

IN THE MATTER of an Application for Leave to Appeal

BETWEEN YUAN YING ZHANG

Appellant

AND THE QUEEN

Respondent

Hearing 3 February 2005

Coram Keith J
Blanchard J

Counsel P Heaslip for Appellant
B Horsley for Respondent

APPLICATION FOR LEAVE TO APPEAL

10.00 am

Heaslip May it please Your Honours, Heaslip as Counsel for the Appellant.

Keith J Thank you Mr Heaslip and thank you for driving through the night. I was wondering this morning how many people would turn up.

Horsley May it please the Court, Horsley for the Respondent.

Keith J Thank you Mr Horsley. Yes Mr Heaslip. We have of course read the material and if you could just sort of highlight the reasons why we should grant leave in this case.

Heaslip Thank you. I have a brief handout that I'd like to give to Your Honours. And there are six copies of this handout. There are two each with which to do as you will and two spares. I also have other spares. The purpose of the handout is to really encapsulate the submissions

with regards to the four different grounds and ... different basis upon which I say leave should be granted. And it's my initial intention to state that if you can tick any of those boxes then we should be proceeding to an appeal. It may well be that this Court feels that there needs to be more than one box, that's another story.

With respect to the appeal before the Court, the very first issue is one of leave to appeal and whether that's an appropriate matter. I say.

Keith J In respect of the delay.

Heaslip No, I'm saying with respect to whether leave should be granted.

Keith J Oh, okay, sorry.

Heaslip And there are various ways of approaching that issue but I think the easiest way is to say, if leave were granted, what benefit could there be to the community in hearing this appeal. If the decision were made, what use could it possibly be to other persons. And in my submission each of the grounds of appeal do provide matters which are of use and assistance to other persons. Firstly.

Blanchard J Section 13 goes to the ... some assistance.

Heaslip It certainly does. My feeling though is that the, or my submission is that the first step I must get to is of general use. And then the more particular grounds for s.13. But if I could direct myself then to specifically the s.13 issues. I don't think it's disputed with my learned friend that the various matters I set out in the first half of my Submissions are appropriate bases upon which this Court can hear matters on appeal. The first question of course on the statute is, is it a matter of public importance. And I say that amongst the four grounds the s.19 issues are of public importance, general importance and substantive miscarriage of justice as a result of, as a consequence of the way.

Keith J Is there any real question though Mr Heaslip about just what it is that s.19 says?

Heaslip I would have thought not.

Keith J So doesn't your point just fall away, that it's a completely general proposition isn't it that if an Act was in force at the relevant time then proceedings could be brought on the basis of it? And can be concluded and steps can be taken to conclude the proceedings. And the amended indictment is for the purpose of concluding the proceedings already under way.

Heaslip Yes. I will say I accept that general proposition. The specifics in this particular matter are that although the law appears to be well thought

out and in this particular instance it seems that it's not been applied correctly. And as such the Court's logbooks may well assist in a further clarification of when s.19 actually applies to any particular factual situation.

Blanchard J How wasn't the law applied correctly?

Heaslip Well in my submission it is that s.19 is commence proceedings or conclude proceedings. Where there is a.

Blanchard J ... anything in between.

Heaslip It doesn't allow for that. And my reading of s.19.

Blanchard J You mean you can't continue a commenced proceeding?

Heaslip That's what my reading of the section states.

Blanchard J What would be the point of allowing you to commence it then?

Heaslip Well Sir the whole purpose of criminal law ... is to provide a system of fair justice for a person who is accused of doing something. If there is to be a change in the direction in a case, then s.19 will allow proceedings to be commenced by the Crown where they are aware that the way they have commenced previously is incorrect.

Blanchard J Well they may not have commenced at all.

Heaslip Or where they may not have commenced at all.

Blanchard J Well they have commenced here and they say, we want to complete this proceeding. That's our purpose. Are we now going to have the difficulty caused by the Court of Appeal Judgment and the way of completing this proceeding is to amend the indictment. Because the language of s.19 is, isn't it, that ... continues to ... have not been repealed for the purpose of. And the purpose here is the purpose of completing proceedings. Not just taking an intermediate step. Its purpose is to, it's for the purpose. Not the actual purpose is to complete the proceeding.

