IN THE SUPREME COURT OF NEW ZEALAND

SC 25/2007

BETWEEN **O**

Appellant

AND **THE QUEEN**

Respondent

Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Hearing: 20 November 2007

Counsel D J Sharp and KL Goldsbury for the Appellant
D B Collins QC and M D Downs for the Respondent

CRIMINAL APPEAL

10.06am

Sharp May it please the Court counsel's name is Sharp, with me Mrs Goldsbury. I appear for the appellant.

Elias CJ Thank you Mrs Goldsbury, Mr Sharp.

Collins Mr Downs and myself for the respondent Your Honours.

Elias CJ Thank you Mr Solicitor, Mr Downs. Yes I'm very sorry we're late starting, that was my fault I'm afraid. Yes Mr Sharp.

Sharp Thank you Your Honour. Your Honour this is my appeal and yesterday my learned friends provided me with a copy of the *Queen v Munro*, which is a decision very recently released by the Court of Appeal which deals with the primary issue on which leave was granted to this Court, so with Your Honours' leave I have adopted some of the analyses which have been applied, and probably applied better than I could do it, so if I could refer to that decision. This decision was a case

of which the particular section which is relied on for this appeal was examined in some detail and the other jurisprudence from other countries relating to the actual wording of the appeal provision was examined in relation to Australia, the United Kingdom and Canada which appear to be the jurisdictions in which the particular point in issue here has been previously considered. The Court of Appeal came to the conclusion at least in my respectful view that the basic test as expressed in *Ramage*, which is the leading New Zealand authority, remained intact and they applied the test and found that in that case applying that test when the whole of the evidence was examined, it was such that it was not sufficient for a jury acting reasonably to enter a conviction. The Court of Appeal did at para.86 of the particular judgment suggest that the word 'ought' was a better word than the word 'must' when examining the actual operative part of the ratio from the *Queen v Ramage*. The ratio was apparently in *Ramage* common ground

Tipping J — I think it's pronounced '*Ramage'* Mr Sharp.

Sharp — I beg your pardon, '*Ramage',* I'll pronounce it that way Sir. In *Ramage*

Elias CJ — It doesn't matter if you don't.

Sharp — I'll try to do it properly. And there was common ground in that case that the verdict was unreasonable or could not be supported having regard to the evidence, if the Court is of the opinion that a jury acting reasonably must have entertained a reasonable doubt as to the guilt of the applicant. Now at para.86 of the *Queen v Munro* it was suggested that it would be better if the word 'ought' were applied and in my submission that is significant because we're the word 'must' is used it's obviously a higher test than 'ought'. 'Ought' is that the encouragement, that the right response would be rather than 'must' which is directive and there's no alternative, so in my submission although the Court of Appeal declined to overturn *Ramage* it had some reservations which can be seen in that expression and that reflection on the ratio of the case that's leading the authorities. Now the other aspect of

Elias CJ — I really wonder whether, I mean I know a lot of ink has been spilt over this, but I would have thought that if a jury ought to have come to a particular then it must.

Sharp — Your Honour the imperative of 'must' is in my submission that the evidence is at such a level that no other alternative is available. 'Ought' is perhaps more discretionary – that it ought, it should, but less than the word must

Blanchard J — But look at the third sentence of para.87 which they're adopting.

Sharp Well that would certainly be the position because if it gets to that level Your Honour there couldn't be any other result if the object was to avoid miscarriages of justice, so although that doesn't seem with respect to be the actual test because they applied the test in existence, if it reaches that standard then there would be no alternative.

Blanchard J So it doesn't matter whether it's 'ought' or 'must'?

Sharp Well not if it gets to that level, because then the result from the Appellate Court with respect would be clear, but there are cases that are less than that Your Honour in which it's submitted that this basis for appeal could be triggered, therefore once that level is reached it should be clear with respect. There can be cases in my submission where it is below that level. With respect if it reaches that level then the Appellate Court

McGrath J I have difficulty Mr Sharp with your observation that perhaps the word 'ought' denotes discretion. It seems to me that 'must' and 'ought' both denote duty, one more emphatic than the other and I don't actually see that the substitution of the less emphatic expression of duty assists anything here.

Sharp Your Honour perhaps the argument for that is it's a Court who is looking at and reviewing legally another body's decision-making, so it is a step back. If a Court steps back and looks at what the jury have done, if the imperative applies then clearly if it's unreasonable it's got to go. The more difficult question in my submission is when that secondary Body has to decide that they ought to have found reasonable doubt.

Anderson J I think really the most helpful approach is in that third sentence in s.87 that indicates the function that has to be performed. An appellant has to satisfy and Appellate Court that the verdict is one which having regard to all the evidence the jury could not reasonably have reached to the standard of beyond reasonable doubt. That just explains the test without functions. It's much more useful than this semantic debate over 'ought' or 'must'.

Sharp Your Honour the reason that I opened on that observation from the Court of Appeal is that after they had found their way through all the authorities and had decided that they would apply *Ramage*, they did take the view that they were there to assess on the basis of all the evidence whether the jury acting reasonably ought to have entertained that reasonable doubt, so they actually came a little bit away from the test and took that view and what they did was they went through a very intense scrutiny of the evidence.

Tipping J Could you help me by indicating how 'ought' as opposed to 'must' emphasises the task that the Court has to perform, because that was the

premise on which they seemed to prefer the substitution? How does it do that Mr Sharp?

Sharp — The word is suggesting as was pointed out before with respect that they are both obligations of duties. Someone ought to do what is right as opposed to someone must do what is right. The must is more emphatic - the ought is a weighing up of the – it's going to be weighing process in any event with respect because that's the task itself. If the evidence in the case tips sufficiently a certain way

Tipping J — Well I understood the Court to be saying that it emphasises the review function rather than the substitution of personal view function, but I can't actually see how that works on the substitution. I would have thought each was equally capable of

Sharp — They both with respect

Tipping J — Well do you agree that that's the function, the task that the Appellate Court is involved in. It's not one of substituting own view per se, it's one of reviewing whether the conclusion reached below was open if you like to use that awkward word to the trial of fact.

Sharp — Yes, yes Your Honour

Tipping J — So I with great respect don't think this point's going to get you very far in substance. It actually comes to the same thing in the end.

Elias CJ — And that's helpful to you. I mean I don't see that you need to argue against it.

Sharp — No, the only thing that I would say in relation to that is that because there are the two limbs to the appeal provision, evidential sufficiency, which can be a weighing if there is any evidence is reasonably easy to determine if there is some evidence upon which a jury might convict because in almost every case there is evidence that could found a guilty verdict, whereas the reasonable aspect is more a weighing or reviewing of the particular

Tipping J — Well in that light would you be good enough to help with para.21 of the judgement – it's the same judgment in *Munro* – the first sentence where they say that a verdict can be unsupported by the evidence even though there is some evidence to support it.

Sharp — That is the review function of the reasonableness aspect of the evidence.

Tipping J — But in your submission that can't be right can it, reading that literally? You make as I understand your written argument a studied distinction between unreasonable on the one hand and not supported by the evidence on the other.

Sharp The actual provision in s.21 refers to there being no misdirection. Unreasonable in my submission may mean factors that impinge upon the evidence rather than the evidence itself. I do intend to develop this argument but the pre-condition for that particular point is that what happens in the trial process is unimpeachable, so as a result of that you are left, and a number of the authorities talk about there being nothing wrong with the trial process but there being a lingering doubt in relation to the safety of the conviction.

Tipping J But what is directional misdirection got to do with unreasonableness on the facts or whether there's evidence to support?

Sharp Your Honour if in the course of the trial things happened which will impinge upon the jury's opportunity to fairly and properly deal with the facts before it, then in my submission that could create the field for unreasonableness and in *Munro* at para.220 on the Court of Appeal looked at a number of factors within the trial process which were regarded by the Court as going towards. It certainly cites it as things that were not adequately dealt with in the trial that impinged upon the jury's ability to properly deal with the facts. There were maps that weren't the way that the Court felt they ought to be. There was a problem with the transcript. There was references within the evidence to a view taken by a Police Officer that was contrary to expert witnesses for the appellant that were stated as matters of fact and found their way into the summing up. So when the jury was faced with this case where problems existed, the reasonableness of its finding was affected by the nature of the process itself. It does not seem in *Munro* to be separate attacks on the basis of miscarriage of justice, but the Court seems to have taken into account these aspects relating to the conduct of the trial.

Tipping J Well obviously if there have been mis-directions that can influence, but here the Court is saying quite rightly I think that there doesn't have to be a misdirection.

Sharp Oh no, no Sir.

Tipping J Can we come back to this point? Are you arguing for unreasonable and unsupported by the evidence to be two different concepts, or are you arguing that they should conflated?

Sharp Well Your Honour the first principal point which is contained in the written submissions is they are separated by something which Parliament used law, so it seems from a fundamental statutory interpretation point that the draftsman described these as two separate things. That only goes so far with respect because the unreasonable argument must involve some review or analyses of the evidence. That's the only

Tipping J But one is quantitative isn't it, no evidence, the other is qualitative?

