.

Elias CJ I think we need to know exactly what was being said here.

Lithgow If you look at page (ix).

Tipping J Where it says, she must have said to Dorian that I've been raped?

Elias CJ And Dorian was not available, was that right?

Lithgow Originally yes. She spoke to Dorian in the car. They headed off north without her. Spoke to Dorian in the car and he handed the phone to the other one.

Elias CJ Dorian Gray, amazing.

Tipping J Dorian Gray?

Elias CJ Yes.

Tipping J Really. Shades of a different type of problem. Did the second one overhear the conversation that she was having with Dorian, presumably by cell phone?

Lithgow They were working it out together, that's right. He didn't actually hear it, they were pooling their information.

Elias CJ Well as a result of what Dorian said to you, did you make a phone call to your flat at Wellington. Yeah, I made several. And then says that

he tried to calm her down and, are you hurt, are you in immediate danger. Dorian had told me, I think she's been raped. And then he says, I mean Dorian said to me, I think she's been raped, so she must have said to Dorian I've been raped. She didn't say to me I've been raped. I just asked who did it and just assumed that it must have happened.

Lithgow Yes, and in fact before that she'd tried to get hold of a third male who was Richard.

Elias CJ And he then says these two friends.

Tipping J Where does the blood on the pussy come from into this sequence Mr Lithgow? I'm just trying to get a feel for the context of it. Because it's somewhat unconventional recent complaint but, to rule it out altogether when it has the two males connotation, that's the point isn't it? That's your principal point. It has the two males so it could be said to be inconsistent and therefore helpful to you to show she said something inconsistent previously.

Elias CJ There's a further Ruling on whether that evidence could be called so she could be cross-examined.

Lithgow On page 156 there's the discussion with Dorian.

Elias CJ Sorry can we just have a moment here? (Judges confer)

Lithgow Now just to get this into perspective, if Your Honours see in page 156 of the Case on Appeal.

Elias CJ Well unfortunately, I don't know why but we don't get supplied with this and I've only just asked for it this morning. So we only have one copy here. I think we should in fact get them as a matter of course.

Lithgow It wasn't clear that we were meant to provide those as part of it.

Elias CJ No.

Tipping J No, it's fair comment.

Elias CJ Well we're looking at 156, what are we?

Lithgow That's what led to the Judge's concern and why he held the voir dire.

Elias CJ Oh I see the voir dire's in the course of the trial, is it not at the beginning?

Lithgow No. This is what triggers it.

Tipping J Who's evidence is this we're looking at here?

Elias CJ Mr Dorian Gray. Ah, I see.

Tipping J I recall her saying presumably.

Elias CJ Yes, Mr Lithgow.

Lithgow Now I'll just get this into perspective. There's one problem with the Judge's decision itself and we raised that on appeal and so far so good. We win that but the more important problem is that the Court of Appeal said, given that the purpose of recent complaint evidence is to demonstrate.

Elias CJ Paragraph? It's [60] I think. That's the heading.

Tipping J The trouble about a recent complaint heading is that this isn't only recent complaint, it's a question of cross-examination to show inconsistency as well is wrapped up in here isn't it?

Lithgow Yes.

Elias CJ And they identify that but.

Tipping J But the purpose of such evidence is different and the criteria of course are entirely different.

Lithgow Now I'm looking now at paragraph [78] and I say that, it's not suggested that the recent complaint part of this case would carry the day at the trial, but if we look at [78]. In those circumstances it was not wrong for the Judge to exclude A's evidence on a recent complaint basis as it was not clear what E was complaining about. Now that's the decision. So that's alright. Given that the purpose of recent complaint evidence is to demonstrate consistency, if accepted by the jury, if a complaint is insufficiently precise to provide a basis for consistency, it is proper to exclude evidence of it. Now that can't be the law.

Tipping J It's proper to exclude evidence of it as recent complaint but it's improper to exclude evidence of it as demonstrating lack of consistency.

Lithgow Yes but I mean it just makes it a tool solely of the Crown which can't be right. So that's a mistake the of Court of Appeal which should be corrected by this Court even though, as I say, it's not the point of this case. Now this is the.

Tipping J Well hang on. Is this statement not really made in the context of the evidence as recent complaint evidence? Is there any discrete discussion of the problem that defence Counsel tried to cross-examine and was prevented from doing so? And the purpose of the cross-examination was to show inconsistency as I understand it.

Lithgow Yeah.

Elias CJ Well it is identified as a distinct question in paragraph [60] and [61].

Tipping J But do they wrap it all up in this one conclusionary paragraph.

Elias CJ Yes.

Tipping J Oh well that's a problem.

Lithgow Which is wrong. Now this is how the Crown used it in their closing. He says at paragraph.

Elias CJ We still don't have that by the way. It's not on the Court of Appeal file.

Lithgow So, Mr Pike, I think perhaps we need a copy.

Pike (away from microphone) I could give you the one I've got here now if reference is to be made to it. It's written on in the usual manner …

Elias CJ We would disregard that anyway Mr Pike.

Pike The Registrar could give that to the Court.

Elias CJ That would be excellent thank you.

Lithgow What the Crown said at [29].

Tipping J What's Counsel referring to as this evidence, this evidence of recent complaint?

Elias CJ That's to the woman.