Heaslip I think what we need to do is to extract out the various parts of where we're at in that proceeding. If you've commenced your proceeding, you've laid an indictment, the next stage is the trial. It's in between those two points that the Crown finds that they've got problems with the charge that.

Keith J Well as my brother's question indicated, s.19 ... commence and are you really saying that because there's not another verb in the middle of (b) that the proceeding then grinds to a halt?

Heaslip Yes.

Keith J So this section would be pointless and if you go back to paragraph (a), you can investigate and paragraph (b) you can commence. Under paragraph (b) you can take steps for the purpose of completing. You can impose a penalty. So this provision would fail, s.19(2) would fail wouldn't it because of the lack of a reference to continuing. That's what you're saying?

Heaslip No, that's not what I'm saying at all. What I'm saying is that because the problem arose for the Crown in between those two points their next step was to seek an amendment to the indictment.

Keith J Continuing ...

Blanchard J But they could have commenced at that point.

Heaslip That's quite correct. And this is what I'm saying.

Blanchard J Well if they could commence it would be very odd if they couldn't amend.

Heaslip Well the problem is.

Blanchard J I mean what you're really saying is they should have started all over again.

Heaslip Yes.

Blanchard J They shouldn't have amended the indictment, they should have laid a brand new indictment.

Heaslip Yes.

Blanchard J Well they're the same thing.

Heaslip Or commenced the proceedings in some other way.

Keith J But they wouldn't have been able to continue ... because 19(2)(b) doesn't have, or 19(2) has investigate at one end, impose a penalty at the other, commence, next to the beginning and complete near the penalty presumably. But the provision which has failed to work is 19(2) on your theory?

Heaslip Well in my submission it won't. What it requires is for it to be a complete commencement which means that a fresh information should be laid.

Blanchard J Why would Parliament want you to start all over again in this circumstance?

Heaslip Well realistically why did the Crown file the charges in the way that they did? They find themselves in a mistake. They fall on that mistake and they have to rectify the mistake.

Blanchard J What if they did that by amending the indictment?

Heaslip In my submission.

Blanchard J Also according to your Submissions, if I'm reading it correctly, the amendment to the indictment occurred before the repeal of the section.

Heaslip No, no, no, three days after.

Blanchard J What was the date of the commencement of the amending legislation?

Keith J I think Mr Heaslip you accept that don't you?

Blanchard J I think it was some time in November.

Keith J No well that's what the Court of Appeal says.

Blanchard J I've got it here.

Heaslip I thought the application to amend the indictment actually took place before the repeal of s.257.

Keith J But the question was the dates as well ...

Heaslip Part 10.

Keith J Well I mean the whole of this argument assumes that s.257's been repealed.

Heaslip Yes.

Keith J And ... and the only question is whether this action is action taken for the purpose of completing the proceedings.

Heaslip That's the point. And the ruling of the learned District Court Judge Bouchier was at 3 November which was after the repeal. So irrespective of when the application was filed, there was no amendment ...

Keith J Well and the enactment ... day. If somebody ... day or if someone was being sentenced ...

Heaslip Yes, which is exactly.

Keith J And you know you're really requiring us to, I think it's fair to say, to make nonsense of subsection (2) because it would have a great gaping hole in the middle of it ... whereas the whole provision says the fact that a provision's been repealed doesn't affect the liability and the penalties.

Heaslip I can understand in theory where you're coming from. But in practice.

Keith J No but this.

Blanchard J I can't understand the theory where you're coming from.

Heaslip Certainly. And if I'm permitted to explain. The purpose of the criminal procedure as I see it is to enable a person to contemplate what direction they want to go. If an information is laid in a completely different section and they have no ... whatsoever in a trial, they then have an option of what other things they might want to do. For instance pleading guilty in the first instance and receiving the least possible penalty. That's one of the provisions of fair and natural justice that exists. And the reason why I submit that s.19 requires a recommencement of a proceeding where the informant has made a mistake in the way they've got to proceed it. In other words, why should the accused be ... because the informant made a mistake.