Sharp Yes Your Honour.

Tipping J It's some evidence but it's pretty shonky so we don't like it, if you'll forgive the colloquialism.

Sharp Of course.

Tipping J But isn't that the essential distinction that's set up here?

Sharp Yes but the difficulty in that test and the problem that results is where does that analyses start and finish and that's the reason that I went to the Court of Appeal considering this 'ought' or 'must' point that with respect it doesn't seem clear from the English authorities, the Australian authorities, or the Canadian authorities as to where the line is drawn for that examination of qualitative analysis. With respect if the evidence challenged in such a way that misgivings or lingering doubts or however it's expressed arise, then in my submission that's a triggering factor for an analysis of the quality of the evidence. Your Honour I've seen the aspect of the judgment in *The Queen v Munro* from Justice Hammond and he goes through the practical difficulties of appeals on which the reasonableness of the finding is opened up and in my submission there does need to be a triggering aspect to going down the road of that qualitative analyses.

Elias CJ I should flag that although everyone starts with *Ramage* in fact these principles are of much greater antiquity and indeed applied to all jury trials, civil or criminal, so I'm not sure about the emphasis you're placing on the statute but I would have thought looking at some of the older authorities what's clear is that unsupported by the evidence is actually the error of law ground which has probably being overtaken by 347 applications. The not reasonably supported on the evidence was a much older form of review where from well I've certainly seen it and it's in a civil context, an 1886 case where the Judges are using the word 'ought' there. Indeed they contract it because in another case one of the Judges thinks that 'ought' should be replaced by 'might'. In other words a more remote standard of review than 'ought'. But I would have thought for your argument all you need to do is argue on the basis of the reasonableness ground and that 'ought' is as good a standard as you can get to.

Sharp The argument proceeds Your Honour without with respect having to go further than that. The particular issue in this trial was one that's been referred to as a credibility argument which is one of the categories of review of this type of evidence which is difficult. It's not unheard of for credibility arguments to be resolved by Appellate Courts and the Australian case in *R v M* was a case in which the issue must have been credibility, so although credibility is often a head-to-head assessment of witnesses which juries are well placed to carry out, it's not unheard

of for credibility assessments to be amenable to review under this type of approach, and in *R v M* the actual ratio of the case which is set out in the written material which I have provided. It's at page 2, at para.3.5 and a portion of the judgment which contains the ratio includes that if the record contains discrepancies; displays inadequacies or tainted or otherwise lacks probative force. Now the submission which is made is that that fits in with the reasoning which can be seen at para.233 of *Munro*, that is that it's a review of the evidence as a whole and it's a review similar perhaps to administrative law where a review takes place on the record. From that a submission is made that if within the record there is material which may have resulted in the jury coming to a reasonable conclusion, that material ought to be taken into account because in this particular case the actual appeal rests on two bases. The first being on a close analysis of the evidence, there is a basis for the credibility of the complainant to be questioned and that there is material by way of the text messages and the telephone records which can be said to provide some external picture into the events that took place at the time the jury found the offending to have happened, or near to it, and that's the analysis of the evidence, but it is submitted that the analysis doesn't conclude at that point because there are other matters and I'm very conscious of the point made by learned friends that I'm not to argue things which leave wasn't granted, but without arguing the points there are a number of factors in which the Court of Appeal found there were matters in the trial process which were unsatisfactory. Now without trying to run appeals based on those points, the contention of the appellant is that when one analyses the evidence and the review of the respective positions of the two persons whose credibility was primary for the jury to focus upon, and takes a view of what happened in the course of the trial

Elias CJ Why don't you just confine yourself to the evidence?

Sharp Well Your Honour

Elias CJ Because that's the test isn't it, that's the test that the case is used, whether the jury acting reasonably ought to have entered a conviction on all the evidence?

Sharp Your Honour with respect if the jury were proceeding on a basis which was not correct, how could it be said that they

Elias CJ Is that a process argument?

Sharp Well yes, if it's something that's on the record that would have impacted upon the decision-making process, my submission is in a consideration of reasonableness or a review of reasonableness, those are factors which should be taken into account.

Elias CJ What are you referring to in that respect?

Sharp	The first one Your Honour is that in the summing-up of the learned District Court Judge and I just refer to the case on appeal
Elias CJ	No, sorry
Sharp	I'll just describe it
Elias CJ	But on the evidence before the jury what is your argument that it couldn't reasonably beyond what you've developed in your written argument, what's the argument that they couldn't reasonably have preferred the evidence of the complainant?
Sharp	If the jury took the view as they were directed that the lines direction applied to the complainant
Blanchard J	But that's introducing a ground for which you haven't got a leave.
Sharp	Your Honour
Blanchard J	A considered decision was made not to grant you leave on that ground.
Sharp	I'm not seeking to challenging the finding
Blanchard J	Oh yes you are, you're coming in by the backdoor.
Sharp	Well with respect no Your Honour. What I'm saying is that the decisions about reasonable – say if the evidence is tainted, or if the evidence on the record has some factor, and I am using the Australian authority of *R v M* but I'm also relying upon the fact that in the *Queen v Munro,* the Court of Appeal enumerated these problems with the trial process
Blanchard J	But that's a miscarriage of justice ground.
Sharp	Well Your Honour there doesn't seem to have been a miscarriage of justice argument mounted in *Munro*. The argument was the reasonableness of the jury's decision, and in assessing that the Court appears to have gone through the trial process and point that out to factors that the Court suggested, or the Court at least set out as part of the finding that the eventual decision was one that the jury could not have reasonably come to.
Tipping J	Is there anything in the Court of Appeal's judgment in this case that you're not allowed to attack other than on the ground allowed but which helps you, just simply because the Court of Appeal have said something that you say helps you because frankly I don't see how you can go beyond that.
Sharp	That is all I'm seeking to do Your Honour. If the Court of Appeal

Tipping J	Well it would be a good idea to come to it pretty smartish then as to what it is that the Court of Appeal has found
Sharp	Yes Your Honour.
Tipping J	That you say helps this factual.
Sharp	Your Honour yes. At page 260 of the case Your Honours there's a passage which is half-way down the page which says *Gauging the Witnesses*
Tipping J	Well that's just the Court of Appeal reciting what the trial Judge said in the summing up.
Sharp	At para.37 over the page Your Honour 'the Judge's summing up in this case' is how the paragraph begins.
Elias CJ	Well where's the impact on the evidence?
Sharp	In this trial my learned friends from the Crown rightly suggested credibility as a central issue. If credibility is a central issue and the benefit of a direction in relation to the telling of untruths is ascribed to the complainant.
Tipping J	But this is a miscarriage argument that something the trial Judge said has caused the trial to miscarry because the jurors' minds were not properly focused or were misled or were perverted or whatever. It's got nothing to do with the quality of the evidence as the jury may have seen it.
Sharp	If Your Honour, just perhaps relating this to administrative law principles, the finder of fact was working on a basis which they should not have worked upon then that can deprive the
Blanchard J	But that's a miscarriage argument
Sharp	But if the inquiry as to the reasonableness of the finding isn't the basis upon which the finding was made
Blanchard J	It's a question of the reasonableness of the conviction based on the evidence as a whole.
Anderson J	It would help us I would think if you can point directly to what evidential matters should have left the jury with a reasonable doubt. That's the task you have to complete.
Tipping J	Because the complainant said she was raped, so there was clearly evidence to support it.
Sharp	Yes.

Tipping J So what is it about the quality of the evidence as a whole that should cause the jury to have doubts about it, and not accept at face value the complainant's evidence, and you've got to bear in mind there was quite a lot supporting the complainant too? So it's an overall package issue.

Sharp Yes, that's accepted that the whole of the evidence needs to be considered and that's accepted.

Tipping J But you've got to have a pretty keen hit haven't you? If a complainant says she was raped and she dashes out of the motel stark naked; says to the first person she sees I've been raped; I mean you've got to have something pretty strong to suggest that the jury weren't entitled to accept that as evidence to the point of guilt.

Sharp Your Honour the first point that's made about the evidence is there's no question that the participants in this were heavily affected by alcohol is the first point

Elias CJ But all of that was put to the jury. All of these questions about the Crown case were the very substance of the trial. That's what the jury was asked to focus on.

Sharp Yes, but Your Honour with respect there was evidence that could not be controverted, in fact was agreed with by the complainant about the timing of these incidents.

Anderson J Well I don't know whether it goes as far as your submissions suggest. The motel owner says that they booked the motel at about 1.15. A text message went to the complainant's boyfriend at 1.27 and 12 minutes is quite long enough for unwanted sexual activity to have occurred.

Sharp Your Honour the evidence of the complainant in relation to the sexual activity was that it went on for some hours.

Anderson J Yes but it doesn't mean to say that she sent the text at the end of it does it?