Lithgow Complaining to the woman. Complaining to the woman which is just, it's not even had the benefit of being true.

Tipping J Which woman?

Lithgow The woman that she went to the Police Station with.

Tipping J Oh, the late one.

Elias CJ Yes.

Lithgow Yes, so that this was entirely natural that the first person she would get hold of would be a female friend at the first reasonable opportunity. Well that's perfect common sense except it happens to be wrong.

Tipping J Well that presupposes that the first complaint didn't qualify so to speak, which is presumably the basis on which Counsel were speaking because the Judge had excluded it as recent complaint. And I'm not saying whether it's right or wrong. I'm just trying to follow the logic of Crown Counsel's argument.

Lithgow Yes. So this Counsel, and the Court seemed to accept that, this is the logic that says if something is excluded as a matter of law, that you can make submissions that are totally contrary to the true situation and pretend it doesn't exist in time and space. That you don't have an obligation to watch what you say. Because it is not correct that she made, at the first reasonable opportunity, a complaint to a female friend.

Elias CJ Well.

Lithgow She tried to.

Elias CJ The judge has ruled that this was recent complaint evidence. That's the case isn't it?

Lithgow Yes.

Elias CJ So on the basis, necessarily he said that this was a complaint made at the first reasonable opportunity.

Tipping J I think you're getting into unnecessary territory here Mr Pike (sic). At the moment you have a clear example of, apparently, subject to Mr Pike, of a Judge not making a clear distinction between recent complaint per se and cross-examination to demonstrate inconsistency. And that seems to me to be the essence. This is a bit of a makeweight this. I don't think this is nearly as good a point as some of your other ones.

Lithgow No well I agree with that. But, because it's in the Court of Appeal Decision, it should go on appeal because it's got to be fixed. Because that simple proposition can't be right.

Tipping J We're not here just to fix up every infelicity in the Court of Appeal Mr Lithgow.

Elias CJ We'd be very busy. Oh I should say I shouldn't have said that, it didn't sound quite right.

Lithgow So I think that should.

Tipping J Well it goes into the mix.

Lithgow It needs a bit of thinking through but it's not going to carry the day obviously. Now the second proposition is that the appeal involves a matter of public importance.

Elias CJ Sorry, is there though another point about the rather over-egging it about the sort of person you would expect she'd make a complaint to a female friend?

Lithgow Well I'm all in favour of the Crown reverting to the proposition literally which has gone out of fashion that they're ministers of justice. They're not allowed the same rhetorical flourishes to cut free and loose as defence Counsel are and that's just tough luck for them. And that principle should be reasserted unambiguously. They are meant to be a bit more careful.

Elias CJ Alright, thank you.

Lithgow So the second proposition is that it involves a matter of public importance and we've covered a lot of this. But the central issue in the trial is obviously consent. The Crown calls two ear witnesses. They wanted or would have been able to justify their views on what they were hearing. Now there was another kiwi flatmate. I say that because the Crown imply and continue to imply that at the trial and the Court of Appeal that they implied that the shared nationality of the witnesses and the accused somehow persists in the understanding of this. So by implication that they would lie for their countryman or their brother. Now the Police, there is other evidence bearing on this issue if there was a retrial. Now having called those two, the Crown attacked them and I say that it is a question of public importance that if those that are called as witnesses and are called for the Crown, and they have to go and they have to tell the truth as they see and are sworn to do so, if they're then going to be accused of serious criminal behaviour without any warning, without any right to have those matters put to them, that that is a matter of public importance. If the defence had done that they would be criticised by the Judge. And then to compound matters, they attack them on the basis that uses the tacit misunderstanding that s.23A would prevent the truth of the matter being before the Court. They then use that to misrepresent what their true evidence would be. I say that they're accused of perjury and to all intents and purposes of being a party to the rape. Because by the other facts alleged by the Crown, they demonstrably could have stopped it.

Now if the public understood what was done here, if the jury knew that the matter was misrepresented to them in that way, I suggest that would unambiguously be a matter of grave public importance.

I've covered all the underlying material related to that. I don't consider it, as the Crown attempt to say, a matter of style or a matter of being able to simply freely advocate on those matters which were admitted in evidence. That's a simplification of what happened here. And that's

also why **Palmer**'s case (**Palmer v R** [1997] UKPC 27, 16/6/97) is interesting because it didn't tell the full story and the Crown always have a duty to see what they can do about making sure that that doesn't happen.

Then turning to 13(2)(b), a substantial miscarriage may have occurred or may occur unless the appeal is held. I submit that by definition, if there's a miscarriage of justice, it will, it's hard to imagine a case in which it wouldn't be, substantial where a person is convicted of rape. I mean quite apart from the penalties now automatically virtually applicable to rape. The mere fact of being convicted of rape will always be substantial if it is a miscarriage of justice.

Now this man, and this is miscarriage of justice issues, as set out in the points. This man had noisy sex with the complainant.

Elias CJ Where are you now?

Lithgow I'm just wrapping it all up.

Elias CJ Oh I see, thank you.