Keith J Well because the Court of Appeal ... necessary for a further step to be taken and there's no difference in ... in terms of filing a completely new information.

Heaslip In practice there is. If you're taking the matter past what is effectively in the summary jurisdiction and the trial jurisdiction, even if it's laid indictably.

Blanchard J Filing a new indictment ...

Keith J But if you go back to the point I've been trying to make. Had there been a completely new second trial, had these cases just been waiting without any documentation filed and the new proceeding was filed, completely new proceedings, completely new investigation, and then it was filed, the taking of the evidence in the course of the jury trial is not completing the proceedings. It's a step on the way, it's intermediate in terms of ... And you would be saying that the Court doesn't have the power under subsection (2) to take the evidence because that's not a completing step.

Heaslip I think I understand the issue that you've raised and I thank you for your explaining it to me in that way. It comes down to a definition of what was completing the matter. And if we define completing as not just being the final step but completes all, in other words doing all things required necessarily in order to bring the matter to an end, then I accept what you're saying.

Keith J Amending the indictment is one of those?

Heaslip Amending the indictment.

Keith J And as I've said ... it's not just the word completing, it's also for the purpose of completing.

Heaslip Yes, yes, I accept on that explanation or that definition of the concept of completing, that an amendment to an indictment would be part of that and accordingly the ground perhaps is a resolved issue and it may well be not an arguable matter on appeal and perhaps.

Keith J Maybe you'll then go onto the other grounds.

Heaslip Okay. I'd like to address ground 4 if I may because that's my other point that's perhaps a somewhat procedural issue and again an area of law which would seem in my submission not to be one of the question as to what the law is but the application of the way the law is applied.

Keith J What is the application that's been made under s.256?

Heaslip It's an application to plead guilty.

Keith J Well ... guilty which she pleaded.

Heaslip Yes, if a person wishes to in the trial jurisdiction plead guilty, the general accepted principle in my submission is that they must be discharged by jury. That is a jury must find you guilty so you must be put in front of a jury, direct a jury to convict and then it would be a guilty finding. But you get around that. There's the 153(a) procedure in the Summary Proceedings Act which allows a person to make written application to the Court to say I wish to plead guilty up to or before they are committed to trial. So that.

Keith J That's not ...

Heaslip No, this provision is what happens after they've been committed to trial but before they're actually placed in ... of jury. Because they still have an option and they can make an application. If they don't make that application then it is for the matter to be decided by the jury and an incorrect procedure has been followed. And it's a simple matter of applying the law.

Blanchard J Well what happened here?

Heaslip Well, I don't know the specifics. My understanding of what happened was the indictment was amended, there was discussions between Counsel and the accused. Counsel directed, sorry accused directed Counsel that they wanted to plead guilty. That was advised to the

Judge and a guilty plea was noted on the file and it proceeded as if the matter was at an end, conviction entered and it actually went on to another date for sentence.

Blanchard J Was she not asked whether she pleaded guilty or not guilty?

Heaslip My understanding from everything that I have obtained to date is that the formal procedures were not applied.

Blanchard J Well we've got no evidence.

Heaslip There is no evidence at this point. And that's a question.

Blanchard J Well we've got to presume regularity in the proceedings.

Heaslip Yes and this particular point.

Blanchard J Where is the miscarriage of justice arising out of that?

Heaslip Well if a person is not fully apprised of their rights and obligations and interests and they are doing something for alternate purpose, in this case because there was a legal issue to be resolved, then there's a question as to whether the guilty plea was correctly entered.

Blanchard J Alright, well if heaven forbid you didn't succeed on any other ground, this point would fall away. It's clearly only an ancillary point isn't it?

Heaslip It is. It's a point of procedure and natural justice and a substantive interest.

Blanchard J Yes alright well I think we've probably got that.

Heaslip Thank you. The more substantive points then, or actually I can perhaps address point 1 now.

Keith J Well the Crown doesn't dispute that aspect, and nor do we.

Heaslip No, certainly.

Keith J So there's no issue there. And no disadvantage ... Court of Appeal ... I mean ... considered the merits of the argument.