Sharp Your Honour the complainant said that there wasn't any texting from the appellant from when they walked down the road to the motel, that there's no text from him in that period of time and so the record has a gap of time that when it's analysed makes the contention of the complainant that the text occurred during the course of the sexual activity difficult to sustain on the evidence. In fact it seems very hard if the evidence of the complainant is accepted on one hand to reach a point where the text wasn't received outside the motel. But alternatively even if the text from the boyfriend was received in the motel, the nature of the response, the circumstances of the response which must have had another person watching a text message.

Anderson J But it's plain from her evidence anyway that he was a very domineering, dominating, ruthless person, and she was in a position of weakness. That's the proposition that was no doubt put by the Crown and at least the transcript supports such an interpretation.

Sharp The actual content of the text message fits in with previous arrangements that would have been known by the complainant and the boyfriend that she was returning to A's. There's no evidence on the part of the appellant that he was aware of the arrangements which were suggested, but the text fits neatly with that earlier deception of the boyfriend. It's getting to a point where the appellant is being deemed to have knowledge of a highly detailed nature of a deception that was admitted by the complainant that she had made.

Anderson J I thought that the evidence was that she texted him from the party 'if you don't turn up soon I'm going to A's.

Sharp That was to the appellant Your Honour. The text was to the appellant that if she didn't turn up soon I'm going to A's is the text that she had made and the point on the appellant's behalf is she was only going to A's if he didn't turn up. If he turned up the unsaid premise is that they would go somewhere else.

Tipping J The Court of Appeal surveys this verdict under the heading *Verdicts Against the Weight of Evidence* which is a slightly unconventional heading but never mind. Now what do you challenge about their analysis which on this texting point, because this is why you refer to it as sort of external material that can't really be argued with, why did the Court of Appeal get this wrong, because we're on appeal from them on the facts? No doubt you will be able to help me here but I thought it all read quite logically as far as the texts were concerned. They weren't persuaded that this texting sequence and so on precluded or got anywhere near precluding what the complainant said had happened. Because that's the sort of level I would have thought you have to be at. You just can't accept the complainant's evidence because here, look there's some unchallenged thing that just can't be reconciled. I would have thought you'd have to get close to that Mr Sharp.

Sharp Well Your Honour when the Court of Appeal considered these they recite that the defence maintained that there was this time period which can be determined in the evidence that makes the suggestion that there was a forced response to the boyfriend untenable or unlikely because of the nature of the call itself. Now that argument is not examined by the Court of Appeal with respect. They say that it's a red herring. Now with respect to the Court of Appeal

Tipping J Where are you?

Sharp They say that at para.21.

Tipping J 21, thank you.

Sharp Yes, it says at the heart of this appeal point must have created a reasonable doubt.

Tipping J Yes.

Sharp It says the timing of the text is a red herring with respect

Tipping J That's the Crown's submission?

Sharp The Crown's, yes, yes, certainly. The appeal point doesn't appear to have been actually addressed.

Tipping J You mean they left that hanging in the air, is that what you mean?

Sharp Well they moved on, they didn't

Elias CJ Well para.23 deals with it.

Sharp By saying that this was a jury case and they must have preferred the evidence of the complainant.

Tipping J We cannot say that this text message must or should have created a reasonable doubt. A paradigm jury case.

Sharp There doesn't appear to be

Tipping J But the defence was consent or belief and consent.

Sharp Yes, my learned friend says that belief and consent based upon reasonable grounds wasn't run. With respect to my friends that's not accepted by the appellant. I can refer the Court to a number of cases where trial counsel referred to belief and consent based upon reasonable grounds.

Tipping J Well that's supported by para.18 of the Court of Appeal

Sharp Yes, yes Your Honour, and there is material which I could

Tipping J I can understand if it was a question of something not having had an opportunity of happening you might be able to rely on the text messages, but how does the text messages bear on whether she consented or whether he believed on reasonable grounds that she was consenting?

Sharp The text message is submitted to be important because the text message is a message to the boyfriend who is in another town

Elias CJ	It's a motive for this suggestion put by the defence that she was lying. It's consistent with the defence theory of the case, but that theory was put to the jury and they clearly rejected it.
Sharp	Your Honour the timing of those aspects is so much to the heart, you see this is a case of which two people of approximately the same age go to a motel at 1.30 in the morning. It's not expressed in these arguments but the suggestion is that they went to the motel for the purposes of having sex and in the statement which the appellant made to the Police, he said that's what he thought she went there for. The complainant gave evidence of a number of what are submitted to be unconvincing reasons for going to the motel and then has a text to the boyfriend which is in very close proximity to the areas that is in no way reflective of somebody who is under pressure or is being sexually violated
Elias CJ	But these are all jury points and they were put to the jury and the jury was convinced by the complainant and there was evidence upon which the jury could be convinced, it's been held by the Court of Appeal. How do you overcome that?
Sharp	The actual timing of those events is such that it submitted that it had to raise significant questions for the jury.
Blanchard J	Well maybe it did, but there's an awful lot going the other way.
Sharp	Well I am with respect going to deal with some of the material which the Crown suggests on the whole needs to be considered that the Crown have suggested in their submissions that I haven't put out the whole of the evidence and the whole of the evidence needs to be considered in relation to the case, and the Crown have submitted that there injuries which weren't referred to on the part of the defence submissions - the appellant's submissions. The first one was that there was evidence of some bruising on the arms of the complainant
Elias CJ	Mr Sharp I think all members of the Court have read the evidence so we are aware of those. I mean you don't need to simply refer to what the Crown says, but you might want to emphasise some of those.
Sharp	Thank you.
McGrath J	Mr Sharp just before you leave the text messages, did you have any particular comment on the Court of Appeal apparently referring to Crown counsel in that Court's observation in para.21, that the message might have been sent pre-emptively, which I take it means might have been sent prior to going to the motel?
Sharp	That point would have been a good point for the appellant to make. If it was sent before going to the motel it would be to dissuade the

boyfriend from calling. I don't understand the Crown to have suggested that to have happened.

McGrath J At the trial, but it was obviously suggested in the Court of Appeal.

Sharp Yes, I suspect she thought she was going to, it would have to be the witness S that that Z is referring to, there's not any evidence that I can recall that would support that.

Elias CJ Well wasn't it a suggestion that she may not have been lying because she was intending to go, whether it was while she was in the motel room she still had that intention or before, it doesn't seem to be clear from this and may not be material.

Sharp She was certainly asked about it and never said that it was for that purpose within the evidence either in chief or in the cross-examination, so she herself didn't give that explanation as to why the text might have been

McGrath J Well you would say it was inconsistent with the evidence she did give I suppose?

Sharp Yes Your Honour.

McGrath J Thank you. I'm sorry feel free now to leave the text messages, I just wanted to cover that point.

Sharp Thank you. I was talking about the injuries and the Doctor in his evidence concerning them said that it was not possible to give evidence of a degree of force but it could cause some pain to have bruising. Well it's submitted that the bruises by themselves, even in conjunction with the other injury which I'll come to, it could only be part of circumstantial case. There's no qualitative evidence as to the force required; there's no other injuries apart from the 5mm anal tear and the bruising on the arms. The complainant told Doctor Peters that she was held by the shoulders and mouth, so the site of the bruising is inconsistent with the statement made to the Doctor when she was first examined on the night, and I accept it was a point that was made to jury but trial counsel for the appellant had the photographs and showed the jury that the places of the marks of the thumb and finger marks as seen were not consistent with someone being held down. Accordingly the question of whether the bruising is evidence that takes on the whole of the evidence the Crown even further submitted to be open. But the points also made about the layout of the motel room and the fact that the bed had been moved. Well there are other factors in relation to the motel room in the layout. That was that the socks were with the shoes. Again it's a point that was made at the trial but it would be an uncommonly careful rapist to put the socks with each of the shoes where they were found. The bed was moved, that's certainly the case, and my learned friends have a photograph in their submissions, the bed

being moved. At page 42 of the case, the complainant said that it was because the bed was on wheels that it moved the way it did rather than requiring some excessive force. The point doesn't take the case any further. The Crown rely on blood stains and this is a point that with respect I know Your Honours have told me about not re-arguing points. I'm not seeking to do that, but it may be that the same mistake with respect is made in the Crown's submissions as may be seen in the Court of Appeal decision and that is that the blood stains were said to have occurred on top of the duvet cover. This is said by the Crown to be evidence in support of the reasonableness of the verdict. Now the Crown rely in their submissions upon photographs. My submission is that it's unsafe and it is speculatory and the jury may have fallen into the same trap, and the reason

Elias CJ Why does this matter?

Tipping J Is it the precise positioning of the blood stains that's an issue or is it the fact of the blood stains?

Sharp No Sir. Your Honour the point that's made, and it's made in great detail in the closing address and arguments on behalf of the Crown at the trial, is that blood stains on top of the duvet indicate that the appellant's position that he and the complainant got into the bed could not be true because the blood staining was said, and it is repeated by the Crown in relation to the reasonableness of the verdict, was on top of the duvet cover, and that is based upon photographs that were observed by the Court of Appeal and have been referred to by the Crown. My submission is that is it safe because the actual duvet was examined by the ESR scientist who examined them and was cross-examined and said after examination that witness could not say whether the staining was on the top or the bottom of the duvet cover, and there was also evidence of DNA from the complainant being found on the bottom sheet which would have been consistent with the

Tipping J But if the jury had the photographs, there was no dispute that it was a blood stain I take it?