Lithgow He had noisy sex with the complainant and the only issue was consent. Now by various means, the facts bearing on the issue of consent were not before the jury. Now some were excluded, and this is set out in the Notice of Appeal and also the Submissions, some were excluded by the wrongful characterisation of the complainant checking out Atirut Sungsuwan where she was in the car coming to or from Porirua where she was asking the kind of questions which in youth culture means you're checking him out as a possibility. Now the Judge excluded that on the intervention of the prosecutor who arguably had far too much intervention in this case and managed to persuade the Judge it was hearsay. Now the Court of Appeal were happy to see that it wasn't hearsay, but simply said, well it didn't matter. But it does matter because the jury asked the question as to when consent applied. And so I think it is entirely possible, entirely likely that some members of the jury may have thought it was relevant that this woman had been dumped by her boyfriend that day and had told her flatmate she was going to get a guy and have fun and bring him home and did ask questions of Sungsuwan's sister about his general this and that because she was checking out things she wanted to know about him. And that she did in Courtenay Place ask him for a fuck which the Crown find entirely unlikely. But since that's now an international word and since they live together.

Elias CJ Do we really need all of this, all of these words in these submissions? I'm just conscious of the time that's running on Mr Lithgow.

Lithgow Well I'm just trying to get all the points that I've put in the Notice.

Elias CJ Yes but we've read your Submissions.

Lithgow Yes, but what I'm trying to avoid is, if it, as appears, that there may be, the Court's carefully considering whether or not to allow the appeal in full, this is the point I made at the beginning, I want it to be all in and that the full Court sort out after submissions perhaps what they want to sort out.

Tipping J What written part of your Submissions are we now addressing Mr Lithgow because I have read them more than once?

Lithgow This is the hearsay point.

Tipping J The hearsay point. Oh yes. Well can we not just say you also rely on the hearsay point and I'll make that a fourth in my tally. Counsel error, lack of evidence, recent complaint/associated Crown Counsel's closing address and hearsay. Is that comprehensive?

Lithgow And lastly the wrongful endorsement which the Court of Appeal deal with. And it's all set out there. The wrongful endorsement of the flawed Crown submission that the jury could infer something which supported the Crown case by the fact of the other Thai young man returning to Thailand. Now the Crown made the submission that the fact that 'X' had gone back to Thailand meant that he knew what was done was wrong. The Judge told Crown Counsel off for that in front of the jury as he should have. But as set out in the Court of Appeal decision, the Crown then at the end of the Judge's address to the jury managed to persuade the Judge that there was a proper basis for the Crown's proposition. And the Judge for some reason mistakenly, as everybody accepted, fell in with the Crown proposition and told the jury that there was evidence along those lines. Now the Court of Appeal accept that that was quite wrong and shouldn't have happened but didn't see it in itself as leading to a miscarriage of justice. And so again, if there is to be an appeal on the full merits, that should be allowed to be put forward as well.

Tipping J Is this really a substantial miscarriage of justice on the accumulation of points argument?

Lithgow Yes.

Tipping J Yes.

Lithgow And so getting back to I think some of the first proposition I think Your Honour Justice Tipping made - was this a fair trial? Answer, no. Is there any reason why it couldn't have been a fair trial? The answer is no, it could have been a fair trial if with all the current rules and without changing any of them, it could have been a fair trial but that some of these having happened. Could also examine the question of the test for trial Counsel and the duties of Crown Counsel.

Is there any other matter?

Elias CJ No, thank you Mr Lithgow. Yes Mr Pike.

12.31 pm

Pike Yes may it please the Court, Counsel does not propose to track each of the points that have been made through the course of this morning's submission by my friend. There are two broad areas in which the appeal must be found to lie, that's commonplace, as to any matter of public importance. It is the respondent's submission that none arises under 31(a). The question of incompetent Counsel which I'll speak of briefly has bedevilled the courts in all jurisdictions for years. The Court of Appeal has fashioned tests dealing with it. And I think now one could think that there's possibly some 20% of the cases that come before the Court of Appeal are critical of Counsel in one manner or another. Formally or informally. But it is submitted that there is no public importance in the issue of the test the Court of Appeal applies or has applied in this case because generally there can be no question but that the Court of Appeal has consistently approached the law on two bases. One, the formal basis, the one that is complained of is seen as prissy or whatever comment is made - I would use the word principled - that trials are a tactical contest for the defence, not so much for the Crown. If it ever was it's certainly not these days. But the point is that so far as the defence is concerned, the Court is entitled, once a jury has delivered a verdict, to insist on reopening the matter of how the defence was run, if, and only if, there's something that at least initially indicates that trial Counsel has gravely or has significantly departed from the standard of competence that is required.

One of the tests which of course has never been gainsaid is that a clear failure to follow a clear instruction almost automatically qualifies for a review by the Court of Appeal. But other matters, absent clear instructions, are not. The Court insists, rightly it is submitted, on Counsel and more importantly the accused or the appellant as that person becomes, disclosing everything candidly to the Court of Appeal. This case for a number of reasons does not provide a springboard, it is submitted, for a thorough revision of the **Pointon** standard because for one matter, trial Counsel's affidavit is before the Court of Appeal, and now this Court, is irregular. And I say it is irregular because it is provided simply by defence Counsel.

This was never a matter referred to the Crown in the ordinary way in which one raises with a proper waiver from the appellant of privilege. The practice is under the practice note that the appellant must provide a waiver and must then provide all the assistance, or the new Counsel provides assistance to get an affidavit, which is of course from the client. It is almost, I know of no case where the client has not made some affidavit.