Heaslip Certainly, and on that basis then perhaps ground 1 is more ... in the first place and perhaps is not a ground for later argument. We're then left with ground 3. Which is whether the amendment to the indictment should ever have been allowed in the first place.

Keith J Substantive reasons?

Heaslip Yes. And effectively that's the substantive appeal that was brought in the Court of Appeal. And the Court of Appeal took the view that a previous decision had been made by the full Bench and could not be pursued unless a full Bench were convened. A full Bench was not convened. The matter was summarily disposed of on the basis their previous decision having applied. But in my submission the previous decision didn't apply because it related to a different time, a different factual background in that the law had changed in between times. And I set out a number of cases and my brief argument, but which would be much more fully expanded if leave were granted to appeal. But the main point is that assuming that there is an argument there worthy of consideration, is it a matter of public importance. Ms Zhang is one of several people under an operation who was charged and in her particular instance there was an amendment to an indictment in some peculiar and specific circumstances. And on the face of it it wouldn't seem that this would be a matter where it affects other people but we've found that just recently there's been at least one other case of a person who's recently been indicted. I don't know the outcome of that particular matter but it was forwarded onto this Court for your information. And it's quite possible that there are other persons that are out there that the Crown are waiting to charge and may well be affected by it. So there is a public importance in those persons who may well be further charged in relation to these proceedings.

Blanchard J You mean these are the people who the Crown would say had committed the offending before ... in 1993.

Heaslip Yes, allege that. And I must say allege that because at no time has Ms Zhang ever had the opportunity of testing this case. She never has. She's simply accepted her Counsel's word that because of the amendment to the indictment that's it, curtains and you have to plead guilty. In my submission that's not necessarily the correct approach. And Ms Zhang has throughout had difficulties with that general view. She entered her guilty plea on the advice of experienced Counsel and in doing so sealed her fate as regards the particular charges.

Blanchard J Do you say **Walters (R v Walters [1993] 1 NZLR 533)** was wrong?

Heaslip I'd say that **Walters** was correct at the time. I say that because.

Blanchard J How did **Walters** become incorrect then?

Heaslip Because of **Armstrong (R v Armstrong [2004] 1 NZLR 442)**.

Keith J Different charges on different sections though.

Heaslip Yes they are but the significance is this. Under **Walters** there's a charge of conspiracy to defraud the public interest because people were conspiring to do what was a known and understood offence. The

statutory offence of conspiracy to defraud existed. If there is no known offence then there is no statutory.

- Blanchard J What do you mean by no known offence?
- Heaslip If the charge under 257 in my submission relates to, I'm conspiring to commit some known crime against this section.
- Keith J The section says I'm conspiring to defraud somebody. Not ...
- Heaslip Yes but in my submission it requires that there be an offence that that person be committing. If I'm defrauding somebody I'm committing an offence of fraud. And my submission is that it is incorrect for that charge to be laid unless I'm conspiring to commit something that is an offence. Otherwise it's not a statutory.
- Keith J Well you are saying then aren't you ... that paragraph [25] of the Judgment which sets out the **Walters** ... Court of Appeal, that that statement of the **Walters** decision is incorrect. The four elements there, ... separate offence, conspiracy, deceit, falsehood or fraudulent means, defraud, mens rea. There's no distinct offence in that list is there?
- Heaslip Well my argument is based on the case of **Hollinshead (R v Hollinshead [1985] 1 WLR 761)** and where it was found that there could not be a common law charge.
- Keith J This is a statutory offence. Statutory crimes instead of ...
- Heaslip Yes.
- Keith J And s.257 ... said that it was an offence to conspire to defraud.
- Heaslip Yes.
- Keith J And so it doesn't have to be listed under that section as **Walter** stated a separate criminal ...
- Heaslip Well in my submission that is incorrect. That's not what **Walters** states. And that that is incorrect if that is the proposition ...
- Keith J Well where you do you say **Walters** is different from paragraph [25]? Your argument now is different to the one you gave a minute ago isn't it? It's no longer a matter of saying that **Walters** is now incorrect because of a later decision. You're now saying that the Court of Appeal misstated **Walters** in paragraph [25].
- Heaslip Well I'm sorry, I'm responding to the questions that you've asked and perhaps I've not been clear. I think **Walters** was correctly decided at the time because the case of **Armstrong** did not exist. I say the case of

Armstrong makes the legal environment completely different. Had it existed prior to **Walters**.