Sharp No Sir, no dispute at all.

Tipping J The jury could have worked out for themselves the force or otherwise of the proposition. Why do you say they were misled?

Sharp Because to state authoritatively that the photographs can show that the blood stains on the top flies in the face of the Crown's own witness who had examined the blood stain and who were able to say that it was not possible to tell.

Elias CJ Is this an argument that the prosecution over-stated things in its submission to the jury? I mean the jury had that evidence. The jury

had evidence also of another blood stain didn't they on the sheet close to the pillow or something like that?

Sharp Yes there were a number of blood spots on the under-sheet.

Elias CJ Yes.

Sharp The argument Your Honour is because the Crown have said that the whole of the evidence, if it is a review of the evidence, needs to be there and have added this piece of evidence as part of the evidence which is said to support the proposition that the verdict that was returned was reasonable.

Elias CJ But just looking at it in terms of what evidence the jury had, the jury had evidence that there were blood spots in a number of places on the bed?

Sharp Oh yes they did. If the point is made that the appellant is caught out in a lie which is the way that the case was presented to the jury because this evidence shows, and it was expressed unequivocally, that the blood stain was on top of the duvet cover and the Crown's own scientific expert said that it was not possible to say that the blood stain was on top of the duvet cover, in my submission that is putting the jury in a position where it can make an unreasonable use.

Tipping J But they have the photograph. Now which was the top and which was the bottom and which was the side and so on surely

Sharp Your Honour the photograph is certainly real evidence. A jury are absolutely entitled to consider the photograph, but the submission in my respectful submission to this Court to say that the blood stain is on top of the duvet cover - the photographs weren't even shown to the jury. The Court of Appeal has used that as a basis to deal with the fact that this was not misleading.

Tipping J Oh are you saying that the jury didn't have the photographs?

Sharp I'm not saying that Sir. The jury would have had the photographs as exhibits, I'm sure of that.

Elias CJ Where is this reference?

Anderson J 129.

Elias CJ 129, at line 22, was that the one you were referring to? Is it possible to say whether that's the usual upside or downside of the blanket as for how it would be used on the bed.

Elias CJ Oh that's the evidence. I was wanting how the Court of Appeal dealt with it.

Sharp Ah yes I'll find that Your Honour.

Tipping J I think we might need to come back to Justice Anderson's point in a moment because that looks quite significant.

Sharp It's para.57 at page 271 of the case Your Honours.

Anderson J You can't logically infer from the presence of blood on top of the duvet that they haven't previously got into bed together.

Sharp That is also a point that doesn't seem to have been made in the context of the argument, but there's a number of places in the closing argument for the prosecution in which it is absolutely pursued as an authoritative basis for finding untruths and tailoring evidence to fit the circumstances on the part of the accused.

Anderson J I think the way you really have to go about this is to say this is the whole of the evidence the Crown relied on but this and this and this doesn't carry the weight that it might seem to at first glance, so the weight of that evidence is this - as against this we have the counter-evidence, and unless you use that technique you run the risk really of running a miscarriage of justice argument of which you haven't got grounds to do.

Sharp I'm conscious that I haven't got leave to run that argument.

Elias CJ The Court of Appeal discussion was all in relation to the prosecutorial misconduct so they haven't evaluated the argument which seems to have been put, or the counter seems to have been put by the defence at trial in any event. They haven't evaluated it in terms of the reasonableness of the verdict having regard to all the evidence.

Sharp Your Honour, yes, that's the problem with these aspects not finding their way into the reasoning and the use of the *Queen v McDonald* seems to make the decision, one that's based on sufficiency only and not an evaluation of these points in relation to the reasonableness. That the Court of Appeal with respect moved directly from *Ramage* to *McDonald* and said there's evidence – trial counsel accepted there was evidence on which a conviction could be entered, as do I, that was the end of the consideration.

Tipping J Putting it quite bluntly Mr Sharp I would have thought that the thing that would have influenced the jury the most, and there's no suggestion of mis-direction or any propriety here as to use, was this running out of the motel stark naked albeit carrying some clothes and making an immediate complaint of rape. That is not independent evidence as we all know but it's highly consistent.

Sharp Yes, yes.

Tipping J Now if you're having to evaluate a complainant's credibility in the sense of both honesty and reliability, that has to be at least open to the view that it's strongly consistent.

Sharp Yes Your Honour.

Tipping J I would have thought in reality that's what it would have been mostly about in the jury's mind, not sort of arcane discussions about who got into bed first or where the blood spots were, or anything like that, looking at the thing in its sort of realistic way of one having sat hundreds of times listening to these sorry tales. But what can you say about that? You make some rather odd remark in your written submissions about something about the Evidence Act 2006 which

Sharp Well the actual probative value of recent complaint evidence

Anderson J It's not recent complaint evidence, it's part of the res jesti

Tipping J Well it's demeanour evidence as well as that, however one carries both verbal and physical.

Blanchard J I would have thought that the strongest part of it is not so much the complaint, although it would have been odd if there hadn't been a complaint, but the fact that she clearly must have been frightened of this guy. He's asleep - both of them agree on that, yet she doesn't get dressed and then leave – she grabs clothes, races out the door of the motel and she's seen doing so by two independent witnesses before she's seen them and she's clearly distressed.

Sharp Your Honour, yes, and the Crown referred to the recent complaint as res jesti type of evidence as the strongest part of its case at the trial. At 1.52 this morning there was a telephone call from the witness who is described as Z, who I is hopefully can say A S was that witness and she rang and spoke to the complainant from her home and she said that she though the complainant sounded worried, not sufficiently that she took any step as a result, but she thought that it was possibly because the complainant was unwell because of the quantity of alcohol that she's had.

Tipping J Where was the complainant when she received this telephone call?

Sharp The complainant's evidence was that she was in the motel and in the course of these events. So we go from 1.52 when on the complainant's case there's terrible events are occurring, and she sounds mildly worried to her friend, or sounded worried but not in a sense to have her friend who said that she was a reasonably good friend, take any steps, and then at 3 o'clock, an hour later, on the defence case as the affects of the considerable quantity of alcohol would have been wearing out, she is hysterical, showing all the signs of somebody who is deeply

distressed. Now the defence do not say and did not say at the trial that that distress may not have been entirely real, but whether it was because of the events alleged, or because of the circumstances as they had turned out that evening, was the defence position concerning that.

Blanchard J Well one can understand her being distressed if she actually consented to sex and things had got a bit out of hand and then she'd repented of it, but the fact of the matter is that at the point she left the motel room he was asleep.

Sharp Yes Your Honour.

Blanchard J So if it was consensual, why, even if she was distressed, wouldn't she have got some clothes on?

Sharp It's not something that's possible to know people's reactions in circumstances

Blanchard J Well wasn't the jury entitled to place considerable weight on that, coupled with the physical injury?

Sharp Those Your Honour in my submission were the strongest aspects of the Crown case.

Blanchard J Yes.

Sharp But against that, and both of those instances Your Honour in my submission are post-crucial time for examination of the issue of consent. They both happened afterwards. The issues that the defence focus on are issues which occurred before or at the time and issues in relation to the position of the appellant. If the appellant was led to believe by the circumstances leading up to the acts of intercourse that he had a reasonable basis for belief and consent, what happened afterwards can only be an indication in my submission that he may have been wrong and not definitive as to his state of mind at the crucial instance. That point does not appear in my submission to have been adequately conveyed to the jury.

Anderson J You can only ascertain whether or not there's consent by behaviour and context that's all. Part of the evidence of course in effect is his own demeanour under cross-examination.

Sharp Yes Your Honour and the jury had the advantage of seeing and hearing the witnesses and that's something which has for a long time been regarded as a critical factor in the

Anderson J But they've overstated current research indicates, but it's not to be ignored

Sharp Yes Sir, I was just going to refer to *Munro* where far better than I could do it, the Court of Appeal have gone through and elucidated the principle that it may not be everything that it was said to be.

Anderson J There's also the fact that he was texting three other young women as potential opportunities for sexual activity.

Sharp Well yes Your Honour and I don't mean to at all do a tit for tat type of argument, but the complainant also saw other young men and what would happen with those texts and the frequency of which texts fly back and forth, my submission doesn't actually take the matter very far

Anderson J Well it was used wasn't it to suggest that it was unlikely that he had a pre-arranged liaison in mind with this complainant because he was pursuing other opportunities.

Sharp With great respect the Judge did say it wasn't a Court of morals and the social lives of young persons might be something that is speculative to really examine with any sort of probative basis with respect Sir.

Anderson J Well you have on the Crown side her evidence with confirmatory conduct as it were, and you have on your client's side what?