Tipping J Did the Crown call the witness for cross-examination?

Pike Does the Crown?

Tipping J Did the Crown call Ms Ord? If you thought there was something wrong or incomplete or whatever, presumably you'd have called her to be cross-examined.

Pike No, she wasn't.

Tipping J Well what difference does it make where it came from?

Pike Well it makes a difference because this Court is enjoined to review and revise the **Pointon** standard. The difficulty is that with or without Crown demurra (?) on the point, with or without it, there is no proper process being followed in getting the matter before the Court on the basis of incompetent Counsel.

Tipping J But if the issue is a more abstract one, at least you'd have to approach it in the abstract and then see how your answer affected this case. I can't see how an abstract discussion of the proper test, and for all we know, the present test, might be ratified. But why is an abstract discussion of it inhibited because of this somewhat unusual, as you put it, way in which this evidence emerged?

Pike With respect because the case was not run as incompetent Counsel and so the Court does not have the fundamental material before it so it can examine the process. The process that the Crown gets an affidavit. That the file is turned over, former defence Counsel's file is turned over to both the Crown and new appellant.

Elias CJ Well what do you complain about Mr Pike?

Pike Sorry?

Elias CJ What do you complain about apart from the failure in the process?

Pike Well it's not a complaint with respect Your Honour, far from it. It is a submission that if the Court is to engage in a review of trial Counsel, principles of trial Counsel error, a proper case to raise it was not this one.

Elias CJ Well why is it an improper case?

Pike It's unsuitable, it is submitted, because the Counsel may or may not have done what the Court of Appeal properly, I would submit, thought she might have done in paragraph [44] of its Judgment. That is, made some more decisions. We don't know. I cannot say that she is uncandid. Far from it. All we can say is that Mr Lithgow asked on a

very limited basis for an affidavit and it was provided. The affidavit was. I thought 23A probably would stand in bar of me asking the questions to elicit this further information which I had been provided on full disclosure.

Elias CJ Well what would prevent you getting a further affidavit from her if you thought it was incomplete?

Pike Well with respect, the case was advanced on a different basis by the appellant.

Elias CJ Oh was it?

Pike It wasn't on an incompetent Counsel basis. Ordinarily we do and Counsel, this Counsel, has simply done that quite recently and the Court of Appeal has asked for a preliminary ruling on the point. But the Court is, if nothing de bene esse all of the time and of course the trial or the appeal runs on the basis that the appellant wishes to run it. It would have been open to say beforehand that this was an incompetent Counsel case and to seek a further affidavit. That wasn't done. But the fact it wasn't done by either Counsel with respect is simply submitted as a basis for indicating that it is not the richest of material to deal with a thorough revision of a fundamental point of law.

Tipping J Isn't the essence of this point, whether you call it incompetence of Counsel or not, the absence of evidence that the accused says should have been before the jury? And that absence happens to have been brought about by a decision of Counsel not to try and get it in.

Pike Well indeed, indeed it is.

Tipping J But.

Pike Yes, the submission with respect is this as to that.

Elias CJ I'm sorry, just pause though. You say that the Court of Appeal wasn't asked to deal with it as a matter of Counsel error. Is that what you're saying?

Pike It was not a ground of appeal and so there was no amendment to the grounds of appeal to add that. It was not an incompetent Counsel appeal. The Court of Appeal however determined that it ought to have been ultimately run that way or not at all. Now with respect the Court of Appeal has consistently run, to get back to the first point which we've moved away, has consistently run two tiers, or a test that is clearly two-tiered. And the two cases referred to in Counsel's Memoranda that indicate it are but examples of **R v Zachan** (CA 304/94; 11/8/95) and the recent one of **R v Kerr** (CA 167/04; 18/10/04), and one under appeal now called **R v Gordon** (CA 276/04; 16/12/04), all indicate that if the evidence or a matter sufficiently

compelling comes before the Court of Appeal which indicates, irrespective of what trial Counsel did, that there was a matter of concern as to the safety of a conviction, then the evidence or the material will be received. Often de bene essi or simply received as under 389 without further ado on the basis that the interests of justice require it. So the, in my friend's submission that the **Pointon** standard needs to be thoroughly revised has to be seen in the light of the fact that it is not the be all and end all of the jurisprudence on incompetent Counsel. The overarching test of the interests of justice has been formally declared to be part of the law by the Court of Appeal in numerous cases of which two or three can be cited here.

Tipping J Well if that's the case, the Court of Appeal here didn't apply it.

Pike It didn't apply it and rightly so, with respect. Because this evidence, this mistake of Counsel, if it was a mistake, was plainly virtually unable to add anything of significance to the testimony of these two female acquaintances of the accused or the applicant here today. The starting point is that these two girls, on that point, it would have been immediately apparent to the jury and certainly apparent in the Court of Appeal, that both these girls gave favourable testimony to the accused. They were led by the Crown not as it is submitted for the applicant, to say well the noises are evidence of rape. That certainly wasn't why they were led. The Crown had to deal with that matter en route, or the prosecutor employed by the Crown, had to deal with that matter en route. They were called essentially because they could give evidence of demeanour that after, presumably that part of the evidence was seen.

Elias CJ Well they had to be called by the Crown anyway.