Blanchard J How does **Armstrong** do that?

Heaslip **Armstrong** removes as a possibility that the conduct carried out by these people was a crime under the Fisheries Act and therefore there could not be a defrauding. Without there being.

Keith J Well surely ...

Heaslip Well in my submission it's possible to defraud somebody without being a crime under the Fisheries Act. You must commit a crime under some other ...

Keith J That's not what **Walters** said. Or are you going to take us to **Walters** and show us that it did say that?

Heaslip Well it did not say that, no. It's not what **Walters** said. **Walters** never considered the issue. It was not a live issue at the time. **Armstrong**, that case, had not existed. And so we come back to the issues of **Walters**, it only dealt with the legislative framework that it understood existed at the time. But it actually got it wrong because of **Armstrong**.

Keith J I just can't follow it that way. **Armstrong** was quite a different charge wasn't it? It required that somebody was, I've forgotten ... , was obtaining ... Fisheries Act. And we said, the Court of Appeal said, that wasn't the benefit that was being obtained there.

Heaslip Perhaps the confusion arises that **Walters** was an alternative charge to that charge. At the time of **Walters** the informant believed that it could have charged under the Fisheries Act but chose instead to charge under the Crimes Act.

Keith J And they succeeded in that.

Heaslip Yes.

Keith J ... you're not saying **Walters** was wrong at the time. And you're not persuading us at the moment either that **Armstrong** affected **Walters** either.

Heaslip What I'm saying is that in the case of **Walters** this issue, the issue as to whether or not they could have proceeded under the Fisheries Act never arose because Counsel never brought it up. And that's Counsel's decision. And because Counsel never brought it up it was not before the Court. **Walters** is not ... one way or the other as to whether or not the conspiracy charges should have been laid vis a vis with respect to the appropriateness of the charges or the lacuna in the law in the

Armstrong decision that was shown. But because of the **Armstrong** decision I'm stating in this case that the issues in **Walters** are silent on the question as to whether or not they should have gone under s.257. And I say that in this case, now that these issues are live issues, they need to be considered. I accept that this is a matter that I will need to discuss fully. I will need to explain fully. I'll need to convince Your Honours and I appreciate that there are matters of clarification that you require. But I'm not arguing the appeal today.

Keith J You've got to show us that there's a chance though don't you?

Heaslip Yes. And what I am saying.

Keith J And your point is that in the **Walters** case, had people focused on the Fisheries Act offences the result would have been different.

Heaslip Yes.

Keith J So you're saying then that **Walters** was ... something wasn't referred to that ought to have been. So it was wrong at the time?

Heaslip I don't want to be disrespectful to the Court. Obviously.

Keith J The section in **Armstrong** was a new section wasn't it?

Heaslip That's quite correct.

Keith J 2000 amendment or 2001 amendment or something. Because we were taken through to Hansard. So it wasn't in force in 1993.

Heaslip I'm just trying to think that one through. I think you're right. Which only further strengthens my argument.

Keith J No it doesn't. If that statute wasn't even around.

Heaslip Yes.

Keith J And anyway, I can see why the scope of the Crimes Act offence in 1993 or 2003 before it gets to appeal was affected by these other provisions. There's the provision isn't there that says that if you conspire to defraud somebody you're committing a crime. And the fact that you might or might not be guilty or you might have a defence under some section in some other statute seems to me to be completely beside the point.

Heaslip I understand.

Blanchard J All you have to have is a dishonest scheme to avoid the Fisheries Act. That's what **Walters** seems to say.

Heaslip Well yes, I agree that is what **Walters** says. Yes.

Blanchard J Well ... real difficulty in trying to avoid ...

Heaslip That's quite correct. But what I'm saying is that there has to be shown that the scheme, that it was fraudulent. That there was an intention to defraud anybody. Because the law at the time did not state this as a crime. You could take as much paua as you like in the way that these persons did. It was not a crime any more than it was to have a cup of tea in the morning.

Keith J ... licence to do that.