Sharp The basic fact of going into the motel at that hour of the morning after the parties and after the texts saying if you don't hurry up I'll got to As. Well I'm paraphrasing that, I'm not being precise, but words to that effect Sir. Then to walk off; leave the other group of people where friends are; go away to another place; to stay at the motel without any resort to the motel owner; without using the cell phone that she had in her presence; follow him into the motel – those are undisputed facts. In my submission that has to create a premise from which the accused can say at least, I thought she was coming into the motel to have sex with me

Elias CJ But he did, he did say that, and that was strongly submitted by the defence.

Sharp Your Honour yes, but that statement was attacked in itself and may not have received the weight it should have because the right to silence as the Court of Appeal mentioned in their decision, was obliquely undermined.

McGrath J There was another factor though Mr Sharp wasn't there that part of the defence theory was that there had been intimacy between the complainants and the appellants prior to the night in question?

Sharp Your Honour, yes.

McGrath J And the problem in the end for the appellant was that when he was cross-examined on these assertions concerning two prior incidents, all

of a sudden they seemed to turn into four prior incidents, with the prosecution I think being able in cross-examination to put it to Mr O that was he making this up as he went along, so there was a second strand if you like supporting his theory of an arrangement or something of that kind that they had in supporting the idea that when she went into the motel she knew what was being contemplated. That rather sort of lapsed and perhaps was part of the reason for a lies direction.

Sharp — Your Honour I wasn't trial counsel, and my junior was present in the trial, and when I read and reviewed that piece of evidence, what it appeared was that that word 'intimacy' can have a variety of meanings. Intimacy in the sense of being with someone in close proximity, or intimacy in the sense of sexual activity, and I was concerned at that cross-examination because in reading the record it seemed to me that he could have unfairly been suggested to have varied from his original statement by a misunderstanding of what that term 'intimacy' was being driven at, and that could have produced apparently but unfairly inconsistent response.

McGrath J — Well that might relate I think to the last incident, the day before the offence was subject to the charge, but Mr O had given evidence of a prior incidence – the one that was supported apparently by the cleaner

Sharp — Mrs Lister the cleaning

McGrath J — And that was intimacy if you like in the full sense of the term.

Sharp — In a sexual sense, yes Sir. Yes she gave evidence that supported what he had said about an occasion where they had gone together from the school to the house. There was evidence of her going to his house and seeing him and being in the kids lounge, I think it was referred to in the evidence, and other occasions

McGrath J — And describing the activity that went on I think.

Sharp — Yes. The submission in relation to that is that it was not necessarily evidence which could have necessarily founded a finding of a lack of credibility in my submission, because the nature of those incidents was imprecise from the way that the questioning was conducted, my submission on that Your Honour.

Anderson J — It wasn't put to the complainant either was it?

Sharp — No Your Honour it wasn't. I'm not here to criticise trial counsel, but when the Court of Appeal looked at the

Anderson J — It's not necessarily a criticism of trial counsel, it can often be an indication that it's been thought up in the course of cross-examination.

Sharp Yes although the presence of a witness to support it would be something which would make that with respect more difficult for someone to come up on the spur of the moment.

Anderson J Fair enough.

Sharp Your Honour, the Court of Appeal did not like the way that the trial counsel used language that's not appropriate. Now it's perfectly proper observations by the Court, I don't make any comment on that, but in balancing the Crown's position and the way that the trial went, it seems that it would be unfair to an appellant to have their case depreciated because of the way argument was put on their behalf. I mean that might be a fault for counsel but it shouldn't be balanced against the opportunity of an appellant to receive a fair hearing.

Elias CJ But you're not suggesting that are you? You're not suggesting the Court of Appeal because it took a dim view of the way trial counsel had expressed himself, didn't give the appellant a fair go?

Sharp I wouldn't suggest that Your Honour, but what the Court of Appeal said was when the issue of the way that the Crown approached its addresses and its method of conducting the trial, it said, it's para.50 of the decision, concerns voiced against Crown counsel, interest of even-handedness refers to defence counsel was not beyond reproach. It goes on to talk about the Court interceding if inappropriate language is used, and that is the resolution of the point left without dealing precisely with that ground and if it had an impact upon the reasoning process, submitted not to be safe to assume, didn't cause some unreasonable approach.

Tipping J Can one possibly test this in this way. If one had been the trial Judge and there had been an application for a discharge under s.347, it wouldn't even have started to get off the ground would it?

Sharp No Sir, I wouldn't responsibly make that application in this case.

Tipping J So why in reverse is it so dramatically different?

Sharp Well if matters of evidential sufficiency could be determined at the s.347 state of the process, there would be no need for a provision to review on an appeal basis because either the Judge's own motion or counsel for the accused if they had any idea what they were doing would point out that there was simply no evidence on which the Crown could proceed. So this provision would be unnecessary if it could be solved by an evidential sufficiency enquiry alone.

Elias CJ I didn't think we were under that ground in any event. I thought

Sharp I'm sorry, I didn't use the correct words when I described the basis, but if it's a s.347 case, the second leg of the section which is there

evidence that is sufficient is in full focus, an absence of evidence won't succeed if the 347 application is made.

Elias CJ I meant I didn't think we were under that limb of s.385.

Sharp No, no Your Honour, but

Elias CJ The evidence on which it was opened or whatever

Tipping J Sufficient.

Elias CJ Sufficient, yes.

Tipping J Or not supported by.

Elias CJ Not supported by.

Tipping J Well they tend to merge and I was just alerting you to the fact that the Crown may be, a hospital pass, but is seeking to rely on a judgment in a case called *Paris* where a Court in which Justice McGrath and I sat tended to equate the two exercises. Now obviously there is no exact equation, but I thought it might be wise to give you an opportunity, although you might have been saving it for reply to just enter on that a little.

Sharp Yes, yes.

Tipping J Because clearly this couldn't have been a 347. Now I'm not saying that that precludes for one moment, but it's not just a quantitative thing at 347, the Court you know in identification cases, in cases where the Judge thinks it just wouldn't be on for there to be a conviction in qualitative terms, that can arise too.

Sharp If the Judge adopts the test that a reasonably instructed jury could convict rather than would, if they used the 'could test' then practically you have to show that there isn't any evidence in my respectful submission – well there's an evidential gap

Tipping J Well I just alert you to the fact that the Crown for better or for worse is suggesting that *Paris* is a helpful authority and may be invoked.

Sharp Yes, I'll try

Tipping J But you would obviously disagree on the premise that there isn't sufficient coincidence if you like of criteria?

Sharp Yes Your Honour.

Tipping J Alright, thank you.

Sharp Those are the arguments and unless there are other matters that I can assist the Court with, that's the case for the appellant.

Elias CJ No, thank you Mr Sharp, thank you. Mr Solicitor.

Collins Thank you very much Your Honours. The Court has obviously examined the evidence in considerable detail and it won't be necessary for me to labour any of the points that I'm sure have already been understood by the Court, but there are one or two matters that arose whilst my friend was on his feet that I think need to be just explained a little further. The first concerns the way in which the complainant exited from the motel. Your Honour Justice Blanchard with respect was quite right to seize on the way she exited and the nature of the way in which she exited that motel. Bearing in mind that she had been in this motel room with a man whom she had known for approximately seven years. They had been friends. They lived close by in semi-rural Gisborne; relied on each other for getting rides to and from town. He was a person whom she trusted prior to this evening. As soon as he falls asleep she grabs a top and her jeans and she goes from the room leaving the door ajar so as not to make any noise when she was going out of that motel room because she didn't want to wake him. A young woman, naked, then runs to the footpath which runs parallel to the main road in Gisborne, and then runs down towards where she knows there is a Service Station, and is seen as you have observed by two independent people who described her as clearly fleeing a scene, looking behind her, being scared

Elias CJ Hyperventilating.

Collins That's when they finally get to her and see what her physical presence is like Your Honour; looking behind her; looking as if she was afraid of somebody chasing after her or being pursued; ducking behind bushes, and looking behind to see if she is being followed. She then gets to the Service Station but prior to then she has obviously managed to put on her top and her jeans and then when she's seen the first thing she says is I have just been raped by the appellant. Their reaction is they will go and confront him and she says no, this is a matter for the Police and asks for the opportunity to call her parents. When they arrive they describe her as eyes wide open; white faced

Elias CJ She also asks them to stay with her while she waits for her parents.

Collins Yes, exactly, yes that's another very important point Your Honour. White faced, and I think there was another description such as conveys the impression of her being in a state of shock, and then when her parents arrive she again says instantly that she's been raped. They instantly turn to the two independent witnesses and then she explained no it wasn't them.

Tipping J Things had been going alright for them.

Collins I think in this Courtroom we can see a slight amusing scene, but it clearly wasn't for the complainant or her parents, and then the Police are involved, and when the Police go to the motel room four important things are observed – one, the motel door is still ajar, just as the complainant had left it so that she wouldn't wake the appellant. The second that essential items of her clothing, her underwear, her shoes are still just lying there on the floor where the

Tipping J Even her shoes?

Collins Even her shoes.

Tipping J She didn't even put her shoes on.

