IN THE SUPREME COURT OF NEW ZEALAND SC 42/2005

IN THE MATTER of a Criminal Appeal

BETWEEN **SCOTT SIMEON THOMPSON**

Appellant

AND **THE QUEEN**

Respondent

Hearing 13 December 2005

Coram Blanchard J
Tipping J
McGrath J
Henry J

Counsel G King and C J Milnes for the Appellant
J Pike and A Markham for the Crown

CRIMINAL APPEAL

10.29 am

Mr King May it please the court I appear together with my learned friend Miss Milnes for the appellant.

Blanchard J Thank you Mr King.

Mr Pike May it please the court I appear together with Miss Markham from our Office for the Respondent.

Blanchard J Yes thank you, Mr Pike. I should apologise to counsel for the delay which was caused, as I gather the Registrar would have made you aware, by the fact that the Chief Justice who had an engagement in Auckland yesterday has got trapped there by the weather so she can't

be here and she couldn't get here by the end of the day, it seemed more sensible to proceed. I gather counsel are happy with that?

Mr King No difficulty, Sir.

Blanchard J Yes Mr King.

Mr King Yes thank you, Your Honours. Your Honours when Mr Thompson's trial commenced he was faced with some inordinate prejudice right from the very start. Because of the way the indictment was framed it was inevitable that the jury would know that he had been in prison and that he had been in prison for a period of some years. The defence applied to sever the three counts on the indictment which related to the period of time when Mr Thompson were in prison on the basis obviously that that means that the other counts can proceed without the inherent prejudice in the jury knowing that for some years he had been in prison. The defence also sought to sever the last three counts in the indictment which related to the sexual allegations against the young complainant aged seven at the time. Those applications were refused by way of pretrial ruling from His Honour Judge Calendar set out in the casebook. So it wasn't simply a case where the jury would know in respect of the violent allegations against his former partner that he had been in prison but because of that approach it was inevitable that when deciding the question of sexual offences the jury would have some knowledge that this was a man who had been in prison for some years. At the commencement of the trial, trial counsel having been unsuccessful in the severance application, tried to have the three counts relating to the time in prison dealt with under s 347. Again it's an oral ruling from the learned trial Judge set out in the casebook in tab 3. The purpose obviously was that if it had been successful on the s 347 counts then once again the trial would be able to proceed without the jury knowing that the accused had been in prison. So the starting position from the defence perspective was that they had done everything really that they could to try and avoid what was recognised by the defence as being highly prejudicial material. The severance application, once unsuccessful, a very novel approach under s 347 relying on the old case of *Harrington* basically saying that because the allegations of the prison assaults were comparatively so minor in the scale of the alleged offending that even if he were convicted of those it was extremely unlikely to add anything to the ultimate sentence to be imposed. That basically on a probative versus prejudicial consideration that those charges should be dealt with under s 347 and the trial proceed on the serious counts. Once again that application by the defence was unsuccessful and so the trial proceeds.

Tipping J There was no appeal on the severance issues I take it?

Mr King No appeal on the severance applications, my understanding too Sir. But as I say a somewhat novel s 347 application, no useful purpose can

be served by these in prejudice and so on. So he certainly, it was something that counsel was very aware of. Now by the time we get to about p10 of the trial transcript all evidence in chief, the jury have already learnt a lot about Mr Thompson and his past and his way of life. From p2 they knew that the complainant had got to know him whilst he was in prison in 1998 in Linton. So they know straight away Linton prison in 1998, we know that he's still in prison in September 1999, same page, when he's transferred to Wikeria Prison.

Henry J It would have been apparent from counsel's opening, surely?

Mr King Oh absolutely, Sir. Absolutely and, and of course had – I'm just going through the issues which were there before Mr Tennett even gets the opportunity to cross-examine. And we have the complainant saying again on p2 that she spent some three years and a bit visiting him in Wikeria Prison. We then had the incidents that are alleged to have taken place in the prison and we have the complainant then being asked extremely general propositions about how the relationship was when they came to live together afterwards. We know very early in the piece that he wasn't working. We know that he had an interest in tattooing, leather jackets, and dreamed of having a Commodore car. I don't know if that in itself has any prejudice in it but the whole, I suppose what I'm trying to get across is that we're dealing with a relatively unusual situation where essentially the whole relationship is on trial and everything through that period of time comes out and of course in a normal case if he'd been charged with a single incident of male assaults female and so on it would be confined to one incident, previous incidents weren't. But we have just this whole relationship being explored. We have very general questions being asked in chief about things like how were things when first got, when he first lived with you. Well there was a lot of verbal abuse, that's p5 of the transcript. Was there violence? Do you recall, can you recall for us the first occasion that you can bring to mind of violence and then we have the talk about the finger being put in the mouth and the mouth being ripped, cut and scraped and about a week later the black eye. Now that incident that is described there at p5 about the finger in the mouth and the ripping that was not the subject of any particular count in the indictment and you will see that that has its own follow on and so on. But we really are in a situation, in my submission, where and it's quite an unusual situation, where the whole relationship has been put up before the jury in very general, there were many incidents of violence, there were many occasions of verbal abuse and not at that point in time specifically relating to the individual counts as would be inevitable one would suspect things come out which are certainly not the subject of any charges in the indictment. We then

Tipping J When you say that's inevitable, Mr King?

Mr King Well because of the way the case was being presented. When you ask a complainant things like what was your relationship like.

Tipping J Well it was inevitable in the light of the looseness in which the questions were framed?

Mr King Yes, mm. That, that's my

Tipping J That's what you mean?

Mr King And, and the looseness of the questions and the way the case was being put forward. But yes and that's exactly right, Sir. When you were asked how were things you're asking for trouble with respect.

Blanchard J This is examination in chief we are talking about?

Mr King This is all the examination in chief.

Blanchard J But you're not complaining that there was anything inappropriate in the way the Crown was approaching it?

Mr King No I don't think I can in terms of what's gone before. But in my submission it always, the proper basis for what was in defence counsel's mind when it came to cross-examine because by the time he stood up to cross-examine the complainant there was really a whole raft of material before the jury he simply needed to be able to answer. And we go on, we have extreme detail of what he said, the abuse he gave her, he was hitting on the landlady's missus and he said this and he said that and it's all stuff which just portrays him a terrible light which does not necessarily relate to the individual counts of indictment. A lot of it does of course, he's asked the witness has asked to talk about what led up to the various assaults but we have this real detail and then we have the followup coming on from that about, we have the complainant having a page of detail about how she tried to cover up the marks with makeup and so on, it's all just painting a very sad and very tragic.

Blanchard J But it would have been very stilted and artificial if there'd been an intense focus on individual incidents with nothing about the relationship because obviously they arose

Mr King I agree

Blanchard J out of the relationship

Mr King agreed

Blanchard J at least in the view the Crown was taking.

Mr King Agreed. That's absolutely correct. But it's, it did need to be carefully managed in my submission and there was, in some parts there was detail which was simply emotive, it didn't really add anything to the case. The case is still able to be presented on an entirely realistic basis and we've got her talking about how she purchased him a lotto ticket, that's p6 and a birthday card and went and bought him a box of beers and a box of wines and met with his anger that she was checking up on him. Then we have a page of detail about that. So we are going into real extreme detail that in my submission the case is able to be presented in a much more clinical way without introducing those emotional images of her turning up at the pub with his birthday card and this lotto ticket to be yelled at and abused. I'm not trying to be facetious but in my submission in a case where there is going to be prejudice in the jury knowing that he had been in prison for some years that a lot of this detail could well have been left out without

Tipping J You're attacking this not as such but as simply as part of the background against which the real attack should be seen.

Mr King That's right, I suppose what I'm doing is endeavouring to justify the approach taken by defence counsel. Certainly the conceptual questions that he was asking, did you feel your motivations and so on, because all of that was properly laid out I submit in the evidence in chief where we have her talking about this, this plethora of detail which simply had to be answered by the accused. Really it was given to him that this horrendous horrible background but in fact the simple facts were that the complainant stayed with him, the complainant didn't report any of this to anybody. The complainant continued to be with him, supportive of him, and of course the complainant had got him parole to her place by telling psychologists and so on that he was a gentle person. So all this emotional imagery that is creative needed to be addressed and in one aspect in my submission it becomes very apparent and that is that defence counsel was faced with the difficulty that this witness had been able to come across so extraordinarily well, even from the transcribed it's quite clear she was able to give detail. She was able to put flesh on the bones of her allegations and take it into that emotional sense where we've got a very graphic description of him threatening to destroy the, burn the toy box with her barbie collection that she had built up over years for her daughter and so on and so on. It's all very, very emotional and counsel of course endeavouring to, to address that goes down the path of saying well hang on you're experienced and portraying your emotions in a different way and he talks about her work as an escort. Totally orthodox in my submission it's not something every counsel would have done. I think there are obviously risks in isolating a jury who are listening to you doing that but part of the difficulty he was faced with was he had to address the emotion that she had introduced into the, into the evidence. And it's really just page after page of building, even to the detail – was anything being said by him, p8. Probably there was a fucking bitch for coming out, why did

you fucking come out there for and I was saying ‘cause you were in gaol all those years. I never once got to be with you on your birthday. Well that, if that’s part of the allegation it’s part of the allegation and it can’t be sanitised but we just have this constant building of this tragic image of this horrible man and this person who had been there for him, given him support when no one else would and so on and so on and so on. And we have of course in the background which the jury weren’t aware that we have a client who is eligible for, for preventive detention so the stakes were very high.

Tipping J It was always foreshadowed in the depositions or whatever they are called now Mr King

Mr King yes

Tipping J it was?

Mr King Yes, I believe so, Sir.

Tipping J They knew, they knew it was coming?

Mr King yes

Tipping J It wasn’t they weren’t taken unawares if you like by the very broad brush approach?

Mr King I, I can’t answer that with precision. Certainly none of this came as a terrible surprise to Mr Tennet I know that. There hadn’t been 344A application I suppose the way he tried to get around it was the severance application subsequently the 347 application. Whether this, this detail, this what I’ve said this emotion, was at the preliminary hearing I’m sorry I don’t

Tipping J no

Mr King don’t know Sir. But we haven’t played on – and as I say it’s really, this is perhaps secondary but it lays the basis whereby by the time he gets up to cross-examine he’s really got to do something to try and redress the balance.

McGrath J He probably would have had to do something anyway wouldn’t he Mr King, just from the fact that he’d been unable to get severed?

Mr King Yes

McGrath J That the charges that would indicate to the jury that the appellant had been in prison for at least three and a half years.

Mr King Yes. That, that's right. Whether he had to go to the extent that he went I suppose is the, is the issue because it's my submission that

McGrath J He had a, he had a problem of a relative at the starting point before any evidence was given, of the relative character of the two principals?