Pike Well unless they were hostile.

Elias CJ It would have been irresponsible for the Crown not to have called them.

Pike Well indeed unless it was plain that they were hostile witnesses and it came within the clear rules that they had to be left or couldn't be called. But they weren't. They gave testimony which the Crown relied on as part of this case.

Tipping J Well they were treated in the closing address as if they were hostile witnesses.

Pike Well there was a word used that the prosecutor slipped into that was seen as inappropriate. But that's in its own separate little category.

Tipping J Well we're going to come to that.

Pike Yes indeed. But here the testimony favourable to the Crown was that the victim came out of her room in a very distressed state and curled up

and was inconsolable and there were various descriptions of her demeanour compatible with somebody who had not had a particularly pleasant sexual experience. But they also said that she was begging to have sex with this man. Now that was their initial testimony. They then testified that the sex was undoubtedly in their opinion joyous. So that too was contrary to the interests of the victim in the Crown case. That got before the jury as properly it had to. But it is submitted that the gravimen of their testimony for the Crown was not the noises but the demeanour. As far as dealing with the noises was concerned, it may well be that both the Crown and the defence Counsel were mistaken about 23A. But Counsel does submit it's arguable. It is not such a plain case that 23A has no relevance at all because, as all judges know, that once cross-examination of a complainant starts as to sex and sexual experience, it's very difficult to control. The principle of the Act is that it is better to get leave, which may have been given, but the leave at least allows the trial Judge to say you can ask this and this and this, but if you start to go into this territory I'll stop you and we'll look at it again. So uncontrolled examination is something that isn't inimical to 23A and it should be given, and is given, a broad purpose. The case called **R v M** (CA 3/04; 23/8/04) which deals with it as to how it says it doesn't apply to where a girl was cross-examined as to how she might have got certain words into her vocabulary, which is a fair cross-examination, where the Court of Appeal said that that is not barred by 23A. There is nevertheless still a matter in which prudence would dictate that 23A leave should be sought. But it will not be blocked. That's the critical part of **R v M**. It's not that you just simply sail in and cross-examine.

Tipping J I'm not following you I'm sorry. Surely, how serious an error and with what consequences is another matter, but surely it was an error not to seek leave to get this evidence in.

Pike Well I submit no, with respect. I would submit the Court of Appeal and Justice Potter writing for the Court at paragraph [44] could be seen as utterly defensible. These two women were hostile to the victim's interests but they partially came through with her demeanour afterwards for whatever reason. They gave testimony that was consistent with her interests. If the jury had believed a word these two women had said, then they would have, or even thought it likely true, I would submit that even without, or even with the medical evidence, there was a chance of an acquittal.

Tipping J But why on earth would you not try and get this additional material in? That's what, I can't see that the balance of advantage or disadvantage is such that you wouldn't at least try to get it in.

Pike Well because I would submit this, if one was trial Counsel. The girls have already said, or this particular witness already said, that the witness wanted, this witness was begging to have sexual intercourse with the applicant. That in itself is potent evidence, if believed, that

she continued with that state of mind through to what happened in that flat. Plainly, however, this Court must, and the Court of Appeal must be in the position of recognising that that evidence cannot have been believed. I would submit it's a fair proposition that the girl was not believed on that point. Now the trial Counsel is hardly a novitiate at defending cases of this sort. Now there must be a real issue as to how far you flog a witness or try to pull out of a witness other matters which start to sound quite remarkable quite frankly. We're saying, we're talking about them hearing sounds which they said were the sounds of joyous sex she always made when she had sex with other people and her boyfriend. And somehow that adds to their credibility in a manner which it is submitted it is difficult to see how. Because it's their opinion of another person's state of mind at the time that has some slight coherence in the status that it's something we've heard before and we think she was having consensual enjoyable sex when we've heard it. But against that, they would simply be asked, has she ever come out of the bedroom after that bleeding in a distressed and damaged state. And the nub of this case with respect, in the end, must have come down to the doctor, the woman, the doctor who examined the victim. She had quite serious vaginal injuries. Nothing that could be seen as consistent with consensual sex. And nothing remotely close to the applicant's description of the way he had sex with that girl could account for the lacerations, the deep bruising, the petechii and the blood. It just couldn't. The jury with respect then asked, and I would say significantly, the most significant point, was they asked to have the doctor's evidence read all over again. And that must have been where they came down to. And one mustn't speculate about what juries do and don't do ordinarily. But in this case there is at least a pointer that what they focused on.

Tipping J Is this a submission Mr Pike that he was so clearly guilty that we shouldn't be troubled about any of these subtleties?

Pike Well it's not, it can lead to that on 13(1)(b) issues, one can talk about that. But it's really an issue of the reality. And the reality of this case, with great respect to my friend, has not emerged. The reality is a bleeding and distressed female stumbles out of her bedroom and curls up into a foetal position after having what the witnesses say was enjoyable sex. She's medically examined and found to be in a state that the doctor says there's just nothing she's seen before compatible with, consistent with.

Tipping J Well so the reality of the case is that he's so clearly guilty that these other points don't really matter?

Pike Well.

Tipping J I'm just putting it to you as the devil's advocate.