Collins She didn't even put her shoes on. They're in the photograph that's actually in the respondent's casebook. So the motel door is ajar, clothing other than her jeans and top are where the Crown says they had been removed from her by the appellant. The bed is at that unusual angle consistent with some pressure or force having been applied from that side of the bed

Anderson J Well I have doubts about that. The sexual activity that was described was pretty energetic

Collins Yes

Anderson J And whether it was consensual or non-consensual the bed could well have been moved in the process.

Collins Well Sir it's consistent with the appellant saying that she was sitting on the edge of the bed nearest to where the telephone is, which is in that photograph, and then he came around and pushed himself on to her with sufficient force to cause bruising to her arm and one can easily envisage that bed

Anderson J I take the point

Collins Moved several feet in that exercise.

Anderson J I accept that.

Collins And the final thing is the location of the blood spot that is ultimately examined by the ESR as being from the complainant. The photograph that hasn't been produced or made available to you can be made available, but it is of a piece of bed top garment that is described as a duvet. Perhaps not accurately described as a duvet. It is in fact a white upper blanket that is quilted on both sides, and the photograph taken by the Police shows blood staining which the Crown would say is clearly on top of that item. That item, along with many others, is removed and

ultimately when it's examined by the ESR, they look at it in the laboratory and they can't tell as neither could we if it were presented now whether the blood stain is on the upside or the downside – in fact it might be interchangeable.

Tipping J Well that's the impression I had from the forensic scientist's evidence that you couldn't tell which way around it was because it could have been either so to speak.

Collins Exactly, so that's why the photograph was important and that's as far as the Crown takes that. Against that we have the explanations of the appellant and I went through the exercise of actually counting up how many times he provided in cross-examination what I would generously describe as unhelpful responses when asked very pertinent questions. Answers such as don't know, don't know, don't know, don't understand or don't know, and there were somewhere between 25 to 30 such responses. And some of those questions that were put to him where he responded in that way were questions that were with respect quite penetrating and important. He couldn't explain the positioning of the bed because his explanation was that they got undressed and got into bed in the way that normal consenting people do, yet if that had occurred one would not have expected the bed to have been pushed from one side to where it ended up which was consistent with the way the complainant described the commencement of attack upon her. He said that the complainant and he had made arrangements to spend the night together earlier that day. He volunteered that only during the course of his evidence. It was a vital matter. It was never put to the complainant, however he couldn't explain why at 1.07am he was still texting another woman with the view to spending the evening with her. His explanation as to why it was necessary to pursue three other women during the latter stages of that evening if he had an arrangement with the complainant to spend the night with her, was he just didn't know, couldn't explain it. He said that he sought to convince the motel owner that he was acquiring the room for himself because that would be cheaper, yet couldn't explain why the complainant was readily observed by Mr Wilson standing straight outside of the reception area in full view of anyone who would have walked out of that door. And there were a whole range of such matters which I won't go on unnecessarily about.

Tipping J I think there was also wasn't there, it was put to him that he knew that she had a long-term relationship with another boy?

Collins Yes.

Tipping J Yes, I just think that would go to belief in consent possibly as quite a significant feature

Collins Yes, he certainly knew of the boyfriend who was at University in another town and knew of that relationship and also knew the circle of

friends that they moved in and that if he tried anything it would soon be known probably. I'm very very happy to pursue the evidential points further if the Court wishes but in summary there was very cogent evidence which supported the complainant's version of events. The jury were perfectly entitled to accept the complainant's explanation of what happened and to reject what the appellant said had happened. There was more than sufficient evidence for them to have reached their conclusions. Now I'm quite happy now to move on to law unless there are any matter of fact that you wish me to pursue otherwise

Elias CJ I think not but perhaps we'll take the adjournment now and if there is a matter of fact we'll ask you about it when we come back thank you.

Collins Thank you very much.

11.32am Court adjourned
11.49am Court resumed

Elias CJ Mr Solicitor one matter we do need to raise and perhaps Mr Sharp needs to comment on is there's a suppression order. I'm not sure whether the circumstances still require that to be maintained.

Collins I asked my friend about that earlier this morning Your Honour. I understand that the circumstances which caused the suppression order to be made in the first place have now changed and my friend I think will be submitting to you that if the appeal were allowed and a retrial ordered then there may be need for a suppression to continue but otherwise not.

Elias CJ Right thank you.

Collins Is that a fair assessment?

Sharp Yes, that's entirely correct.

Elias CJ Yes thank you Mr Sharp.

Collins I was going to go on to the law but we'd welcome the opportunity to address the Court on any matter of fact that might be troubling any member of the Court.

Elias CJ No I think not Mr Solicitor.

Collins Can I start as my friend did with *Munro* and say that there are many aspects of *Munro* which are helpful and there are parts of *Munro* that with the greatest of respect, further refinement could be entertained by this Court with a view to providing more certainty and clarity around

the law. And could I start with an issue which the Judges in the Court of Appeal did not engage in in *Munro*, and that is the relationship between s.385(1)(a) and s.347. A reading of the Court of Appeal's analysis of the facts would cause I think any objective person to conclude that this was a case which shouldn't have been left to a jury. That a 347 application ought to have been made and granted. I understand no such application was made. But what's left a little unclear from the analysis of 385(1)(a) in *Munro* is how a case that might have been the subject of a 347 is reconciled with an appeal under 385(1)(a), and Your Honour Justice Tipping has already foreshadowed that. In the Crown's submission there is in reality probably very little difference in terms of the legal analysis which should be applied when dealing with an application under 347, and a consideration of the essential elements of 385(1)(a). Now without in anyway limiting the scope of 385(1)(a) could I respectfully submit that 385(1)(a) might be usefully engaged where for whatever reason 347 has simply not been raised at trial or if it has been raised it has been misapplied. So in terms of reasonableness and evidential sufficiency 385(1)(a) might be engaged in a situation where a trial Judge has declined to grant a s.347. There are a number of other circumstances where there is sufficient evidence but nevertheless a verdict is not reasonable. We can proffer a number of situations which might arise. It wouldn't require much imagination to conceive of a change in circumstances in the present case to illustrate the point. If for some reason the jury had returned not guilty verdicts on four counts in this case, but guilty on one, the case could be made out that there was sufficient evidence as has been conceded, but nevertheless a guilty verdict was unreasonable because if the jury on the basis of the evidence in this case considered

Tipping J	Inconsistency has always been regarded as a subset of unreasonableness hasn't it in the sense that that's a pigeon-hole if you like under which it's normally, although it could be put under miscarriage.

Collins	Yes, I think it fits neatly totally irreconcilable verdicts, I prefer to avoid the language inconsistent

Tipping J	Yes.

Collins	Totally irreconcilable verdicts would I think constitute unreasonableness in a situation such as this.

Anderson J	I recall a case involving alleged fraud at a Casino where substantive acts were charged as an offence and the very same acts were the overt acts with a couple charged of conspiracy. And the jury convicted on one and acquitted on the other. Talk about a classic case of totally inconsistent and unreasonable verdicts.

Collins	Yes, yes.

Anderson J The charges were wrongly laid in fact.

Collins Yes, but I think that what I call totally irreconcilable verdicts in a fact situation such as the one we are presented with today is an example of how sufficiency of evidence may be established by the ground yet a verdict nevertheless considered unreasonable by an Appellate Court under 385(1)(a). Other situations of which *Munro* is an example is where there is a clash of expert evidence and the nature of the Crown's expert evidence is not sufficient as to outweigh the defendant's expert evidence to the requisite standard, and I can recall a couple of instances of that occurring in the mid-1980's in relation to insanity verdicts where the Crown put up their experts on insanity; the defence put up their experts despite a very strong direction from the trial Judge that the jury should acquit on the grounds of insanity, a jury would quite contrarily decide they weren't going to let this person off on the grounds of insanity.

Blanchard J I seem to recall Justice Penlington had two of those trials in a row in Hamilton and was pretty concerned about the jury verdict.

Collins Yes, yes.

Blanchard J I remember that because I rang him for advice when I had a similar situation in New Plymouth.

Collins Yes, well that seems with respect to be another classic situation where there might be sufficient evidence by one reading, but nevertheless it is totally unreasonable for the verdict that has been entered.

Anderson J Appeals have been allowed on that ground.

Collins Exactly.

Anderson J And later to insanity.

Tipping J Yes and both of those appeals were allowed by the Court of Appeal.

Elias CJ But the trial Judge too has power to enter an acquittal, under another provision of the Crimes Act.

Blanchard J Yes that's come in subsequently. It came in as a result of the case that I did in New Plymouth.

Anderson J It would still be open for counsel to apply as Mr Solicitor will recall from the 1980's to apply post-verdict under 347.

Collins Yes indeed I remember it well Sir.

Elias CJ That's what I was thinking of.

Anderson J Well it had happened on the JBL case as well, there had been an application of post-verdict there.