Mr King That's right.

McGrath J And so he had to do something to reduce the complainant in the eye of the jury if he was to get anywhere in this case?

Mr King Yes absolutely.

McGrath J And what you're really saying is he shouldn't be blamed for setting out to do that?

Mr King Indeed.

McGrath J Well I guess I can perfectly understand the situation Mr Tennet was in.

Mr King Yes. It, of course it's a matter of degree and there were things that he said which frankly I cringe when I read the pinch and a punch for the first of the month comment. It just has no place in, it's one of those things I suspect in the heat of battle and it was a battle that it probably, he probably regrets saying that as well. But he, in my respectful submission, was unduly criticised inherently in the Court of Appeal judgment as being the author of what had happened. It's my submissions that it's equally open to say that he was faced with the situation where he needed to attack and he needed to attack on an emotional level. He needed to address a plethora of allegations spanning the entire course of the relationship which has been laid out in such emotional and prejudicial terms in chief. So I'm not being critical of the way that the approach was done. Whether the severance application should have been granted, whether the 347 application should have been granted, that's neither here nor there in this court.

Tipping J We have the severance rulings in the papers, Mr King.

Mr King Yes, Sir.

Tipping J Yes

Mr King Yes.

Blanchard J But that, that's not part of the appeal.

Mr King That's not part of the appeal, no. But it's in my submission it was, it was the judgment was highly critical and unfairly so I submit because he was faced with this predicament that wasn't of his making. He'd

done everything that he could to avoid it. He had to deal with it as he did. At times he crossed the line perhaps. My friend certainly makes the point s 14 of the Evidence Act could have been invoked on several occasions. I couldn't, with respect disagree, with that. But probably the real concern, probably the reason that this matter has found its way into the Supreme Court is because the judgment has sent shock waves through the defence bar. It's been disseminated widely. I know Mr Lithgow put it in his leave application that it would that the judgment was immediately given to all faculty and participants on the litigation skills course this year. And there have been few decisions that have sparked such comment and such debate and really there are two issues. One is what the Court of Appeal actually meant, that's one thing, but secondly and probably just as importantly is how it's being interpreted by people that have to stand up and do this job every, in cross-examining and complainants and so on each time. So if nothing else it's finding I would respectfully submit for some principles to be delineated.

Henry J Mr King at some time when it's convenient to you could you just articulate the error of law which you say the Court of Appeal fell into?

Mr King Yes, Sir. I submit

Henry J You don't need to do it now

Mr King No I'm

Henry J just when it's convenient

Mr King No I'm happy to do it because it can be stated very simply. I submit that the Court of Appeal took the view that because defence counsel had courted the responses that he had obtained that no substantial miscarriage of justice arises. I submit that the Court of Appeal drew a distinction between the situation where this type of material is adduced in chief.

Tipping J Well they in effect said didn't they that if it had come in in chief they would have demanded a new trial.

Mr King I think that's what they were saying.

Tipping J They didn't quite say that but

Mr King They said with great force

Tipping J yes

Mr King in their submissions which I suppose is the next best thing. So in my submissions that's what the Court of Appeal has been interpreted as

saying that this material was bad. And if it had been adduced in chief it would have occasioned a substantial miscarriage of justice but because it was defence counsel's fault then in their words "it would be a very unusual case where a hard line at trial is able to be pulled back from". So

Henry J Are you contending that if inadmissible material is adduced as a result of the conduct of the cross-examiner the Court of Appeal is saying that there can never be a miscarriage of justice?

Mr King No, they're not going that far. They're saying

Henry J so what they

Mr King it would be a very unusual

Henry J they've given undue weight to it is that it

Mr King yes? In my submission to place too much emphasis on the cause of the prejudicial material being before the jury and not enough emphasis on the effect of the prejudicial material being before the jury.

Henry J So is it permissible to give weight to the conduct of the cross-examiner?

Mr King I don't envisage a case where recourse has no input, I've tried to articulate that in my submissions, Sir.

Henry J Yes it's a matter of balance is it?

Mr King It's a matter of balance of course it is and I think with respect the Court of Appeal don't say never, they don't speak in absolute terms at all. What they say

Henry J But for a moment looking at the result of this case do you make that same challenge to the trial Judge's ruling?

Mr King Yes, Sir. I think so.

Henry J Well I'd like hear you on that in due course because it seems to me she didn't approach it in quite the same way as the Court of Appeal did.

Mr King No. No, Her Honour was much more concerned with the effect it seems to me rather than the court. She certainly one suspects underlying her rationale because she quotes it and talks about defence counsel asking these questions and it all being borne out in cross-examination as opposed to chief and so on. Whereas the Court of Appeal judgment whether they meant to have that emphasis or not certainly that is the obvious interpretation saying if a prosecutor was to

adduce this material then that's a miscarriage of justice, but if the defence do it then unless it's really, really bad it's not a miscarriage of justice.

Tipping J You are going to take us in due course to the trial Judge's ruling on the application to the jury are you?

Mr King Yes I'll, I'll take time now.

Tipping J Well whenever suits.

Mr King Yes. No I'm happy to turn to that now to p51(roman numerals) – I think that's our (1).

Tipping J Because in a sense this turned did it not in the Court of Appeal, or should have turned on whether there was sufficient grounds to as it were interfered with the trial Judge's discretion?

Mr King Yes I think that's right. But it, it seemed to evolve into a general comment of the conduct of cross-examination by defence counsel. And I suspect that's where the public interest component in, in the case in the case comes from. Her Honour Judge Maze p50 ruling number one, the important feature is of course that defence counsel saw himself the, what he regarded as prejudice to the extent of at least making the application. It's not a wasted case that's done.

Henry J Sorry to interrupt but at what point did this application, was this application made by Mr Tennet.

Mr King I think it was just after the complainant had completed giving her evidence. Certainly it was no further, whether she had not quite finished but I think it was immediately after. The transcript in a couple of places talks about going into chambers and so on to talk about obviously issues arising from the cross-examination. But we have from paragraphs 3 we have all of the matters being properly put out, set out from the, from the trial transcript. We have in my submission clear examples of questions that were being asked that could have been answered perfectly properly, perfectly truthfully without this vast array of material coming in.

McGrath J Mr King could I just perhaps ask, my impression was that it's at pp96-97 that the application is made is that, is that, do you know if that's right, it is part of the observation?

Mr King Yes

McGrath J And that he's been off work because he shot is arm in 2000 with P if you look at p97?

Mr King Certainly that's the last one which is discussed in the judgment.

McGrath J There's then about forty minutes

Mr King yes

McGrath J and then the court resumes later though there might have been other reasons for that. I just wondered if that helps you to place it, would that have been

Mr King I think it does, yes.

McGrath J Yes

Mr King Yep. No that, that would seem to be absolutely correct, Sir.

Tipping J Well there's an observation at the bottom of p96 which should never have been made in that form in front of the jury.

Mr King No

Tipping J But that seems to be, as it were, the ultimate provocation.

Mr King Quite, quite a lot of the objections were dealt with in front of the jury and quite a lot of submissions were made in the course of that. But I'd agree sir. But that certainly does seem to be the point and from there we have still a few pages of cross-examination

Tipping J but I don't think much turns on

McGrath J the cross-examination is, is that, does not seem to cause the problems after that, that's the last

Mr King that's right that's the last

McGrath J of the appellant's complaints anyway

Mr King last of them yes. Then we get up to re-examination on p107 which was very technical in nature. But the transcript of course is important and whether, whether it's even relevant of course my submission is that whether this can said to be the fault of defence counsel and whether he actually courted it, whether he entered into a slug fest and so on is really secondary to the issue of what was the effect of this disclosure. But in my submission the questions that he asked could all have been properly answered without the introduction of this material. For example p52 QUESTION: "the party wasn't like his mate's that he's known since the age of 10 or 15 or something" and the ANSWER: "oh Timmy he'd known well, he'd known him from being in prison in Australia". Well

Tipping J Was there any other evidence that had come out lawfully or unlawfully that he'd been in prison in Australia.

Mr King No, Sir. So suddenly the jury knows not just that he's served a lengthy sentence of imprisonment in New Zealand but they know that he'd known someone well from being in prison with him in Australia. Now that I submit adds a whole new dimension to it. I mean a forgiving jury might think well someone might have just made one mistake in their life and ended up with a big sentence and that obviously resulted in doing at least years and years in prison in New Zealand but to hear that they've also been in prison in Australia is a whole new this wasn't a one off mistake. This is this person's way of life, and I might be over stating it in the other direction there. But that is extremely prejudicial I would submit.

Blanchard J Mr King we are wandering around a little bit we have gone to Judge Maze's ruling, did you want to address that further?

Mr King What I submit, Sir is simply it's matter of degree. A point comes when the case has recognised that judicial direction is not sufficient to overcome prejudice. I submit that the line was crossed in this case. And that the Judge was wrong.

Blanchard J Where do you in that ruling she was wrong?

Mr King Paragraph 11. Mr Tennet complains that directions to the jury would not cover all the matters, then talks about how she had "I should confirm that early in cross-examination yesterday afternoon I did indicate caution to Mr Tennet" so we have her starting to apportion blame rather than simply concentrating on whether a direction could adequately address. We have, then we have the, the come back slightly in paragraph and saying that I'm conscious that some latitude has to be given. Then at paragraph 13 "the issue really must be what harm will flow from a continuation of the trial in light of matters raised". So in my submission that's, that's proper and appropriate but as against the background where Her Honour has seemingly, at least implicitly said that well defence counsel has courted this.

Henry J It was that point I was interested in, Mr King. It seemed to me that until we got to paragraph 18 and the reference to p81 of the transcript which is the Tribesman top there's nothing that the Judge has said which she has said was really caused by counsel's conduct.

Mr King That's right.

Henry J So that's the first time when she's related to that.

Mr King Yes although it seems with those early introductory paragraphs before she gets on to discuss the actual test then there is you know I took the steps of warning counsel and so on.

Henry J But when she goes through the individual

Mr King yes

Henry J instances it seems to me she's not placing any weight on counsel's conduct.

Mr King She certainly doesn't say she's placing any weight I accept that, Sir, but as I say those introductory comments in my submission showed that it was very much in her mind that Her Honour was subconsciously

Henry J The only ones that I could pick up were paragraphs 18, paragraphs 22 to 24

Mr King Yes. The Tribesman top I mean if I can just refer to that I mean we've got him sowing the number 13 on it and things as well. So it's unlikely I would submit that the jury would have not seen that as a gang reference to sewing yellow velvet number 13 on it is the context of doing it. Certainly in 22 and 23 and 24 we have direct references to Mr Tenet's cross-examination.