Pike Yes, I would, I would say that under (b). I don't say they don't matter. That's not how Counsel would put it. They matter because they are matters of process. But as to the first point, the 23A point, the Court of Appeal made observations in paragraph [44], objected eminently by my friend, about the position of trial Counsel. I would submit the Court was shrewdly right in judging how Counsel would have been given the totality of the evidence. To go into more and more detail as to what these noises were like would have led, such an air of.

Tipping J This is another example in a way of a finding contrary to what the witness says which has never been put to the witness. This approach of the Court of Appeal ascribing to Ms Ord thought processes which she never deposed to, is another example really isn't it of putting something not put to the witness. Their evidence has been discounted on the basis of points never even put to them.

Pike Well with respect Your Honour I'd have to say from very long experience that the Court often will impute or determine what Counsel, responsible Counsel, might or might not have done or other witnesses on the path to judgement. As long as it's not irrational for a Court to do so, it's submitted, the fact that it hasn't been put to anybody is not something that is so unusual as it ought to attract the attention of this Court.

Tipping J But she says, I didn't try and get this evidence in because I didn't think I'd be allowed to get it in. The Court of Appeal have said, well the reason she didn't put it in, or at least a major contributor was, that she thought the balance of advantage was against it. It just seems wrong to Mr Pike.

Pike Well with respect Your Honour, it is not an unusual approach from that jurisdiction.

Tipping J Well it would have been in the Court that I'd sat on frankly, because it just doesn't seem right. The witness is there, you can call for them to be examined if you're going to make those sort of findings. But anyway I don't see this as central to the present issue.

Pike No, with respect the point on the competency of Counsel was simply that this is one of those cases where the Court of Appeal rightly, it is submitted, said look you go down the route of the full and competent Counsel complaint or this matter can be taken no further. This was a judgement call. And there were inditia that it was a judgement reasonably open to reasonable Counsel. Perhaps paragraph [44] can be read in the light simply of the Court saying from its own collective experience, that Counsel would have a difficult row to hoe in any event using this evidence because fundamentally the reality was that these two witnesses would not have been seen by the jury as witnesses of the truth because had they been so, their first comment as to this woman

seeking a sexual encounter with the applicant would have decided the case in the defence favour.

Elias CJ That might have been a reasoning available to the Court if they were dealing with the proviso. But it does seem wrong to attribute to defence Counsel those reasons for the judgement she made when she said that she made it simply on the basis of s.23A.

Pike Well she did. She went no further than that. I can only reiterate that she did not say that was her only reason. There's nothing incompatible with what she said and what the Court of Appeal has said would be additional matters. Simply she has not gone on. She may have rejected this. One doesn't know, that is true. But even so, even if she did have that as only the reason, the way the trial was run, the nature of the trial, leaves this Court in the position where the Court of Appeal must be seen as within the parameters of its discretion to adjudge that s.23A leave may or may not have been given. It was not a clear cut case, so clear cut that in the interests of, that it was necessary in the interests of justice for this woman to be cross-examined further, which she wasn't. I mean as the trial Counsel did not put to the complainant about her further noises, which was interesting because after all these witnesses came next. So her decision was obviously a very early decision because she did not lay the foundation for saying this by even trying at an earlier stage to get in and cross-examine her on the fact that she'd made such joyful sounds and did that on other occasions, i.e. the 23A was raised after, as far as one can see, after this witness had testified. And only when the new ones came along. The evidence, it is submitted, is relatively, in this trial setting, worthless. And the Court of Appeal would be right to treat it as so, given the whole feel and nature of the trial in all the circumstances.

As to the, with respect, that's all I need to say I think with respect on 23A. And I do see it as a case and Counsel does submit it as a case where it was simply a judgement made by Counsel which could have had no harmful effect on her position. And may, as the Court of Appeal said, have actually put her into a worse position than had she let it alone.

Tipping J So Counsel's conclusion did no harm in other words?

Pike Did no harm and it may not have been wrong. It's just impossible, with respect.

Tipping J Well never mind whether it was wrong. It did no harm, that's the essential point isn't it?

Pike It's both.

Tipping J Mm.

Pike The Court of Appeal was right to say it wasn't a clear cut case.

Tipping J I have difficulty accepting this but anyway, you say it did no harm?

Pike Because the matter got before the Court. It also, as has been observed, it slipped out as the phrase might be, that certainly this jury in this case could have been left in no doubt from what this girl said in that statement that she'd heard it before is not something she got off the television. She'd heard it before would be in that courtroom understood as that it was the complainant. They lived with her. That they'd be talking about the complainant. But I mean that's no matter. But I just want to contradict with respect the impression that the jury would have thought, oh they heard it before from some extraneous sources and not from the victim.

As to the other matters in the case, it is submitted the 23A and the **Pointon**, the **Bernadetto** case that is made, I would simply submit that the Court of Appeal in New Zealand has for years done exactly what **Bernadetto** did. And the Privy Council in that case, interestingly, in the critical paragraph [65] of the **Bernadetto** Judgment, the last lines, a defendant should be punished for the crimes he has, and so on and so on. That was talking about receiving fresh evidence. The Court of Appeal has always in this country received fresh evidence on the basis that if there's something compelling about it and they're left with, phrases vary from a lurking doubt, to unease as to the safety of the conviction, the evidence gets before the Court of Appeal.