Collins I'm sorry Your Honour. Documentary evidence as the Court noted in *Munro* that where a conviction is based solely on documentary evidence an appeal under 385(1)(a) might be able to be entertained. Also we emphasise what the Court noted in *Munro* at para.72 - the inquiry must be whether the view the jury came to is one which a reasonable jury could arrive at or whether the jury ought to have had a reasonable doubt, it's not a process of substitution.

Tipping J Well this I think is one of the key points that it's still a review function isn't it? It's not a substitution of the Appellate Court's take on all the evidence

Collins Yes.

Tipping J That seems to be a point common to pretty well all articulations of the text.

Collins Yes, yes.

Tipping J Is that a fair

Collins I agree entirely with that Your Honour. On the other side of the equation there are instances where 385(1)(a) is less likely to be able to be effectively engaged in an appeal and without in any way saying that there are hard and fast rules, instances where judgments are based on credibility are less likely to be amenable to review under 385(1)(a).

Elias CJ But they are less likely to be overturned on appeal on fact too.

Collins Yes.

Elias CJ Yes, it's the way of the world, yes.

Collins And similarly where the jurors have in fact have had the opportunity of hearing and seeing the witnesses. Now in terms of where New Zealand jurisprudence should go. I am very very happy to traverse the English and Wales situation, the Canadian case law and the Australian case law. I think it's fair to say that the Court of Appeal's summary in *Munro* is pretty close to the submissions that have been previously filed in this Court by the respondent, but can I just simply urge that notwithstanding the very partial acknowledgement of the lurking doubt concept in *Munro*, it would be very very unfortunate if this Court were to think that the lurking doubt concept really needs to gain any traction in this country. The lurking doubt concept is based upon initially at least the English 1985 Statute which is worded quite differently from s.385. It is a concept which is prone to difficulties in terms of its vagueness, particularly when it has been expressed as being one that is

based upon some intuitive fuel that the Appellate Judge may have, even if that isn't supported by the evidence.

McGrath J It's instinctive, not analytical isn't it.

Collins Yes.

Anderson J A visceral function.

Collins Yes it did remind me a little of that fantastic Australian movie, The Castle, where the vibes.

Blanchard J The vibes.

Collins I think with respect that New Zealand jurisprudence should be developed in a way which provides more certainty, more guidance, and is more consistent with the wording of the language of 385 than

Elias CJ Where do we find, sorry, I'm just looking for 385. I can't remember where we have the text of it. Can you just point me there? I suppose it's in one of these.

McGrath J It's in the appellant's submissions at the beginning.

Elias CJ Is it?

Collins And Madam Registrar would you like to make a copy of the Act available to Her Honour?

Tipping J Is it a little simplistic or is it sound Mr Solicitor to suggest that this may be one of those cases where all else fails you simply apply the words of the statute?

Collins I'm very relieved to hear Your Honour say that. It was precisely what I was going to be urging this Court to do.

Anderson J Now where do those words come from because originally in 1893 and 1908 the expression was against the weight of evidence?

Collins Exactly and then they

Anderson J They changed in 1961.

Collins No 1945.

Anderson J In the 45 Criminal Appeal Act?

Collins Yes and that came from the 1907 English Criminal Appeals Act.

Anderson J Yes, that's right.

Collins	And the words of the English 1907 Act were adopted in Australia and Canada at different times.
Anderson J	Yes that's what I was trying to recall, thank you for that.
Collins	And in Australia and New South Wales it was 1912 and I think other States subsequent to that but not the territories. And in applying the plain language
Elias CJ	The concept of unreasonableness though had long been applied to appeals on the basis that verdicts were against the weight of the evidence so it was the point of my question earlier
Collins	Yes.
Elias CJ	I'm just not sure that really any of these so-called tests are any different. The one that I have trouble with is *Anderson*
Blanchard J	*McDonald.*
Elias CJ	*McDonald,* sorry.
Collins	I was going to say though I don't know if everyone has that problem but
Elias CJ	No, Justice Blanchard and I did talk about ordinary names.
Tipping J	Was there a case called *Blanchard*? It's one I'm not familiar with.
Collins	The Court may find para.87 of *Munro* to be the most helpful and incisive description of what 385(1)(a) is about, namely that third sentence 'no jury could reasonably have reached a verdict as unreasonable which no jury could reasonably have reached to the standard of beyond reasonable doubt'.
Anderson J	But the words of the statute mean what they say and this is the technique used for applying it.
Elias CJ	Sorry, which paragraph did you say?
Collins	Para.87 Your Honour.
Elias CJ	87, sorry I thought you said 35. Yes well that is the debate that the House of Lords was having in 1889, the difference between a verdict no jury could have possibly have come to and the difference between a verdict which no jury ought to have come to. It just seems to me we seem to go round and round on all of this.

Collins	Well I think the test as it's articulated in that third sentence of para.87 is as close to the wording of 385 that there could be and that at the moment we start introducing words such as 'ought' or 'might' or should and things like that, there's room for blurring and room for misunderstanding, whereas a simple articulation of what the words actually are rather than amplification in any way, would with respect be of the greatest assistance.

Elias CJ	Well accept the Court of Appeal in 86 says 'let's use ought'.

Collins	Yes, well quite frankly I find that unhelpful.

Elias CJ	Well I would have thought you'd want it because reasonable is so much in the eye of the beholder.

Collins	But that's what we have Judges for.

Elias CJ	Yes.

Tipping J	Good eyesight. I think I agree with you Mr Solicitor, this is really the kernel because it is introduced by the test to be applied of the Court of Appeal's reasoning. I just had a little bit of anxiety about para.21

Collins	Yes as did I.

Elias CJ	Yes.

Tipping J	But I think we can easily deal to that.

Collins	Yes, and whilst dealing to matters, if I can use that description, I did also find it just a little disconcerting that the Court of Appeal slipped into the habit that the Australian Courts have slipped into of transposing to New Zealand language from the English Statutes without Parliamentary sanction, so to say that unreasonable means dangerous, unsatisfactory or unsafe isn't helpful or necessary. Unreasonable is unreasonable as assessed by the Court of Appeal.

Elias CJ	I think these all reach back to earlier concepts, because unsatisfactory was one of the standards applied in the 19th Century and that was interpreted by the Courts to require a verdict that a reasonable ought to have come to.

Collins	Yes.

Blanchard J	To be fair to the Australians, and I'm the last to be fair to the Australians, if you look at *Chamberlain* in the quotation that you've got in para.38 of your submissions Mr Solicitor, it explains there that unsafe or dangerous is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained

such a doubt – ought to have entertained a doubt. But I agree with you that's it's probably unhelpful to use those words.

Collins Yes, when I was reading through *Munro* yesterday at para.41 where is there the comparison with *Ramage* and the suggestion that unsafe, unsatisfactory and dangerous really just means unreasonable, my instant reaction is well if it's unreasonable it's unreasonable. Why try and pad it or expand and provide rooms for doubts and arguments for another century.

Elias CJ Well just speaking about *Chamberlain* though, I mean do you have any difficulties with the excerpt from *Chamberlain* in para.38 of your submissions because it seems quite unexceptional to me?

Collins Apart from the fact that they do introduce – is it in para.38 that they acknowledge

Blanchard J You've got a quote from the same judgment further up the page where you are criticising reference to dangerous.

Collins Yes dangerous, yes

Blanchard J But then they explain it.

Collins Yes, and with the greatest respect I've made the point I think if we just stick to a formula that is extremely simple, easily understood and is not padded in any way with additional language which might lead to argument and confusion.

Tipping J *Chamberlain* has traditionally been regarded as a judgment to which a number of minds made their individual contributions and they were all brought together in the way which was not entirely satisfactory. In other words different members of the Court may have had a hand in as it were compiling it and it does suffer I think a little bit from defuseness and lack of

Collins Focus.

Tipping J Focus, exactly.

Elias CJ Well is there anything though wrong

Tipping J You can't really criticise any particular sentence but it should be possible to make it a lot more user friendly if you like.

Collins Yes.

Elias CJ Well is there Mr Solicitor anything wrong with must have entertained a reasonable doubt as to the guilt of the accused?

Collins No that's entirely consistent with *Ramage*.

Elias CJ Yes.

Collins But I just also go back to the way in which it was articulated following on from the Canadian example in *Munro* at paragraph, was it 86, 87. I just find simplicity in the language that a verdict is unreasonable if no jury could reasonably have reached that verdict to the standard required.

Tipping J What paragraph was that?

Collins That's para.87 of *Munro.*

Tipping J Of *Munro*, yes.

Collins Yes.

Tipping J Yes it seems a very simple and tight expression. You see in *Chamberlain* you've got this must, ought dichotomy that seems to have seduced

Elias CJ But it seems inevitable really that that is what you are going to have to

Tipping J Well why don't they use the same language? It's prone to just cause people to think that there are shades of meaning or shades of

Elias CJ Because it has to be expressed in terms of obligation, in terms of the jury function, otherwise you're inviting the appellate Court to decide whether the verdict was reasonable according to the Appellate Courts' view of what would have been reasonable.

Collins Reasonable on the basis that no jury could.