Henry J 24

Mr King Yes

McGrath J Mr King if you accept that in the end the decision as to whether to declare a mistrial is one that has to take account all of the circumstances, isn't one of the circumstances that counsel knew what, clearly knew what he was doing in cross-examining as he did indeed the Judge had pointed out perhaps unnecessarily

Mr King Yes

McGrath J The risks of, of following that course.

Mr King Yes. It has to be one of the circumstances. The question I suppose is how much weight can legitimately be attached to that and this, that is the flow on that we get from the Court of Appeal judgment.

McGrath J Judge Maze's ruling

Mr King yes

McGrath J I, I suggest there's no error in paragraph 11

Mr King No

McGrath J in her indicating that it is a circumstance that she's taking into account as part of the overall circumstances in which she will assess in the end

Mr King Yes

McGrath J of her ruling whether or not to declare a mistrial.

Mr King Yes

McGrath J There's no problem is there in what she says in paragraph 11?

Mr King Correct. And, and no she approached it completely correctly and in paragraph 13 the issue really must be what harm will flow from the continuation of the trial in light of the matters raised. In my submission that's spot on. And so the error

McGrath J Well which part of the ruling really gets you somewhere in your concern about the fairness of the ultimate result?

Mr King No it's the ultimate result really, it's the, that Her Honour clearly gave insufficient weight to the prejudice that would be inherent in the disclosure that were made.

Tipping J Is it only the result rather than any flaw in the reasons she gives that she points to?

Mr King I think that must be right so. It's an undue weight argument. Certainly that first sentence of 13 absolutely articulates the proper test which of course this Court in *Sungsuwan* really adopted the same precisely the same, in other words putting emphasis on the effect rather than, than cause. Now whilst Her Honour does make the point that some of the issues could have perhaps been handled better by defence counsel and that some of the answers that he gave, that were given by the witness were as a result of the questions that were asked.

Blanchard J Well take the one that she deals with at paragraph 18 the question about why they went to look at a car in Hamilton and not Otorohanga

Mr King yes

Blanchard J It seems to be a very deliberately asked question which she simply answers because they were going, already going to Hamilton to get things for the Tribesman top

Mr King Yes. Again Sir that's true but whether the asker of the question could have foreseen that she would have given that response.

Blanchard J Well why the question?

Mr King Whether the answer could have been given, well we already had other business we had to attend to in Otorohanga[sic]. I mean it could have, it still could have been answered in completely truthful but non prejudicial way. I think

Blanchard J That's asking rather a lot of a witness in these circumstances.

Mr King Yeah, when you're attacking her it is.

Henry J How would one deal with that, by I mean the witness at prehearing that she wasn't to say anything that which would indicate he was a patched member?

Mr King Yes, in my submission there could be and I've said

Henry J Regardless of the question? What else does she have to be told?

Mr King No

Henry J By Crown?

Mr King I've set it out Sir what I submit, my wish list. They are right at the end of my written submissions.

Tipping J You client's wish list really Mr King.

Mr King My client's wish list. Sir, 48(iii) "complainant should be briefed before being called to understand the basics of being a witness inter alia the basic parameters of hearsay, unnecessary prejudice, making submissions, talking about offences not charged, drug taking and gang activities not related to

Blanchard J Well this was gang activity but it was related to the matter in hand. Why did she go to Hamilton. The answer was "because he wanted to get stuff relating to his Tribesman patch.

Mr King How it should be dealt with, that's the concern then what I submit is that the witness should still have been briefed in the way set out there. It's not, it's not going to take long. It's simply putting them on notice that they shouldn't do that and the point can also be made

Henry J Did that not happen?

Mr King Apparently not.

Henry J Was she not briefed at all?

Mr King There's nothing to say that she was. Briefed in that way.

Henry J It wouldn't be on the record would it?

Mr King No that's right.

Henry J What I'm asking is did that not happen, that nothing happened, was the witness not briefed at all?

Mr King I don't know Sir. I can't say but from the record it doesn't appear that there was much attempt to restrain her but it can proceed is you tell the witness look just answer the questions, you have to answer them truthfully but don't add in unnecessary prejudicial stuff about gangs and drugs and other acts of violence and so on that's not there. If there's an issue there that you don't think that you've been able to give the correct answer ask to speak to the judge, see the judge, or wait for the Crown lawyer to make an application to re-examine on those issues. Because now in that way the case is run by the court. The evidence that comes in is dictated by the court. If the court thinks that you've asked a question that can't be accurately answered in any other way then the Crown can re-examine on it. But it's

Henry J well isn't your (iv) regardless of whether the witness has been briefed or not?

Mr King Yes. Yes in my submission and that's really what I, what I submit this, this whole issue is about, is about the trial process being dictated by the trial judge rather than by a witness because once it's said the genie's out of the bottle and directions can only have limited use.

Henry J You can only asses that by looking at the individual matters of complaint and then accumulating them can't they.

Blanchard J Are you suggesting that Judge should have had a word with the witness?

Mr King Mm. I think, I think as a rule of best practice once any issue started to arise the Judge should speak to the witness with obviously in chambers with counsel and the accused present and not the jury. And just

Tipping J Never heard of that Mr King

Mr King No. No but this was an unusual case where that was one step. I'm not being critical of the Judge for not doing it but it might be in future cases an appropriate step to take or to alternatively stand the matter down and have the Crown

Blanchard J But wouldn't that involve the Judge getting into areas that the Judge might not have real grasp of.

Mr King Yes, well the Judge doesn't have the statements and doesn't actually know what the Crown

Blanchard J so wouldn't it be a dangerous kind of intervention for a Judge to make?

Mr King Perhaps the intervention would be for the, if it's during evidence in chief for the case to be stood down briefly while the complainant is spoken to by the officer in charge or someone else and that explained because what we are talking about is not extensive. We're just talking about basic principles of telling them look just don't get into

Henry J Contrary to all practice isn't it to have a police officer speaking to a complainant in the middle of evidence?

Mr King Mm. Mm.

Henry J Doesn't sound right to me I'm afraid.

Blanchard J It would seem to me that the most the Judge could possibly think of doing where this kind of situation is arising is for the Judge to say something to counsel. But in this case it appears the Judge had done that.

Mr King She did. But that's and I suppose I'm extrapolating from that if it's proper for a Judge to caution counsel about crossing the line then it should be equally proper in some way, I don't quite know how

Tipping J Well it's not unknown for Judges to say to witnesses in front of the jury kindly confine yourself to the question asked or something relevantly neutral like that. I don't think like my Brother Henry I don't think we can start laying down prescriptions for

Mr King No. I sort of regretted going down that path as I started saying.

Tipping J Mr King while I've interrupted do you agree that in the end the question probably comes to whether this was a discretion which the trial judge could reasonably have exercised. In other words we would have to say before saying that she was wrong, that no trial judge could reasonably have taken the view that the prejudice inherent in this could be adequately coped with by direction? In other words it's a discretion and we have to say that this ruling was outside a properly exercised discretion. I mean there are all sorts of ways in which it can be put but that's it in essence isn't it?

Mr King That has to be right, Sir. With respect.

Tipping J And if the Court of Appeal had confined themselves to that exercise and had not sort of made sweeping statements well perhaps a little

unfair, apparently general observations about how it was alright in chief but would have been terrible in chief but it was alright here.

Mr King I think with respect it would

Tipping J it would have been just a simple routine exercise of the supervisor power of the Court of Appeal.

Mr King If the Court of Appeal had said we have looked at this, we have asked ourselves whether this material could have created a substantial miscarriage of justice, we've factored in that it was adduced in cross-examination but we don't give that too much weight we are more interested in what the outcome was the trial who was in the best position because she was there hearing it all was clearly of the view that it could proceed, she hasn't fallen into any error of principle, she's approached it in the proper and correct way. Then I suppose

Tipping J Your client would have had to have lived with that.

Mr King I think that's probably right.

Tipping J If that has been the

Mr King Yes

Tipping J But isn't that with respect in effect, forget the glosses that were put on for which I have some sympathy with your argument

Mr King Yes

Tipping J but isn't that in effect what the Court of Appeal have said?

Mr King Well it's difficult to discern. I know that's my friend very persuasively puts that in his written submissions so that was really what they were concerned with saying at the end of the day being that the jury already knew what he was in prison and it was inherent that they knew he was in prison for at least three and something years, that really adding that he had also been in prison in Australia and was a member or associate of the Tribesman and the P comment my friend argues of course in the context was probably admissible anyway to explain behaviour. That's certainly the approach that they've taken but in my submission if that was what the Court of Appeal had said then they would be correct in principle. In other words their approach would be correct but I would still be saying that they gave undue, didn't give sufficient weight to the actual prejudice that was inherent in this matter so it's, taking it back not for the matter of principle but to a question of degree. And my submission would be that it was, this was bad, this did occasion substantial miscarriage of justice so their approach was right but they gave it undue weight.

Blanchard J And you're saying that the trial judge also didn't give enough weight to the prejudice?

Mr King That's all I can say I think.

Blanchard J And was, and you would have to say she was clearly wrong in thinking that the prejudice could be overcome by her trial direction.

Mr King judicial direction, yes.

Blanchard J Do you have any complaint about the trial direction other than that it simply could not do the job in the circumstances?

Mr King No Your Honour, You Honour

Tipping J If anything it was favourable to the accused

Mr King Her Honour hit hard as she does, I mean she's a very experienced lawyer and judge.

Tipping J I thought she handled this whole problem quite, quite well frankly.

Mr King She handled Mr Tennet well. I've had experience of another appeal recently where there were issues there but

Blanchard J Just remember this is all being recorded and will go on the web.

Mr King Of course. And then Mr Tennet will phone me no doubt as soon as it's over to find out how it went. But no, no I couldn't criticise Her Honour. She, she intervened at a point, she said careful.

Tipping J Frankly to say forget all about drugs I would have thought if anything favourable to your client if anything because I mean anyway you know.

Mr King Yep. No I agree, I just submit that this was too severe to be overcome by direction.

Tipping J I understand the point.

Mr King I think, yep people talk about Dr Young's research into juries and so on and I've read all of that and I've had a couple of trials that were part of that so I sort of know a bit about it. But the thing that the public always say and the big question defence lawyers and Your Honours would have had all this as well is getting off on technicalities. Well with the greatest respect, the greatest example of a technicality to a jury to a member of the public must be, you've heard he was in prison in

Australia but ignore that, you've heard he used drugs but ignore that. That's just with respect an impossible thing to ignore.

Tipping J I think your best point frankly Mr King if I may identify it in this way.

Mr King Yes

Tipping J Was the fact that being required to face trial without severance in relation to the sexual allegations I think the chance of severance in relation to the prison one was remote, but the sexual ones being required to face trial conjointly with all this other stuff, perhaps the court has to be particularly vigilant in such a situation. There are cases which say that if you do decide not to sever there is a call for particular vigilance in certain respects. And I think that's your client's best point.