Heaslip This is the problem with the, this is what happened with the case of **Armstrong**. Notwithstanding that they carry out these actions, they committed no offence.

Blanchard J They committed no offence as charged in **Armstrong**.

Heaslip Yes.

Blanchard J But that wouldn't mean there was no offence.

Heaslip There was no charge.

Keith J Well fishing without a licence. ...

Heaslip True. But there was no other charge that was brought. And in my submission.

Keith J But they were being charged with a heavier offence because it was serious offending as the Crown saw it requiring a heavy penalty.

Heaslip That's the first issue with regards to this matter and in my submission it exists as a live issue and it may well be that I'm against it with being able to argue. And I don't propose to attempt to argue it any further today. I refer to the case of **Hollinshead**. And **Cox (R v Cox [1968] 1 WLR 88)** in my submission is a basis upon where I start. It may well be that at the end of the day it does not, it's not a case, how can I say it. At the end of the day it may well be that that argument does not hold water in the appeal. But if it did hold water there would have been a substantial miscarriage of justice. And that's the first part of that problem. The second.

Keith J So just in one sentence, what would you be saying s.257 requires?

Heaslip That there be an actus reus and a mens rea relating to some offence known on the statutes.

Keith J So instead of saying conspiring to defraud, you're conspiring to commit another offence.

Heaslip And ...

Keith J That's somewhere else in the Crown ... that's a quite distinct matter isn't it?

Heaslip Well in my submission it's part and parcel of s.257 in the way it was worded.

Keith J So the words of 257 ... against ...

Blanchard J So's **Walters**.

Heaslip The second issue is with regards to the indictment that was actually filed. The Court in allowing that particular indictment made a mistake in terms of **R v P** [1998] 3 NZLR 587 that there was a one charge alleging two separate matters and as such it fell foul of the rule in s.329 subsection (6) of the Crimes Act.

Blanchard J What are the two offences?

Heaslip There are two separate conspiracies that occurred. One in Christchurch, one in Auckland.

Blanchard J Has this point been?

Heaslip That's in paragraph 27 of the submissions.

Blanchard J Was this point argued before the Court of Appeal?

Heaslip I believe not.

Blanchard J Well in that case how can you take it here?

Heaslip In my submission because the Court of Appeal took the view that it did with respect to whether or not it was ... disposed of the appeal in short order and did not hear all the matters that it should have.

Blanchard J It didn't dispose of it in short order. It delivered a judgment of 30 paragraphs on the question of conviction.

Keith J A week after the hearing.

Blanchard J I've omitted the paragraphs which related only to sentence. They certainly erred in what they said about their ability to hear the matter. But they then went on to address all the arguments that were put up to them. This one simply wasn't argued.

Heaslip With respect to that issue, it's my submission that just because something was not argued in the Court of Appeal does not mean that it cannot be argued here. This is a final Court of appeal and if a matter has not arisen in the lower Court, there is nothing to preclude you from hearing the matter.

Keith J Can you say that your client has been prejudiced?

Heaslip I can.

Keith J In what way?

Heaslip Insofar as that the indictment itself should never have been accepted in the way it is.

Keith J No, no, that's not the point. Assuming there's an error, what is the prejudice?

Heaslip The prejudice with regards to a conjoint charge in the way that it is structured is to make each matter seem, when you add two pieces together, it looks bigger than two separate matters. It has the effect of making the conspiracy larger rather than to talk about two discrete.

Keith J This is a matter that goes to sentencing?

Heaslip It's an issue that later goes to sentencing.

Keith J Well ... sentencing appeal was made and was dealt with.

Heaslip It was dealt with yes. But this also goes to the root.

Blanchard J Why was there two separate conspiracies? Why couldn't the Crown charge it as one single conspiracy?

Heaslip Because of s.356, sorry 329 subsection (6) which says that you can't do that.

Blanchard J 329 subsection (6). A single transaction, yes, but a single conspiracy. A conspiracy can be a developing ... If you have two burglars who conspire together to rob a house, and while they're on the way to rob the house they come upon a third burglar and they join him in the conspiracy, you don't get two separate charges of conspiracy.