There's just no question of that. And it doesn't need. **Pointon** doesn't block it and never has. So far as the other matters are concerned, I comment on the statements or the prosecutor conduct. There are cases, certainly mostly Canadian, we have had mercifully few here, where inflammatory comments by the, and I think this must be seen as careless or inflammatory rather than anything else, comments have ended up with a new trial being ordered. The standard on that alone is high, it is submitted. And here the word, the only word that was used was the word callously sat by. Which was perhaps unfortunate. One can say that it would have been better to simply say they were probably mistaken or indifferent. Because really callousness covers indifference. It may be justifiable. The Court of Appeal thought so. The Court of Appeal didn't precisely say if the word callous ought to have been used.

Elias CJ Indifference though also Mr Pike suggests that they were not telling the truth in their evidence.

Pike I think so. I think the comment callous could be read that. I suspect that was one of those words that was unwisely chosen.

Elias CJ No, my point is that even if they sat by indifferently, that contradicts their evidence that they didn't believe there was anything amiss.

Pike It does.

Elias CJ So it too is more than the prosecutor really was entitled, given the information he had and given the way that they'd been treated, to say.

Pike Well the difficulty with that is that it incorporates an elliptical proposition inasmuch as that had the evidence come out, the prosecutor, had the bricks been put in the right order, might have been able to suggest that their embellishment of, we've heard this sort of before, was still nevertheless part of a chain of testimony that ought not to be given any weight. And so could say that they still, even though they had said that they'd heard it before, it's the same sounds as joyous sex, then pointed out juxtaposed that with the distressed and bleeding state, badly injured state of this woman as she came out of that room and said well can we really accept that. That might have been in **Eagles** terms (**R v Eagles** (unreported) CA 22/04; 18/3/04; 31/3/04; Anderson P), verses **Eagles** terms justifiable. The real gravimen of it is the foundation hasn't been laid and the use of the word comes out of nowhere.

Elias CJ Yes.

Pike That's the problem and it's one of those things that unfortunately happens and shouldn't. I don't think the Crown wants to stand here and say, well that can pass muster. The Court of Appeal said that it could pass muster to a degree but kindly perhaps didn't go down and look at the word callous. If it had have done it plainly wouldn't approve it. But that is the submissions made on that and this Court does not need to rule on prosecutors' conduct. There's not flagrancy here. There's probably inadequate attention to laying proper foundations. But there's not that sort of air of flagrancy that requires this Court to intervene, it's submitted.

Insofar as the other matters are concerned, Counsel simply wishes to submit that the points made about recent complaint and the hearsay and so on are redolent more of now approaching this Court as a second Court of criminal appeal rather than truly finding a matter of public importance. Because the law is clear, the Court of Appeal was within reasonable bounds in its decision and so no matter emerges justiciable in terms of 13(1)(a) on those points.

Tipping J I'm sorry, and I'm conscious of the time but I am also conscious of the responsibility we have. There is that passage in paragraph [78] of the Court of Appeal Judgment which leaves me wondering frankly whether the Court of Appeal had really got to grips with what was going on here. You know the one I'm referring to?

Pike Yes, there's the question they had one lot of. These are both statements on the same day as I understand. One, the first witness or

the first in time seems ambiguous or at least it requires interpretation by a witness that the trial Judge rightly wouldn't have that as a …

Elias CJ Well isn't that a jury question?

Pike Well I would submit with respect Your Honour that if a trial Judge saw that a passage of evidence that seemed to be supportive of credibility was in fact relying on the interpretation of another witness that the Judge would be right to say no you can't have that.

Tipping J But isn't there potentially at least the difficult precedent in this framing of it in paragraph [78], that it seems to suggest that if it isn't sufficiently precise to provide a basis for consistency, it's out altogether? No reference can be made to it, not even for the purpose of relying on the inconsistencies.

Pike I think, well, with respect, the Court by now is dealing with numerous trial matters that cannot be thought, I'd have to say with respect to the Court, that a busy Court dealing with numerous points may slip into expressions that are wider than intended. It wasn't the nub of any particular point. And the Court of Appeal was really I would submit addressing itself to this particular case. Now the trial Judge did say it oughtn't be cross-examined on because it would simply bring it all back in and he saw that as prejudicial possibly to the applicant's position more than anything else. But as a general proposition, of course recent complaint, so-called, any statement made by a complainant of a crime will be admissible and can be cross-examined on ordinarily. And I think, I do not suppose for a moment the Court of Appeal thought it was laying down a general rule than an excluded recent statement.

Tipping J But they haven't dealt with the complaint, sorry to use that word again, that the Judge's preventing trial Counsel from cross-examining on it was wrong and prejudicial. They seem to have elided the issue into a single one which I don't know, but it just seems to me it's worthy of some thought as to whether that isn't, if there isn't some sort of feeling abroad that it's sort of all in or all out.

Pike I submit, no. I mean Counsel certainly knows of no such feeling. It is unusual to see that. I do not think the Court of Appeal for a moment was setting this as a principle, a statement of the law. It was simply elliptically again dealing with points, saying that no harm came, that they obviously could see no harm in it. Oftentimes, as the Court will be aware, the Court does not deal fully with all arguments put to it. It simply cannot. And **Surrey Game Farms** I think is one of the classic expressions of the law that it's not obliged so to do as long as it fairly deals with the major points that are put forward by the appellant . Which plainly it did.