Mr King And especially so in a case where he's eligible for preventive detention and pretty much got it, he got fourteen years.

Tipping J Quite well that just adds colour.

Mr King No, no but it just adds, it just adds, it ups the ante Sir.

Tipping J Yes.

Mr King And in a case when there is already prejudice which is inherent in the case such as the disclosure he had been in prison and in my submission the court needs to be extra vigilant to too limit that and to ensure that it doesn't go beyond acceptable parameters. The severances you will from the severance ruling was a reasonably close call and in fact His Honour records that he had indicated to counsel that he thought that the sex cases should be at one stage severed and it was only after hearing further argument and considering recent authority that he decided against it, so it was a relatively closely call but to hear this background and it does have that flow into those allegations that just a horrible controlling behaviour. And remembering also of course that the complainant, the adult complainant was also the recent complaint witness in respect of the sexual abuse allegations so she's there in a dual role in any event and really quite an unusual role to be both the complainant and a recent complaint witness in a case and has the benefit of those directions and so on that follow on from that.

Tipping J And I suppose I'm, and I'm just putting your argument at the moment Mr King

Mr King Yes, Sir

Tipping J not signalling a view, I suppose you could also say that if there is any error of principle in this both the trial judge and the Court of Appeal it

is not recognising the need for that extra vigilance because that seems to me to stand out, there's a double vulnerability if you like.

Mr King Yes absolutely.

Blanchard J It doesn't appear that trial counsel made anything of that in relation to the request for a mistrial.

Tipping J He wouldn't.

Mr King He was probably shouting

Tipping J I wouldn't expect him to I mean

Mr King He, there were, there were actually a couple of things that I thought he didn't, didn't mention there that he perhaps could have. I come back to that, they've just totally escaped me at the moment, but there were a couple where he probably have put it in that way. But fundamentally I think the court's absolutely correct in its grasp if we were just dealing with a straightforward exercise of discretion from the trial judge, the only think I would say is that yep she got the test right, she identified the facts, identified the prejudice, but resulting view obviously that it was not so bad as to occasion a mistrial and could be overcome by judicial direction. That I submit was simply a weighting error not a principle error but nonetheless a significant error and which the court should properly intervene to correct. The Court of Appeal I submit fell into that same error but also attached undue weight to causation. Clearly critical of the way the defence lawyer conducted the cross-examination. To that I submit they were unfair on defence counsel because he was faced with a situation where he had to address these matters in the way that he did, in places might have crossed the line but that the court should not use its powers in a disciplinary way if there were to be problems in that respect then they could be dealt with either through the Law Society or through legal aid there's all sorts of ways that defence lawyers get punished and it also raises the whole subsidiary issue of when does the inquiry become one of counsel and confidence. In this case Mr Tennet conducted the appeal, clearly he didn't feel that he had done anything wrong and was prepared to take it on the chin if the court thought that he had. But when the issue became, when the emphasis changed to say not just what happened but why it happened and you courted this and so on, then he offered to withdraw and said quite properly and I think anyone would have in those circumstances but the court were very quick to say no don't do that and then come to a conclusion very quickly that this could not be a point in error in any event. Well in my submission that was a finding that was simply not open to the court on the material before it. The Court of Appeal, through its rules and through its practice, has a very set protocol and procedure for considering issues of counsel in competency and nearly always, in fact I can't think of a case where it

can proceed without a waiver being given and nearly always involves affidavits from the accused and counsel. And if I can perhaps and I know I'm going along a hypothetical path to some extent. But if it were a situation where Thompson had complained about his counsel saying he just totally cooked my goose in that trial I had no idea, he said leave it to me and off he went. Then would it not be a radical error, I know with *Sungsuwan* and I think with respect *Sungsuwan* is a decision which really does clarify the law and there was too much emphasis on radical error as opposed to the effect, but we would certainly be in that path. Here we have the Court of Appeal appear to go down there a long way, appear at least on one level to make their decision on the basis of reap what you sow basis. But without actually exploring whether or not the sins of counsel should properly be visited on the accused. It's one thing, it's one thing we accuse people tell their lawyers oh I want this witness called and there's discussions about tactics but with respect that's very rare that you have a client giving anything more than minimal input into cross-examination technique and style. Obviously Mr Tennet had good instructions from his client because he had, he was able to put these propositions, many of which were, were accepted, the complainant accepted that she had lied, she called it a white lie in ACC about the injury to her finger. Well that was always going to come out, it had to come out. It was a prior inconsistent statement about one of the charges in the indictment. He broke my finger when she's told the doctors and she's told ACC that he didn't break her finger she fell over. So that's always going to come out and clearly the client I don't know where he had got that from but obviously his client had had, had provided him with some detail. But the Court of Appeal error was to say (1) we're more, well we're more interested in cause than we are in effect, this was done in chief we'd give you the appeal, because it's done by your own lawyer it will be very unusual, not never but it will be a very unusual case to say that the hard line

Henry J Did the Court go so far as to say that had it come out in evidence in chief

Mr King No they, they come pretty close to saying that. They said "there will be great force in Mr Tenet's submissions"

Henry J Well if they didn't what I don't understand is how it could have come out in evidence in chief. These matters which are the subject of complaint other than (1) paragraph 17 this wouldn't have come out in chief.

Tipping J I wondered about that too, Mr King. And I thought that they must have been speaking in some sort of theoretical or hypothetical vein.

Mr King I think they were simply saying if prejudicial material of this type

Tipping J But it does add to the contrast in a sense that they are saying it would have been alright, sorry would have been not alright in chief but it's apparently okay if it comes out in cross-examination.

Mr King Yes. A lot of these types of issues are the type of thing which can come out in chief, association with a gang well that's, that can frequently slip in. The use of drugs. I mean lot of this could have easily come out in chief. In my submission the demeaning of counsel well I don't think attach much weight to that.

Blanchard J Happens all the time.

Mr King Yes. All the time.

Blanchard J Even in this Court.

Mr King Exactly. But this wasn't material which one would say would never come out in chief, this type of stuff which does come out in chief but not to this extent I would submit.

Henry J Except when you look at what brought the evidence out they're questions which the Crown wouldn't have asked.

Mr King No well the Crown don't cross-examine, Sir. They don't cross-examine their witness.

Henry J No but you're suggesting that some of these could well have come out in evidence in chief.

Mr King Yep.

Henry J But one's got to look a the type of question which would elicit the answer.

Mr King Well in my submission Sir the, if we take for example the "knowing Timmy in prison in Australia". The complaint has given in chief very detailed evidence about being assaulted seriously by the appellant and then going to a birthday party and that there are all these people around and that she'd made herself up to cover the injuries. Mr Tennet asks the obviously question well the people at the party were by and large your friends not his, in other words there were people that you could have spoken to about it so that approach from defence counsel was absolutely courted by the evidence in chief as it had been adduced.

Henry J I have got no problem with that but the type of question at p65 which brought about the answer is not the type of question Crown counsel would be asking the witness.

Mr King Sir the, the witness had given her version of events in chief. She'd said that she was a this party, that automatically raises questions about well why didn't you talk to anybody at the party to a defence, it doesn't raise it in the Crown's mind but in the defence it case it has to be addressed.

Henry J What I'm suggesting is that this material is highly unlikely to have been brought out by the Crown because it wouldn't be asking these sorts of questions.

Mr King They were matters that were not of interest to the Crown case. The Crown case was interested, was based on the witness in chief and what she said. So this was simply the defence trying to undermine those propositions. No Your Honour I understand the point I think Sir and, and Your Honour of course is correct. Crown aren't going to be asking questions about how did he know Timmy Paxton. It just wasn't part of their case. But it was part of the defence case by necessity that some sort of explanation

Henry J Yes I follow that thank you.

Mr King Yep.

Blanchard J Mr King we will carry on until 11.45 and take the adjournment then.

Mr King It's one of those cases, a bit difficult really to know how to, how to address it because the arguments have proved to be reducing righting but there are two levels obviously. One is of course and primarily I'm concerned about is Mr Thompson's predicament that he went to trial, this information for whatever reason was before the jury, it was a level which when one looks at comparable cases was very much at the top end of the scale in terms of prejudicial material. On the second level of course it is what are the implications and how is this judgment being interpreted. Are defence counsel now feeling that they are being hampered in doing the most important part of their job in a trial which cross examining important crown witnesses and I submit that obviously the latter can be clarified without necessarily affecting Mr Thompson's case but Mr Thompson himself in my submission can properly feel that there was this plethora of material available in a case where he was already faced with an appeal of inherently illegitimately prejudicial material. At that point admittedly said that it could be balanced by judicial direction. But when you add in that not just that he had been in prison for years in New Zealand but also that he had been in prison in Australia that adds a whole new dimension. He's not a person who's made one mistake, we're talking about a career criminal on both sides of the Tasman. The gang connection and the use of P and so on. All of those factors I submit take it to just an unacceptable level and I submit that first and foremost the trial Judge erred in thinking that it could be overcome by direction and the Court of Appeal erred in upholding that

discretion. The case law and probably the most graphic example was the *Colin McLean* which is cited by my learned friend at tab 7. Where the complainant under cross-examination stated that she was contacted by police as a result of the defendant's ex-wife having laid rape charges against him. Well that was it. The Court of Appeal having considered all of the cases leading up to it considered that that created an unacceptable risk. There was talk also about the way in which it was handled and for example the court noted that there was a two hour break immediately afterwards. So the jury was sitting there for two hours together obviously knowing that this is serious stuff. The Court of Appeal overturned a conviction for rape on the basis of that one isolated comment that he had previously been charged with rape and it was also known and the Court accepted that the jury probably knew that he had been acquitted of that rape charge but the mere fact that he had previously been charged with a rape case was sufficient for a retrial to be ordered there. In terms of

McGrath J As you say though that part of the context was that there had been very substantial publicity around rape concerning the man and that the trial had taken place, that the trial in this case was taken place within a few weeks. There were rather, it was a rather special case was it not.