Heaslip Well in my submission the way that the facts went through this case and the way this indictment is worded which, in fact there are three different areas although in the facts at sentencing they say there are only two. It states at Christchurch, Auckland and elsewhere did conspire with other persons. And there were two distinct separate matters that were going on in Auckland and Christchurch.

Keith J It's simply a geographical issue.

Heaslip They were separate matters.

Keith J Well she's supplying.

Blanchard J How do you know that.

Heaslip Because of the facts that were before the Court.

Blanchard J Which are?

Heaslip Sorry. Unfortunately I do not have the Case on Appeal. I understand that's not provided until after the issue of whether there's leave to appeal or not.

Blanchard J Oh no, no the Case on Appeal's supposed to be available. It's the Court of Appeal Case on Appeal that gets used. That's what the Rules say.

Heaslip Yes.

Blanchard J So it's available.

Heaslip I have a copy. It's at page 9, the summary of facts that set out.

Blanchard J Well without going into detail, what does that in general terms say?

Heaslip Well essentially that there were matters that were occurring in Christchurch and matters that were occurring in Auckland. And the matters were with the same people but were separate things that happened. And there may well be defences.

Blanchard J But it could still be all part of the same conspiracy.

Heaslip They could be. But in my submission.

Blanchard J Well in pleading guilty as one composite charge, then the opportunity was there to say no, no, these split it into its components and then I'll plead separately to each.

Heaslip Yes.

Blanchard J Your client's accepted it was one conspiracy.

Heaslip Because of the ruling made by the learned District Court Judge.

Blanchard J That's a different matter. The Judge didn't make a Ruling as to one conspiracy.

Heaslip She made a Ruling that she accepted the indictment as it was worded.

Blanchard J Yes. But she wasn't being asked to tell the Crown to separate the indictment into its components. The point is simply not live.

Keith J I mean there would be complaints that have been half a dozen or so charges each with a maximum penalty of 5 years.

Blanchard J Like my burglars.

Keith J Mm.

Heaslip I guess you were right when you gave the point earlier that it wasn't raised in the Court of Appeal and therefore there was no complaint made at the time. It wasn't raised in the Court of Appeal – why should we hear it now? I understand that. I'm simply stating that this is an issue which it may well be disposed of just as quickly on the appeal but it's a matter which as the cumulative weight of whether or not this particular indictment should have been amended in the way that it was. And the last matter and perhaps my matter of most strength now is paragraph 26 where because of.

Blanchard J Are you at your Submission are you.

Heaslip Of my Submissions. Which relates specifically to the direction of the learned District Court Judge on 27 November where rather than reserving a point of law under s.380, there was this process whereby she pleaded guilty in the hope that s.383 would result in ... In my submission the appropriate course of action should have been to bring in the jury, direct a verdict of guilty and to reserve the point of law. That wasn't.

Keith J Well the points of law have nevertheless ... Court of Appeal and they're here in terms of the application for leave.

Heaslip Yes.

Blanchard J If the Court of Appeal hadn't made the error of saying it didn't have jurisdiction and it had skipped that point and gone on and considered, then he wouldn't have an argument. There's no disadvantage because the Court of Appeal has said, would have then said, well we've got jurisdiction to consider these matters and reserve them. And that's in practical effect what they did. Got into an awful tangle but they did consider all the points that were sought to be raised.

Heaslip Yes. Well boiling all of that down, I'm left with, perhaps if I can restate my application for leave in this way. The sole ground that now appears for consideration is this question of whether or not **Walter's** applied to this particular matter having regard to changing law, having regard to changing case law and statutory law. And having regard to

the issues in **Hollinshead** and **Cox**. And that's I think the strongest point that this appellant can make. That being the ground, in my submission it has relevance to her directly because she feels a miscarriage of justice has resulted and we say that it's a substantial miscarriage because the consequences to her were catastrophic – a prison sentence. There was a substantial miscarriage because if the indictment is allowed to be amended in circumstances where the law has been incorrectly applied and that a guilty plea is thereby induced, then the whole administration of criminal law is put into disrepute. That is a matter of general importance to the public. But it is also a matter of specific importance to any other persons who may be caught up in a similar circumstance. Whether it be in relation to this type of legislation or in other types of legislation where matters of law are confused. It is of importance to the public to know that if there are problems with regards to the way a judge at first instance looks at law and case law, that they can come to a final court of appeal and have those issues considered. Those are substantial matters in my submission. Can I assist you any further?