Elias CJ That's the difference, which means that the jury should have come to the same conclusion. I don't see that it actually complicates it because it is just the same thing.

Collins Yes, I'm not so sure that ultimately – if it is the same thing can I urge us to have a very simple expression that doesn't add language that isn't there.

Anderson J Yes does tortology elucidate?

Collins Yes, and from the discussion which is going on I think I get the impression that the Court is probably not going to require much persuading that it may have gone a little far in the High Court of Australia and that certainly been illustrated with the difficulties at least one Australian Criminal Appellate Court got itself in *Hillier*, where focusing just on what the Court thought was a reasonable verdict,

resulted in the remarkable situation of an Appellate Court ignoring the fact that the appellant himself had given evidence in the trial and was plainly disbelieved and yet in *Hillier* they made no reference to that when allowing the appeal and hence that extraordinary situation had to be corrected by the High Court of Australia in allowing a Director of Prosecutions Appeal. I don't know how often that's happened but I would have thought it would have been in an extraordinary rare occasion.

Blanchard J In that kind of appeal in Australia does the result obtained in *Hillier* mean that *Hillier* goes back into jail?

Collins Goes back to jail did you say?

Blanchard J Yes.

Collins I have no idea.

Blanchard J Or is it the same as the English Attorney-Generals reference.

Elias CJ I think it's the same as the

Collins A rehearing has been ordered on the appeal in the Australian Capital Territory's Criminal Court of Appeal.

Blanchard J Oh.

Tipping J Look at the appeal on proper principles?

Collins Yes, and reassemble a new quarter and look at it on proper principles. But what's happened in terms of bail or not, was that your question?

Blanchard J Oh no you've answered the question really with that last remark.

Collins Right. And it will also be obvious from what I'm saying that the approach which I'm urging upon this Court and which I hope finds favour is also entirely consistent with the Canadian approach which gives appropriate weight to the primacy of juries but nevertheless recognises that on occasions an Appellate Court is going to have to exercise its judgment and determine whether or not the verdict was reasonable, ie, whether or not any reasonable jury would have acquitted

Tipping J There's no constitutional so-called problem is there because Parliament has expressly that there may be such cases.

Collins Precisely, and *Munro* is a classic example. With that modification of ought to *Ramage*, the Court of Appeal had no difficulty in deciding that it could apply 385(1)(a), so I think that the proposition that's been advanced Your Honours has the following advantages. It's consistent

with the language of s.385(1)(a). Hopefully it's viewed as being a very simple and easily understood test

Elias CJ Did you address, I thought in your submissions you had run together the unreasonable and cannot be supported having regard to the evidence, is that a distinction that you

Collins I didn't mean to run them together Your Honour. I recognise them as being

Elias CJ Well sorry I might be confused. Maybe it's the Court of Appeal in *Munro* that has slightly

Tipping J In 21 of *Munro*

Elias CJ Oh yes, yes.

Tipping J That where they appear to allayed the two.

Collins Yes, yes.

Tipping J But they can't have literally meant that because .

Collins I don't think so, I mean or is in this context disjunctive and all of my submissions have been based upon that proposition, so the test which is being urged upon the Court actually reflects the language, simple and easily understood and also gives proper primacy to the role of the jury and recognises the significant role of Appellate Judges in appropriate cases being able to examine the evidence and determine whether or not a verdict is unreasonable. The only other matter that I thought I might put into the mix Your Honours, and I didn't put this in my submissions, but I found a little bit of the United States jurisprudence and I can make this available to you if you so wish, but some of the United States jurisprudence shows just how much the primacy of the jury is valued in American cases. I will just quote one paragraph which is relying upon a United States Supreme Court judgment – 'the Court reviewing the sufficiency of the evidence, whether it be the Trial or Appellate Court, must apply familiar principles. It is required to view the evidence in the light most favourable to the verdict, giving the prosecution the benefit of all inferences reasonably can be drawn in its favour from the evidence. The verdict may be based in whole or in part on circumstantial evidence' and it goes on. But you get the flavour there that in the United States the verdict of the jury is close to sacrosanct. Now I'm not urging that approach, but it's interesting that I would suggest *Munro* probably wouldn't have got off the ground in an Appellate Court in the United States.

Tipping J In other words if there is a possible way of justifying the jury

Collins You do it.

Tipping J	You do it.

Collins	Yes.

Tipping J	But of course have got the reasonableness

Collins	Precisely, that the safeguard

Tipping J	Criteria and super added, haven't we?

Collins	Yes and that's the safeguard.

Tipping J	Yes.

Elias CJ	And that's part of our legal history.

Collins	Exactly.

Elias CJ	It's been around a long time. Just your mention of the position in the US reminds me I haven't had a look to see whether following on from the provision as to trial by jury in the Bill of Rights Act, which I think is not contained in the ICCPR is it? No it's not, but the appeal, the right of appeal is. Has there been any case law on that? It doesn't matter, I just wondered whether there had been any consideration of what constitutes effective appeal within the meaning of the ICCPR.

Collins	I'm sorry Your Honour I personally haven't.

Elias CJ	No.

Collins	I mean I'm happy to do some research on that provided it's available.

Elias CJ	No, I might call for some research to be done and if it throws up anything we might put out a memorandum. I can't recall seeing anything on that, but since we have these over-arching precepts now, I wondered whether there was anything.

Collins	Thank Your Honour, and in future I will try and cover that point off.

Elias CJ	It's probably nothing.

Collins	Now those were the submissions I was proposing to make. I'm very very happy to assist the Court if I can any further.

Elias CJ	No, thank you Mr Solicitor, thank you very much. Mr Sharp, do you want to be heard in reply?

Sharp	Three very brief matters that relate to the facts. The first is that my learned friend emphasised the res jesti recent complaint type of

evidence from what before the prosecution and clearly before the jury. With respect to that, it has to be evidence after the crucial phase when the question of consent or a belief in consent of reasonable grounds was considered, it is activity after the act of intercourse has occurred and therefore it can only be matters subsequent to the crucial point of inquiry. I accept it could be a factor that could be taken into account but there are two factors in addition to those which have already been submitted to Your Honours. The first is that although the complainant left the motel room in the circumstances which have been fairly described by my learned friend, and she left items of her clothing present. The evidence from the complainant is that there was a violent struggle when the clothing was removed. There is no evidence whatsoever to show any damage to any item of clothing that was recovered from the motel by the Police, and it submitted that that piece of evidence is a piece of evidence, or a lack of a piece of evidence that is focused in time at the moment when the mind of the accused, or the mind of the appellant, has to be brought to contemplation. It is my submission that absence of evidence, damage to the clothing, is a factor which weighs in favour of the position for the appellant.

Anderson J You'd have to know what the nature of the clothing was, the materials

Sharp Sorry Your Honour. It's described as underwear and other items of clothing that are left in the motel. It is described within the evidence that her top and other material was not damaged. No evidence was recovered. Directly after the complainant spoke on the roadside she went to the Police Station so her clothing was recovered from there and the motel and there was no evidence at all of damage to that clothing in the alleged violent struggle which took place preceding the intercourse taking place. The final point is that there is a glass beside the bed in which chewing gum obtained by the complainant was put in a glass beside the bed. Now this is before any allegations of alleged sexual contact. Now that is something which the complainant did because the evidence recalled and she says in her evidence herself. She took the chewing gum out and put it in a glass beside the bed. Now that is a factor prior to the act of intercourse and prior to the inquiry as to the state of mind of the accused. In counsel's submissions those are factors at the crucial time of inquiry rather than later that would weigh in that consideration of the reasonableness of

Tipping J Each of these factors I presume would have been before the jury?

Sharp Well they would have heard evidence as to it, yes Your Honour.

Tipping J Yes.

Sharp They did hear evidence, it wasn't

Tipping J There's nothing new in that from the point of view of what the jury would have had to weigh up?

Sharp	Yes Sir, except the defence did not, as far as my recollection is of their address, make reference to the chewing gum aspect of it being in the glass.

Blanchard J	What are we supposed to take from the chewing gum? She might simply have got sick of chewing that particular piece of gum.

Sharp	Yes Your Honour. The

Blanchard J	It doesn't seem to me it really takes you anywhere.

Sharp	Well the evidence from the complainant is that once she sits on the bed a violent assault immediately follows it. There has to be an opportunity to take some step

Blanchard J	How long does that take, taking a piece of chewing gum out?

Sharp	Well if it's in the course of being violently attacked, with respect, I don't see how there would be an opportunity to do that.

Blanchard J	She didn't I think say that instantly she sat on the bed the attack occurred and she could have taken it out before she sat down on the bed.

Sharp	Your Honour the evidence is that she went to the toilet and then came out and sat on the bed

Elias CJ	And looked at the phone.

Sharp	Yes.

Elias CJ	And took the chewing gum out.

Sharp	Yes Your Honour. Those are the only matters of fact that I wanted to drawer Your Honours' attention to.

Elias CJ	Thank you. Well thank you counsel, we'll take time to consider our decision in this matter and thank you for your help. We'll retire now.

12.24am Court adjourned