Mr King It was although that seemed, the publicity component seemed to be more along the lines and of course Your Honours were sitting on it so it's not for me to tell you, but it seemed to be more of a focus on well the jury were probably aware of it in any event therefore the prejudice was not so great. It seemed to be in that context saying well they probably knew about it anyway. That's inevitable in a small town that someone on the jury would know about. And so the disclosure in the court was not such a big deal. And yet the Court of Appeal of course held that it was and overturned the conviction. And that's very similar to the decision of the Privy Council in *Athurton* Mr Learned Chief Justice gave the judgment of the court. In that case it was a retrial where it was known that the accused had not previously been convicted but had previously been charged and whether he was acquitted or was withdrawn subsequently or not, but part of the recent seems that the retrial was set was that there had been the inadvertent disclosure of that in his first trial so a retrial was ordered. At a second trial it seems that everyone, especially Crown counsel went to enormous lengths to avoid that happening again. It was agreed that the defence lawyer would ask the police officer in charge of the case "you know that he's got no previous convictions don't you". The question asked was slightly wider than that long the lines you know that he his, that Ethol Arthurton is a man of good character, has no previous convictions. So he, he, despite the fact that they'd adjourned and seen everyone in chambers and worked exactly what was being said as a typical attempt by the defence to gild the lily. And Ethol as a man of good character has no previous convictions, objection by the Crown who obviously it seems from his latter comments in the case was clearly concerned

about the thing being derailed and so – it's all set out at paragraph 8 on p952 of the decision we have "I know he was arrested and charged for a similar offence" was the eventual answer that was, that was given. So there we have again it's almost identical situation to *McLean*. We had the man on rape or sex charges with the revelation to the jury in one very fleeting moment that he, (a) has no previous convictions but (b) he has been charged with something previous. So although there's prejudice in that it is at least balanced to some extent by the fact he has no previous convictions. So there was, there was both good character and a hint of bad character in the same.

McGrath J But it wasn't so much character was it as propensity given the type of offence that he was charged. But these, these are just indications of a principle being applied aren't they in different circumstances.

Mr King Well they show in my submission that the courts place great importance on the right of an accused person to be tried on the actual offences rather than on any previous background. It shows that the courts recognised that there is a great deal of prejudice inherent, compared to what we're dealing with in Mr Thompson's case I submit relatively or lesser levels of prejudicial comment. That's debatable of course but that's, in my submission we have fleeting comments in both where the jury at least know he hadn't been convicted in the past. Contrast that with knowing that Mr Thompson had been in prison for years in Australia and had been in prison for years and years in New Zealand.

McGrath J You put a lot of emphasis on the Australian matter.

Mr King Yes I do, Sir. I submit that that's, that's

McGrath J Perhaps the matter that concerned me initially in this case was, was more the fact that he was a drug addict and that he shot up in his arm $2,000 worth of P but just a point in that regard. I'd like to put it to you, I'm look at p96 of the transcript. Would you accept that in response to a question concerning, in response to a proposition that there was no difference in Mr Thompson's attitude between the beginning of October when he was still working and the end of October when the serious and violent offending allegedly took place, it was relevant to give a response that he was on P he'd got himself onto P in the treatment is that a relevant matter in terms of having probative force.

Mr King It's an obvious answer that was given that the witness gave him. Whether that is relevant I suppose then the inquiry becomes is it more prejudicial than probative.

McGrath J I certainly understanding you saying its more prejudicial than probative but if its relevant and this is the point I think that has been touched on

earlier – it's it, wasn't it a rather generous direction to say it should be ignored that the Judge gave?

Mr King Well I think that, that's what my friend has argued in his submission saying that it was relevant but then as I say the inquiry becomes prejudicial versus probative. So I submit that the Crown presented its case that there was escalating violence and control.

McGrath J I'm raising this Mr King, I'm raising this really because you're raising understandably the *McLean* case and the *Arthurton* but those two matters both involved evidence that was plainly irrelevant and had no place in the trial. Whereas it seems to me that a lot of the material that you're dealing with did have probative force and they were responses that were given to questions that come into the area as you say as to whether it was more prejudicial than probative but it was a far more grey area than the *Arthurton and McLean* cases were involved in.

Mr King The three weeks he was off work he'd shot up in his arm $2,000 worth of P it's difficult to see how that in itself could be relevant. It might be relevant to the answer, sorry to the question the counsel has asked a question, whether that was a silly question to ask or not but I don't know just because he asked a question which invites response, the response of course can be given in a number of ways and it can be answered truthfully without reference to prejudicial material. So the relevancy can be obtained without the prejudice.

Blanchard J Well how would that have been done if she, she genuinely thought that the difference in his attitude was cause by his drug taking?

Mr King Well I suppose, the difficulty is though that and my friend has fallen into the same trap I submit by saying in his submissions that the use of P could explain the abnormal behaviour, the kicking and burning of the toy box and so on which is inviting a degree of speculation. I mean the jury don't have the benefit of expert advice as to how P affects people. All they know about it is what they see with Anthony Dixon

Henry J The purpose of the question was to try and establish that there was no reason for a change in behaviour and therefore what she is saying is a pack of lies.

Mr King I think what the answer

Henry J Isn't that what was behind it?

Mr King I think looking at it I, I suspect Sir that the Crown had presented its case and opened to the jury in court and said that there was escalating violence. It started with pinching and so on in the prison and just got worse and worse and worse until the 1st of November when the complainant reported it to the police. This of course is, so October is

an important month. So to test that whether there was escalating violence I don't know it's a, in light of the answer that was given it's an extraordinarily silly question to ask.

Tipping J It was an ill disciplined question.

Mr King It was ill disciplined question. It could have been confined. The relevancy issue I suppose if the Crown thought it was relevant they could have sought to lead it in chief, they didn't.

McGrath J But the defence counsel was really asking this question to advance the defence theory that she decided she wanted out and she'd do it

Mr King Yes

McGrath J by reporting him to the police without any good cause.

Mr King Yep

McGrath J Any so it was quite an, it was obviously a question that may have been broadly asked but it offered opportunities for the defence as well as risks.

Mr King That, that's right and of course the defence were in a position where they could make the point that, and it was accepted by the complainant that she had lied to get him out of prison and was not prepared to lie to get him back in prison. I mean that's the, I suppose that's the submission that's how Her Honour summed up the defence case to the jury. She lied to get him out now she was lying to get him back in.

Tipping J There's one aspect of all this Mr King that perhaps I'd like to dwell upon maybe after the adjournment. The Judge gave the standard direction at p3 I think it was at the signing up, you know separate consideration of counsel and so on and she said as one often reads you know you've got to isolate the evidence relevant to each count and you've got to take into account only that evidence that's relevant to that count, but she didn't give them any assistance as I read the summing up as to what was the true scope of the relevance of some of this prejudicial material. And it's something that's always worried me a little bit. The judges simply let juries work out in their minds what's relevant without really giving them much help.

Mr King Yes

Tipping J Now I don't know whether that's not sort of directly raised on this appeal but it, it may have some sort of collateral impact and maybe I'm, I'm over doing this because it is a standard direction but it isn't actually quite as helpful. It's an abstract direction rather than

Mr King Absolutely

Tipping J Rather than a focused case specific direction.

Mr King And to some extent it's kind of a meaningless direction. I mean it does seem to be following the evidence code type approach of everything's in it's all just a question of what weight is given to it. And it also seems to mirror the present favoured direction on similar fact evidence which is saying don't, don't see it as earth shattering but how much weight you give to it is really a matter for you. That's the difficulty

Tipping J I don't think in this case, it's not going to turn this case on this point I don't think but it, it's always niggled away at me this issue.

Mr King I'm a big fan Sir of taking everything to case specific directions even right down to the onus of proof, you know incorporate the names in the indictment and to tell them the Crown must prove that XX did this on the date and so on. So no general directions if they can be avoided. Make everything case specific in my submission that's the way that juries are going to take sense and take meaning from it. I think we have achieved that to some extent with provocation where it is much more case specific now but let's not go down that path.

McGrath J Would you have preferred a direction along the lines in relation to the P that he is how the P's relevant which is relevant to this particular aspect rather than the direction, disregard this totally.

Mr King No, no, that's right. Her Honour faced a situation where she possibly another judge could have gone another way and said it does have some relevancy it might explain some of the behaviour but Her Honour took the view properly in my submission that this formed no part of the Crown case so therefore it had no relevancy to it. The defence obviously didn't want it in either but the Crown weren't relying on it therefore she was proper to say it's relevant disregard it.

Tipping J Well presumably this direction was tailored to some extent by how the Crown had addressed the jury.

Mr King Yes.

Tipping J Because if the Crown had come in with a big hammer saying oh P's highly relevant to his conduct then they Judge might have had to have given a more careful direction.

Mr King The Crown sort of alluded to it very slightly by saying things about the strange behaviour with the, with the toy box incident and so on which was just quite bizarre. But they certainly didn't say that. Her Honour properly in my submission said it's got no relevancy so far.

Tipping J Well it's a safer course to take.

Mr King Yep. Whether as I say I suppose it's a, it's a lesser question really as to whether in some cases it could have been deemed to have had some relevancy and another Judge might have not been so charitable. But clearly it was not something that the Crown had wanted to lead. It was not something that the Crown were basing on their case and therefore I submit that it just had not relevancy. Even if it did have relevancy to answer your question Sir it involved a degree of speculation. The average member on the jury doesn't know anything about methamphetamine, pure methamphetamine other than what the media portrayed to them. It's dangerous for them to incorporate that type of armchair psychology to say well that therefore could explain this, this strange behaviour and its escalation it's speculative I suppose is what I am submitting. Before we even get into the issue about probative versus prejudice and it is, it's just about the most prejudicial thing I would submit that you can throw in front of jury nowadays, if a person's using P that's so pernicious and it's so regarded that way by members of the public.

Blanchard J We will take the morning adjournment.

Mr King Yes sir, I won't be very much longer.

11:45:38am COURT ADJOURNS

12:00:56pm COURT RESUMES

Mr King Thank Your Honours. In indicated that I won't be very long and I don't intend to be obviously. If there are any questions I will do my best to answer them. But the essence of the Court of Appeal judgment is in my submission to draw that very sharp distinction between material introduced by the prosecutor and material that was introduced as a consequence of the conduct of defence counsel.

Blanchard J Is that point that you say is worrying the bar?

Mr King Yes, Sir. It's, it's – and I don't think I'm overstating that Sir it's caused some shock waves, everyone is talking about

Henry J It's really the sentence at the end of paragraph 70 on p42 of the case is it?

Mr King Yes. I, I and, and the earlier comments about engaging in a slug fest. I mean there's various ways it can be looked at. One can say that this was just an apparation this was a defence lawyer who just crossed the line and therefore that needed worry the rest of us. But the concerns are that this if interpreted in certain ways can be misused. That witnesses can effectively be briefed or prepared or prepare themselves

or brief themselves that if the going gets tough they can (a) divert the attack, (b) dissuade the lawyer from asking the tough questions and (c) introduce prejudicial material against someone.

Henry J There's no indicate of that in the judgment is there?