Keith J No, thank you Mr Heaslip.

(10.43 am)

Keith J Mr Horsley, as one of the recent experts on **Armstrong**, I tried to put these things out of my mind.

Horsley So did I Sir.

Keith J Could you give us your assistance in terms of the impact ... as you see of **Armstrong** on **Walters**.

Horsley Yes, certainly Sir.

Keith J Because that, so far as I can recall, that issue wasn't around at all was it.

Horsley No Sir. It certainly was never raised as an issue in **Armstrong**. In fact there is one mention of **Walters** in the **Armstrong** decision and that's before Your Honours at Tab 2 of the First Agreed Bundle of Authorities.

Keith J So what paragraph of **Armstrong**?

Horsley Perhaps the Registrar could make it available to the Court.

Keith J What's the paragraph?

Blanchard J No ...

Horsley It's at page 447 of the Reports and.

Blanchard J It's a mention only relating to penalty.

Horsley Yes Sir and it's just a fleeting comment that of course in the context of the Fisheries Act it was never an imprisonable offence. However the Court then as an aside almost mentioned the fact that **Walters** however was authority for the fact that a conspiracy could be charged which gave rise to effective imprisonable penalties. And my only submission with respect to that, and it wasn't argued, is that if the Court had any difficulty with the continuation of that **Walters** principle, that would have been an opportune moment to comment that of course with the advent of s.233 **Walters** no longer applied. And of course the Court did not say any such thing.

Keith J Well I mean the simple proposition on that I think isn't it, that there are these two completely ... offences and while sometimes one section could be read down by reference to another, in this case 257 as it was was broadly stated wasn't it? And maybe some people thought too broadly stated and that's why it disappeared. But anyway it was there.

Horsley Yes Sir.

Keith J And that provides for an offence which is not tied to other offending. Whereas in the Court of Appeal last year we said that it was tied to a benefit under the Fisheries Act ...

Horsley The Fisheries provision certainly was Sir. And to come back to my friend's original submission that there needs to be an offence committed, of course the whole purpose of s.257 was that that was distinct from the conspiracy under s.310 of the Crimes Act which does of course require a conspiracy to commit an offence.

Keith J Yes, yes.

Horsley And 257 was that much broader proposition. So **Walters**.

Keith J Known as the Somersby provisions.

Horsley Yes, yes. And **Walters** simply made the comment that given a certain factual scenario, a wholesale abuse of the Fisheries Act could amount to a defrauding of the public and it's really as simple as that. Now that broad proposition was never changed by the advent of s.233. And you will recall Your Honour from the debate about what Parliament was trying to intend with s.233. And clearly it was trying to make a specific Fisheries Act section which would cover this sort of situation of wholesale commercial abuse. And certainly the amended s.233 now does cover fishing unlawfully for a commercial gain.

Keith J Yes.

Horsley That doesn't have any effect on the Crimes Act offence of s.257. And **Walters** made it specifically clear that just because there were offences under the Fisheries Act, it did not mean that s.257 was not available. The effect of **Armstrong** in fact that there was no other, there was no charge available under s.233 for this conduct. There were however wholesale breaches of the Fisheries Act. My learned friend was incorrect to say that this was no more putting someone in jeopardy than going out and having a cup of tea in the morning. Of course there were serious breaches of the ...management regime, taking of excess paua, the sale of fish is still unlawful, it's just that it was ... only. Given the scale of the offending, the Crown elected to proceed by way of s.257.

Keith J Thank you.

Horsley Thank you Your Honours. I'm not sure if I can assist you much further on that point.

Keith J Thank you.

Horsley Are there any other issues that I can assist the Court with?

Keith J No thank you. Is there anything in reply?

Heaslip No thank you Your Honours.

Keith J We'll adjourn briefly and come back.

Court adjourns 10.48 am

Court resumes 10.52 am

Judgment delivered by Keith J dismissing application.