But to finish off quickly now Your Honour may it please the Court as to the substantial misconduct, the 13(2)(b). Certainly much of what, the Court of Appeal was right in many of its rulings, it's submitted, that the overarching point is that it is impossible to suppose, given the medical tests and the jury's obvious reference back to it, that the other matters, that anything indicates that this was a consenting rape.

That leaves one other important issue and that's why Counsel did mention **Palmer**, and that is, even if the Court is not satisfied, is satisfied rather that the person is likely guilty, it may nevertheless order a new trial if the unfairness is so egregious that the Courts cannot countenance the way the trial was run. **Palmer** was an example of that simply because vital evidence was left out and the trial Counsel were adding to that problem. Here it is submitted we do not get to the **Palmer** standard. It is less than that. These are trial errors. The Court of Appeal dealt with the matter in a long and difficult number of points, and did so properly it is submitted and leaves no residual 13(1)(b) concern.

But I don't wish to add anything to the written …

Elias CJ Thank you Mr Pike. Do you want to be heard in reply Mr Lithgow?

Lithgow Some very brief, very briefly. Just getting clear about whether just callously is a word out of place. If you look at [51] for example, or callously sat there and allowed 'N''s brother and 'J''s friend and business partner to rape 'E' and 'J' only intervened when she realised that there might be a second incident and she thought that too much. Now it's clearly a permissive callousness they're talking about, not an indifferent callousness.

The second point is that, as you'll see at the beginning of the Court of Appeal decision, that they set out that a waiver was provided by Ms Ord. So the Crown, whatever there at paragraph 3, so if the impression was given that it wasn't intended by the Crown that there hadn't been a waiver of privilege and that Ms Ord didn't make herself available to the Crown, that's not the situation.

In dealing with that paragraph 3 you'll see that she was Counsel at both trials. (Away from microphone) Before attaching any general significance to what's called the overwhelming medical evidence, you'll see now that you have the Crown closing that the medical evidence loomed extremely largely in the Crown closing, it became more and more vivid as it went on. At the first trial, which ended in a hung jury, both the prosecutor and defence Counsel were women and it may well be that they didn't make such a big thing of there being blood in the vagina than the man was able to do. But you'll just see that from the way in which the closing was done.

Now bearing in mind there was a hung jury and the evidence on the second trial, the medical evidence on the first and second trial, were almost identical. So whatever else you can say about it, it didn't carry the day.

And then there's the question of whether I, as defence Counsel, I as appellant Counsel, squarely put before the Court that it was a criticism of Counsel. It's set out in the Decision that I attempted to persuade the Court, at paragraph [21], that I shied away from accusing Ms Ord of having made an error of the **Pointon** sort. This was dealt with directly at the trial and I made submissions that it was inappropriate and the business should stop, of having to criticise defence Counsel in a **Pointon** manner and that I didn't want to do it that way. There was then a discussion related to **Bernadetto and Labrador** and my understanding was clearly that the Court accepted that the position **Bernadetto** didn't take it any further from what the Court of Appeal would be intending to do. And that there didn't need to be a focus on blame. But then when the Decision came out, it's been dealt with in **Pointon** terms. So that's exactly set out there what I did do.

Tipping J You mean they adopt or appear to adopt **Bernadetto** orally, but reverted in **Pointon** in their written Judgment?

Lithgow Yes, yes, and missed out the key bit. And just while thinking about **Bernadetto**, although it is about admission of extra material on appeal, remember the case had been through appeals of the, two appeals I think in British Virgin Islands.

Tipping J Is this **Bernadetto and Labrador**?

Lithgow Yes.

Elias CJ But it's an extremely strong case. It's nothing like this case.

Lithgow But it related to a decision that the Counsel had made about what they would try and put in at an earlier appeal, I mean at the Privy Council they were allowed to put in more. So the Counsel had made a decision but the Privy Council simply said, we're not interested in all that. It's just got to work out whether it's important.

Elias CJ Well the merits were just overwhelming. Clearly a huge miscarriage of justice had occurred in that case.

Tipping J I sat on the leave.

Elias CJ Did you?

Lithgow The principles are just as good for coming to terms with a better way of dealing with these assertions by appellant Counsel that what was done at the trial led to risks of miscarriage of justice.

Tipping J Are you saying in essence Mr Lithgow that the comment that you shied away from doesn't fairly represent what took place in the Court of Appeal?

Lithgow That's their choice of words. I said I didn't want to do it that way.

Tipping J I understand, yes thank you.

Lithgow But there was no suggestion that it wasn't fully thrashed out as to who was saying what about all this.

Tipping J Yes.

Lithgow I was attempting to get the Court to move to a softer method of dealing with this rather than **Pointon**. It wasn't a hidden agenda, it was an obvious one. I don't think there's, there was perhaps a couple of. The Crown did speak to Letitia Ord. There were a few rhetorical flourishes in the Crown's submissions here. The flatmates were not girls. There's 26 … (away from microphone) and always remember when looking at the evidence that a number of the witnesses gave evidence through interpreters. So hanging on one precise word isn't going to help.

Elias CJ Yes thank you Mr Lithgow. We'll take time to consider what we should do in this matter. Thank you Counsel for your assistance.

Court adjourns 1.13 pm.