Mr King No but in my submission in this way I preface it by saying if interpreted in certain ways. But the court were clearly of the view that what happened was as a direct consequence of trial counsel's cross-examination. They then seemed to say that because of that we're not going to allow the appeal whereas had this type of material been adduced in chief we would have. And whether that's right or wrong I suppose is one question, but that's certainly an interpretation which is open and which is being taken. The concern of the bar is that it places the power not in the court but in the witness, it's not the court that decides whether a character has been introduced and whether certain material was probative and prejudicial and so on and so on, that's all given to the witness with the court taking a secondary role saying well if you do it and it comes in, we would have done something about it, if it was done in chief but because you've courted that yourself.

Tipping J Would this problem be assuaged to some extent Mr King, if not fully, by *Sungsuwan* consistent reinforcement of the fact that essentially it's the effect

Mr King rather than the cause

Tipping J that counts rather than the cause although you, that is not to say that you divorce it entirely from its context

Mr King of course and in my submission I suppose that's what I'm urging, I've quoted *Sungsuwan* quite extensively in my submissions. Very forward looking judgment, *Sungsuwan* which certainly brings I submit New Zealand more into line with the international authorities and the approach laid down by the European Court and I know that England have recently done away with labour incompetence(??) and so on as well so that's absolutely correct. But I do submit that the, there are the types of issues that arise in this case are not isolated to extreme cases. I was cross-examining a young man in a manslaughter trial last year putting to him the tough questions in claiming that he'd seen certain things which my client claimed no way he could have seemed quite prejudicial. It was so obvious that he was just waiting for the opportunity to pounce in that my client was a drug dealer that he was doing a drug deal at the time. Now that had all been excluded but the witness had to be and you could just, it was one of those situations you could just sense he was, you know trying to stop him, trying to stop him of course it came out. And to a lesser extent than this one the Court of Appeal's view is that well look it's a serious matter and doesn't have a lot of effect.

Tipping J What was the name of that case, Mr King?

Mr King *Jessie Gill*

Tipping J Oh the motor manslaughter.

Mr King That's right.

Tipping J Yes.

Mr King The allegation was that he'd been off doing a drug deal at the time that's why he was racing up and down the road.

Blanchard J So how was that handled then?

Mr King Well I applied for a mistrial at the time. That was declined. I took it on appeal and didn't get anywhere on anything on a whole raft of grounds about similar fact evidence and so on mainly and that it's just kind of got lost.

Tipping J I think it was refused to come here as a recall.

Mr King That's right but that was purely on the similar fact.

Tipping J Quite.

Mr King I had nothing to do with that. But what I'm submitting is that the issue about how far you push is always very difficult one for counsel to manage. The law sets out the rules you're bound obviously the lawyers are bound them just like everyone else that there has to be relevancy, s14 of the Evidence Act is there to be able to invoked if it just is intended to be and so on and of course lawyers are always acutely conscious if that if you tick a witness you risk ostracising the jury. And so there's all these checks and balances already built into the system. If you cross the line there's complaints that can be made and so on and that's not infrequent. But really to be dissuaded from asking the tough questions because you are fearful that the witness knows something about your client and can pounce it without adequate redress is a very difficult predicament for counsel to be placed in and that by and large is what this case is being talked about as meaning. That somehow there's a shift in the wind and that if you are caught in response in cross-examination your clients, your problem and your client's well your fault and your client's problem. And the, the concern is that witnesses will become aware of this and will be able to avoid asking the tough questions.

Tipping J You mean the threat or the potential for a prejudicial answer?

Mr King Yes.

Tipping J Will inhibit the robustness of what otherwise would be

Mr King Precisely, Sir. For example if the, if you know your client's been in prison in the past and you know the witness knows your client's been in prison in the past then there's an enormous amount of power vested in the witness to sneak that in if you give them an opportunity. And that I think is the concern because its accepted that cross-examination is really at the forefront of trial advocacy. It's far and away the most important aspect of defence counsel's job in a jury trial. And it does have to be handled delicately because there are many hooks. But this is just another one which is added. Its unnecessary in my submission because the law already provides all those adequate protections. There are proper mechanisms which can be employed if you're asked a question courted a response which is there and then if the witness doesn't give it that the Crown think its needs to be given then there can be applications and re-examination and so on. But to taking and vesting in the witness really the control and the power of what goes in front of a jury is a very dangerous position. Now I know I'm talking in somewhat extreme language and it's not as extreme as I've made out but that is the concern is that suddenly the witness carries the power.

Henry J If something were to happen then it would be an obvious miscarriage?

Mr King It's, well the danger is and this is one of them that the court really with very little basis has oh well things were introduced gratuitously and again we are drawing distinctions. Instead of just looking at the effect we're looking at what was the motivation of the witness. Was the witness

Henry J Well I thought you accepted earlier that it is a relevant factor that the way that cross-examination was conducted elicited the information

Mr King It has to be a relevant factor. But

Henry J It's a matter of degree isn't it?

Mr King It is a matter of degree, Sir. But, but when we and this case is a classic example, the Court of Appeal have looked over all of these comments and have come up and they say three or four times in their discussion that they are not gratuitous. Well with respect some of them could be seen in that way. Most of these answers could have been, all of them could have been perfectly truthfully and honestly without resort to prejudicial material but it's just one of those things. I say it's gratuitous

Henry J But also be clear it's not only prejudicial material it's got to be inadmissible doesn't it?

Mr King Yes. And we're talking illegitimately prejudicial, Sir.

Henry J It's inadmissible material.

Mr King Indeed.

Henry J Not just prejudicial because you can get a lot of prejudicial material which is admissible.

Mr King No when I use it, I just use it in the way the case was illegitimately prejudicial.

Henry J Quite a few of these examples which were initially relied upon really are examples of admissible evidence.

Mr King In my submission they're not.

Henry J Well look at paragraph 17(i) of your submissions I'm sorry.

Mr King Yes, Sir. Allegation of assault in which the accused had not been charged.

Henry J Yes. In the context of this trial which involved a history of violence of a period of time that must be an admissible piece of evidence.

Mr King Well I think it's arguable that it is, but it's equally arguable that it isn't. It's only admissible to either place some sort of context on it, in that situation it's of relatively limited probative value but obvious prejudice.

Henry J Well it's not prejudicial because Mr Tennet made something of it as being inconsistent with the alleged statement. And he seized on it for that reason.

Mr King Defence lawyers are very clever at trying to turn things with are a distinct disadvantage into an advantage in closing addressing. Someone unhooking a hose and throwing it over the back fence in a murder case by fire the defence are forced to try and make something of it to try and say therefore he thought everyone was going to get.

Henry J Just that I have difficulty in seeing that that particular example is inadmissible evidence.

Mr King Well in a normal case if a person is charged with an incident and offence out of an incident the fact that they've committed a similar offence in a similar incident in the past is generally regarded as inadmissible. There are exceptions to that, whether it's called discrete conduct evidence, whether it's called similar fact evidence, whether

it's simply putting things in a realistic basis to a jury but in a case where a person is faced with ten counts of violence against a person to introduce and eleventh incident and more, this is, it's really unfair I submit to limit it in this way because we have the, remember the evidence in chief where the witness is asked what was relationship like, Oh he was abusive and aggressive and there were incidents of violence, so we have it all being thrown up in the air in front of the jury in any event. But then we have quite a description. Now I could go on Sir and address you at some length as to why I would submit that that was inadmissible. I would accept that there's an argument that it is admissible but it's not one point in isolation, it's the whole number of areas. The complainant working as an escort, well that was adduced in chief. It was in chief that she said she stopped working as an escort after he was gaol because she no longer had, well she stopped working after he was in gaol because she no longer needed to buy him tattoos leather jackets and save up for his

Henry J It wasn't relied on at all in the District Court, was it? That item was not relied upon in the District Court?

Mr King It, it, what was the focus of the District Court was the cross-examination but the cross-examination was on areas which had been introduced in chief. So for example on 17/2 in chief it was brought out that she'd stopped worked because she no longer needed to buy him tattoo gear

Blanchard J Sorry what's the reference?

Mr King This is the working as an escort?

Blanchard J Yes. What reference to the evidence in chief?

Mr King It's about p5, Sir. It's very early in the piece.

Henry J It arises I think on p40 and p41.

Mr King In cross-examination Sir?

Henry J Yes

Blanchard J There's a reference back

Mr King A reference beforehand.

Henry J P40, line 20

Mr King Is that still in chief?

Henry J No that's cross-examination.

Mr King I think the reference that I was looking for was p41 which is evidence in cross-examination.

McGrath J There's nothing in certainly the Court of Appeal decision that suggests it was in chief.

Mr King No

McGrath J They say the only incident in chief was the finger in the mouth assault.

Mr King That's right of the complained of comments. But many of them, the reasons Mr Tennet was cross-examining on those areas was because there had been reference to them in chief.

Blanchard J Where did she say if at all that she was required by him to work at an escort agency?

Mr King p40 "at that time what was job"

Blanchard J Which line?

Mr King line 19

McGrath J then a couple of lines down "I didn't need to no longer I wasn't with him"

Mr King Yep

Blanchard J But that, that isn't necessarily a statement that he was requiring her to work at the escort agency. I think this point has been elevated way beyond its real importance.

Tipping J I think it's p41 line 5.

Mr King yeah where the relationship

Tipping J If one really wants to get into this.

Mr King Yes well the relationship had ended I didn't need to get money

Henry J She stopped because she didn't need the money

Mr King To buy tattoo gears to buy

Tipping J for him to buy tattoo gears

Mr King hoped to get a Commodore and all that

Blanchard J That's the bit the Court of Appeal mentioned.

Mr King yes

McGrath J But the real

Mr King and I agree I, I don't place great, I mean the reason the escort that was raised was because Mr Tennet was endeavouring to explain the very dramatic

Henry J Mr King this point was never relied on before the trial Judge was it?

Mr King The trial Judge didn't seem to place great stack on causation, certainly not as much as the Court of Appeal.

Henry J This, this complaint about being required to work at an escort agency was not made before the trial judge?

Mr King No, she doesn't mentioned it and I assume it was but of course it was the same counsel

Henry J Well she listed six matters which had been raised by Mr Tennet

Mr King Yes

Henry J That was not one of them

Mr King Correct

Henry J Item 3 on your paragraph 17 was not one of them, item 4 I don't think was one of them, item 7 I don't think was one of them and item 10 I don't think was one of them.

Mr King Sir, when we're looking at the prejudicial effect it's my submissions that Court of Appeal properly summarised what the particular aspects were.

Henry J Weren't they the ones that Mr Tennet was then promoting?

Mr King Yes I think that must be right. I mean Her Honour

Henry J Because the Court of Appeal wouldn't have of its own volition gone through and extracted everything would it?

Mr King I don't expect they did.

Henry J What I'm suggesting is that by the time it got to the Court of Appeal Mr Tennet had found five additional items which he hadn't thought warranted complaint before the trial Judge?

Mr King He probably through he had a home runner with the four he had with respect Sir and I'm not being facetious when I say that. The danger is and I faced it a couple of weeks ago in the Court of Appeal and His Honour Justice Hammond was right that virtually not appeals nowadays are done by trial counsel they are all brought in by others and they nearly always it seems involve allegations of counsel incompetency. If this had been briefed out to someone else at the appeal stage there would probably be numerous other things that would have been raised. Mr Tennet ought to be congratulated I submit for coming, it seems with respect that he has refined his argument but the essential features, the essential elements of prejudice is not perhaps the also runs about being forced to work as an escort, that's just part and parcel, but it's the P use and addiction, it's the prison in Australia, it's the gang associations. And, and probably inherent in that is the length and time the man had spent in prison throughout his time. Now those are matters which are ordinarily for properly and good reason not before the jury. They were all before the jury in this case, whether there were other matters that weren't relied on at the time.

McGrath J Does that mean to same that you are not suggesting that there was anything prejudicial and the evidence which was given in response to the questions on the escort agency matter?

Mr King I can abandon that. That was, that's what Mr Tennet argued, I'm simply acknowledging that he didn't seemingly raise that with the

McGrath J But the point I'd like to make is that Mr Tennet probably raised this matter because he wanted to be able to address the jury on the possibility that the bruising to the complainant was caused by someone else to the appellant.

Mr King The bruising and the fact that the complainant was a capable of selling a good story because that was inherent

McGrath J Yes but that he suggested she was dissembling and matters of that kind.

Mr King That's right.

McGrath J Now that was what motivated them to raise it. He presumably would have been able to address on those matters at the end.

Mr King And did so.

McGrath J And did so. And I suggest there's nothing in the end that prejudicial in relation to that, that came out collaterally unfavourable to the appellant.

Mr King Well only in that the fact that she was working as an escort and was able to get bruised in that occupation and was able to dissemble was what he wanted.

McGrath J Yes

Mr King He got in the fact that he was basically her pimp. And that is prejudicial.

McGrath J Okay there was a response to that because at the cross-examination went on to established that she was engaged in this particular activity

Mr King a long time before she met him

McGrath J before he was released from prison

Mr King correct

McGrath J now in the end doesn't that balance out any possible prejudice there might have been. I suggest we can really disregard that. He got what he wanted from this evidence. He addressed the jury on it and there's nothing that could possibly weigh in the scales as unduly prejudicial about the evidence read as a whole.

Mr King No you've convinced me. And yes I'm being honest when I say that.

McGrath J I appreciate that Mr King, thank you.

Mr King You're perfectly correct it raised there for a purpose, the purpose there, there was a little bit of a sting in the tail in that purpose for him but that probably genuinely is in the benefit outweighing danger category. No I am prepared to accept that entirely. Paragraph 70 of the Court of Appeal's judgment. Adding to the specific term of imprisonment to the jury's knowledge of the applicants being in prison in New Zealand the reference is to knowing Timmy in prison in Australia, to his gang link and to his use of P. It's those matter really.

Blanchard J So you think the Court of Appeal is there correctly summarising the areas which are a cause for concern?

Mr King I think that's right Sir. The demeaning of counsel, well that's nothing, that's not going to affect a jury. In some ways again it's probably you've seen how difficult she is with me, is this really the type of person who would sit in silence while she's being assaulted month in and month out. She's a forthright and strong individual. She certainly was every match for me and gave me what for. But it doesn't, it's not consistent with her explanation, I mean you know again it's all the type of stuff, which I don't, I mean you usually as a lawyer you

Tipping J Turn it to your advantage with counsel's normal skill?

Mr King Yeah exactly, well you do what you can with it and it's the sort of thing that you can make that type of submission from, but it's those issues that submit. Now I know that I've probably harped on about the being in prison in Australia but I do submit that that really does take that, take it to a different level.

Tipping J Is it the fact that it's Australia that takes it to a different level or is it the fact that it's outside New Zealand.

Mr King Well if it was Bali you'd probably get their sympathy I suspect. But the fact that we are dealing not just with person who's made a mistake that could have wound up in prison for a few years, that's one thing but we've shown that this is his way of life.

Tipping J It's another discrete period of imprisonment that's the problem.

Mr King That's right. That shows he is a bad person because I doubt whether the jury would have known too many people who have been in Australia and in New Zealand. It takes it not just a person who could have made a mistake but this is his way of life. And of course it's always a difficulty whether something should be elaborated on about when a person's been in prison. I've had a case come to me recently someone to appeal because it was revealed that he has been in prison, it was necessary it was in transcript in the tapes but in fact he had been in prison for disqualified driving and his view is that well the jury should have known that he was in there for disqualified driving not for murder or for something more heinous but here it does invite that type of speculation. They know that he's doing years and years they know that he's known someone well from prison in Australia, got gang connections for P use. Now the Court of Appeal in that paragraph 70 have stood back and said whether despite the defence contribution to emergence could be said to have caused the trial to miscarry to an interweaving of the concepts of the, of cause and effect, despite defence counsel's contribution to its emergence. With respect that should have said whether these matters could have caused the trial to miscarry. Obviously a relevant factor that they were brought in. If it can be clearly established that this was an accused instructions to his counsel that's obviously another relevant factor. Just as if it can't be shown that it was the accused who wanted his counsel to do this and instructed his counsel accordingly then the question is should the sins of counsel be visited on the client who after all has to do the time. Again we have the court concluding all were the consequence of the conduct of the case and it would be a very unusual case for the appellant for the defence of a hard line taken a trial to be permitted to try again before another jury. Again whether it's the appellant who repents of whether his counsel repents its somewhat artificial in my submission to simply group them together. And I embrace just in

closing Justice Tipping's observation that in a case where there is already an amount of prejudicial, inherently - sorry illegitimately prejudicial material before the court such as by necessity knowing that the accused had been in prison, then the court needs to be extra vigilant to ensure that further prejudicial material is not likely permitted. In closing my submission it's a case where the line was crossed, the material cannot be said to have not influenced the jury. The fact that he was acquitted of some counts or others well that's not here nor there. The simple fact is he's now doing an extremely lengthy sentence of imprisonment with a very lengthy non parole period, nine and a half years, in a trial where this material was in front of the jury. It is my submission that on *Sangsuwan* type approach then the effect is of far more significance than the cause, but even on a cause type approach I submit that some of this material, certainly the bits that I am primarily concerned about is set out in paragraph 70, Timmy in prison, the gang link and the use of P. If they were at the fault of the defence it was the fault of the defence for asking loose questions, those particular aspects asking how well he knew people at a party or actually putting the proposition that he didn't really know these people at the party did he, to get the response well he knew Timmy because they had been to prison together in Australia, that's not something which should be laid at the foot of defence counsel on a cause and effect basis. Likewise the P use again maybe bad questioning but certainly nothing terribly offensive in the question that was asked. And beyond that I simply rely on the written submissions about at which I think the court turns on the *Sungsuwan* approach and giving defence counsel some reassurance that if things really get out of hand with questioning that they can nevertheless do the job they can ask the hard questions properly and appropriately and the trial will not be hijacked by a complainant who wants to make submissions and wants to put the boot in. Unless the Court has any questions that's probably my submissions.

Blanchard J Thank you Mr King. Mr Pike?

Mr Pike May it please the Court the approach in the respondent's case to the matter before the court, the rule 29 matter is the fundamental submission that has emerged here that it is essentially a balancing exercise which is complained of and no particularly fundamental point has emerged. The case in the Crown's submission has rightly come here because of an unusual perhaps set of propositions in the Court of Appeal as to the nature of defence counsel's obligations and the risk taking conduct which did not appear to have been a central feature of the case before Her Honour Judge Maze when she decided the issue at trial and accordingly the Court of Appeal has really in the Crown's submissions sharply perhaps reminded counsel that at times conduct in a trial will be relevant and that absent truly or plainly clear evidence of a miscarriage of justice that conduct will be relevant to the sort of remedy that they might be accorded when seeking retrial. This is not

to reinforce or to uphold a just desserts principle at all but it is a simple recognition of a every day trial occurrence in which tactics in an adversarial system are relevant and carefully thought through. And if tactics go wrong then even with respect in the light of *Sungsuwan* and its reminders it may very well be that a new trial might not be ordered where in a case where there was no issue of tactics and there was incompetence or inadmissible evidence got before a jury the balance might be shifted slightly. The overarching issue before a Court of Appeal is always was there a miscarriage of justice substantial enough so that we have a concern the there has been a conviction where there ought to have been an acquittal or the other leg nowadays that has come into sharp focus, we might be satisfied the conviction is well founded but the appearances of a fair trial have been so departed from that the court could not uphold the result and that of course is the *Brown v Stott* type of approach in the Privy Council and tended to come somewhat into focus in the case in *Howse* as to how those two issues, those conflicting issues might be resolved. Here it is submitted that essentially defence counsel ran a very aggressive cross-examination, the case concerned two people from class, condition of life that the jury could not have been in any doubt as to what sort of lives they led or what sort of people they were. A submission is made with respect that given the fact that there was medical evidence as to the injuries suffered by the complainant in this particular case some explanation had to be given about that. Where there was no medical evidence of course mendacity might do, allegations of mendacity would be sufficient but of course here the complainant's evidence was such that the defence counsel needed to establish a reason for injuries and did so by suggesting inter alia that she was lying throughout her testimony to a degree which is serious perjury is simply not gilding lilies is a very polite way of putting it if I can say that. But what the defence case essentially amounted to was to say this woman comes before you, her injuries to the extent that she can show or prove that anything happened to her that was an injury was because she was bashed or brutalised in the massage parlour and she's using that to now testify that my client is a brutal man. And also was not only lying about that but she's lying about her daughter's corroborating her daughter's sexual abuse of her daughter for purposes of revenge because the relationship has been ended by the appellant or in the trial court the accused. So there was a headlong and in manner aggressive and that is the important point about this trial it is submitted. The Court of Appeal was more concerned, as was the trial Judge, with the manner and demeanour of counsel rather than the sorts of questions asked. As Mr King has said to this court he is sure too skilful defence counsel could have asked in a much better way, much less confrontational and may well have got much less difficult answers to cope with. But the fact is that this counsel deemed to be acting on instructions launched into something which was at times sank to very great depths of really denigrating the witness in the witness box to such effect as dealing with the idea that she can fake pleasurable sex from

Mr Thompson because she could obviously do that as a masseuse then she can obviously manipulate a jury into believing she's as pure as the driven snow and a victim of all this rather than the victim being the hapless accused who is now the subject of a campaign of vilification and revenge. So this was not, this was not a polite trial. This was a clash of two people from conditions as I say of life which were only too well known to most jurors one would have thought. The trial Judge whose role was critical in this in the Crown's submission got it right. She made, she took the observations in the courtroom has been said time and again by the appellate and senior appellate courts that the deference that will be given to the trial Judge who can weigh what has happened in the courtroom setting, who can see the jury, can see the dynamics between counsel has to make a judgment as to whether the case had got beyond the point where a fair trial can be guaranteed even with a strong direction or it can be salvaged i.e it has not become a casualty it may be salvaged or the imbalance and the impropriety maybe restored and balanced and she made that judgment and she did so with respect in accordance with law and principle and as I understand it nobody from Mr King does not disagree with that. Mr King, my learned friend's case is that she got the balance wrong. It is submitted with respect in that regard that is a difficult proposition to run in an appellate court. It is doubly difficult to run at a senior appellate court level reviewing the record now and being bound by the record in the way the case was run. And here with respect it is submitted that the trial judge's direction rightly categorised the information as matters that the jury could be trusted to put aside and we entrust trial judges with that observation every day of the week as I need not tell senior appellate judges, that is how our system runs. We also with respect as *Arthurton* in the Privy Council case makes it very clear and so with *Weaver* both cases we cite in our submissions. In both those cases the observation is made or there are observations tending to indicate that inadvertent prejudice getting before a jury is capable of being cured and juries can be trusted unless the circumstances it might be thought are extreme. In leaping to that point in the very few cases where a senior court, the appellate court has reversed a trial judge ruling such as *McLean* the principle there was one where a court was entitled to say with respect to the trial judge, you have got it plainly wrong because the jury is apprised of the fact that this man has been accused through the official organs of the state has been accused and dealt with as a rapist in an identical set of circumstances with a partner which has devastatingly similar fact conduct which was seen however as not probative to call a similar fact and was excluded. Now in those circumstances it has to be said with great respect, coupled with the trial judge's difficulties apparently in dealing with it firmly enough that the appellate was right to say that that evidence and plain evidence must be, sorry the discretion was plainly wrong. Here it is submitted however that the matters that the Judge Maze saw unfolding some of which were legitimately before the jury, a few were not, could be entrusted to the jury to do it's – could be

put to one side by the jury being trusted so to do. The record discloses, it is submitted, that the jury did that because of the acquittals on some of the counts, it wasn't simply an open season, there are acquittals on four counts. The court will note from the record that that counts are those which are ill sourced. They seemed to rely more on the complainant's testimony without any form of corroboration in anything else and it was evident from the questioning, the questions the jury came back on that they were searching for some form of corroboration at times. So those four counts it is submitted and analysis of the record will disclose that those four counts were counts where evidence from the complainant would have to be accepted without any external indicia at all. And so it appears that the jury was well able, the submission can be made and is made, the jury was well able to decided that she is snapping back, this is just a cat and dog fight between two people at the moment. She snapping back. We can ignore this nonsense for what it, or give it the weight its worth which is essentially nothing. It is just simply somebody trying to restore their dignity or to answer back or to fend off a particularly aggressive set of questions at times from counsel for the accused at trial and the submission is made with respect that why the case is somewhat unusual is the Court of Appeal did instead of perhaps as has been observed from Justice Tipping, instead of perhaps confining the issue to whether Judge Maze was right in law and principle and could be reverse of which there would seem to be no real question of that, she ought not to be, it went on tot make some very trenchant observations about the conduct of the defence and therefore gave rise to the just desserts principle. It is submitted with respect that will the Crown takes on board my learned friend's submission that this has sent shockwaves as he calls it through the defence bar, that if the court here was mind to say its granted review in the case because of a concern that it might be read too widely, then the Crown would certainly accept that the Court could certainly say that consistent with the old cliché that or truism that cases are only authority for what they decide, that this case was decided

Tipping J I beg your pardon Mr Pike, you're saying that the Crown wouldn't resist the view that the Court of Appeal has gratuitously entered something that perhaps is expressed too widely?

Mr Pike I'd have to with respect Your Honour I would, I would say that the Court was right to remind counsel of the obligations, that it did so in a way that was perhaps very, it had a stridency to it that has obviously caused concern. But it did, I have with all respect Sir to my friend's argument the Court of Appeal and certainly the Judge writing is no stranger to the jurisprudence, human rights jurisprudence, at all made it very clear that the fairness of the trial is not negotiable. They were very concerned

Tipping J It all depends what you mean by an unfair trial, somewhat circular that is but I understand your point Mr Pike. You're saying the court should

have confined itself to the one issue and there is some ground for feeling that this needs to be tidied up a little. Is that a fair

Mr Pike That is a fair summary Sir in the sense that if there is concern, which would be better I have to say with respect put before a court at this level by an amicus brief from the defence bar or somebody who was writing on behalf of it with actual illustrations of the problem rather than, as I say I don't for a moment doubt that Parsons Coffee bar is a buzz with renditions of the case under appeal but that it is proper perhaps or more proper to put it before the court, this court, in a way in which it truly engages the supervisory jurisdiction of the nature enduing, which in the cause of enduing can embark upon. But I agree that if there's a perception that there has not been enough emphasis about the right to a fair trial and the, the emphasis which was made by the court and is made and accepted in the Crown's submission that defence counsel are still given the widest possible ambit to run a case, and we cite case law which from the UK recently which indicates the Privy Council that – sorry Canada Supreme Court which makes it clear that defence counsel for instance may ask questions where they just got a hunch that what their answer will be, they don't have to source it in some evidence to justify themselves. These are important principle and we uphold them and the Crown does so unwaveringly and unhesitatingly. But we certainly see this case with respect as one where the Court of Appeal has very possibly over emphasised the conduct of counsel at the risk of submerging the fact that hard protracted and at times aggressive cross-examination maybe justified depending on your witness, depending on your trial. And if there is an inhibition, if there is now a suggestion that appeals will be lost if defence counsel is overly aggressive then that should be put back into context no they will not be lost for that reason. It's a very relevant reason and with respect I would seek to rely on Justice Henry's observation. It's a relevant reason but it is not the only basis that there's a reading of this court's judgment which indicates that it has a very high degree of relevance, when its relevance is a factor in a case. The overarching factor is always miscarriage of justice, the Crown's accepted that time and again. *Sungsuwan* upholds that. The only caveat would be entered with respect is that while much has been said of cause of effect the idea in *Sungsuwan* that you must look at the effect and not the cause oftentimes and I think this is what the Court of Appeal is saying, oftentimes cause and effect are inextricably bound up, so the effect in a trial is caused by counsel's aggression unnecessary aggression therefore the trial judge might say this is not led by the Crown. The jury, I am satisfied a jury can see through this, see that these bits have got in as just hitting back, a lot of it could be rubbish, they won't rely on it, it hasn't come from the Crown and that's the important point I think the Court of Appeal makes in its para 65 which is the one reading unusual in the sense that it talks of

Blanchard J Yes 65.

Tipping J Sorry, the Court of Appeal is paragraph dealing with the, sorry I've lost the place, I know what it says.

Henry J Page 40 of the case.

Tipping J Oh thank you, thank you very much.

Mr Pike 65, had the passages complained been introduced by the prosecution in chief there would be great force in the argument. That has caused some surprised. I submit that the meaning of it has had the passages complained of being improperly introduced by the prosecution then it is led or introduced with the inframata(??) of the state in some way and that's the distinction the courts make I would submit as between inadvertent

Tipping J That's not what they're saying. That maybe what they should have said. But that's not what they're saying, they're saying that had the passages in this case been introduced by the prosecution, that's the problem.

Mr Pike It is. But you may disagree Sir but I'm trying to as I say

Tipping J You're trying to let them down gently

Mr Pike perhaps the court was thinking it was thinking it was in a sense it would have been improper for the prosecution to lead some of those matters, not all of them in the way they came out but one would not see that normally done and one wouldn't say that it was right to do it. It wouldn't necessarily be impropriety some of them would be some wouldn't but the fact of the matter is that be that as it may the courts have always made a very clear distinction between matters introduced by the prosecution which then has that official inframata, the state action, the police have put this case together they must think its true, as against some witness who is haplessly floundering under cross-examination blurting out matters which the jury can then see for what they are is of no moment whatever and probably quite untrue.

Henry J What the Court of Appeal might have been trying to say there was had the Crown asked the witness had Mr Thompson been in prison in Australia, that would have been quite improper.

Mr Pike Yes.

Henry J Was he a drug addict?

Mr Pike Mm yes indeed it would be quite improper.

Henry J That's the sort of thing they're talking about isn't it?

Mr Pike I would have thought so Sir yes. I have to

Tipping J I would also find some, I don't know what this has got to do with it frankly. This next sentence or the one starting "we do not doubt that" I don't really quite understand that sentence, in any case trial counsel acted irresponsible that's at trial presumably and then elected to appear on appeal.

Mr Pike Yes. Yes.

Tipping J The Court would then consider making its own motion an order for a new trial well that presupposes that the irresponsibility led to a miscarriage of justice presumably?

Mr Pike Yes and was carried on I don't I can't help the court with that passage, I am not procedure was really, the court had in mind there.

Tipping J I think they're really indirectly sort of saying that perhaps that Mr Tennet was being a bit adventurous in appearing in the Court of Appeal but then they said oh no they didn't want him to withdraw.

Mr Pike No

Tipping J It's quite elusive and I think really quite unfair in a way that it's not put clearly as to what, what they're really meaning.

Mr Pike I think Your Honour's comment the first one of those two propositions must be right one, that they were really saying that had this not been, this was a moderate appeal in the circumstances. Had it not been we might well have said that. Well really ordering a new trial would be an odd thing to do.

Tipping J It would.

Mr Pike The main thing to do is, happened not, very recently was to ask counsel to stand down and to make an order that other counsel be engaged but that was extreme. But that happened a few weeks ago, a month or so ago, which is the right thing to do is to simply say that grant and adjournment. So that, that would have been an unusual course but I certainly take, I don't want to say anything more to the written submissions. I do accept the point this case is before the because the Court of Appeal has done something quite unusual in its criticism and the manner in which it is done has left an impression. I don't demean what Mr King has said in the slightest and the Crown for its part would certainly not wish to see defence counsel feeling that this judgment has inhibited a robust approach, the usual robust approach reinforced in endless case law and if that is necessary here then the

Crown simply would support it. But I don't want to say anything more Sir, really. That is to the written factum.

Blanchard J Any questions?

Henry J No, thank you

McGrath J No, thank you.

Blanchard J Thank you Mr Pike.

Mr Pike If the court pleases.

Mr King Only if there's any questions, Sir?

Blanchard J Thank you. We are grateful to counsel for the assistance they've given us and we will take time to consider our decision.

Mr King If the Court pleases

Mr Pike If the Court pleases.

ALL STAND

ENDS 12:53:47 pm