

ERIC BARRY STEWART

Appellant

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v

THE QUEEN

Respondent

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Hearing: 7 May 2009

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

Appearances: S J Shamy for the Appellant
J C Pike and S B Edwards for the Respondent

CRIMINAL APPEAL

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MR SHAMY:

May it please the Court. My name is Shamy and I appear for the appellant.

20 **ELIAS CJ:**

Thank you Mr Shamy.

MR PIKE:

May it please the Court, I appear together with Ms Edwards for the respondent.

5 **ELIAS CJ:**

Thank you Mr Pike, Ms Edwards. Yes Mr Shamy?

MR SHAMY:

Thank you Your Honour. Well I have filed a written synopsis of submissions
 10 and I'll speak to them perhaps interpolating along the way as matters come
 up. In terms of the summary of argument the two issues are firstly the
 inappropriate submissions to the jury by Crown counsel at the trial in relation
 to the defence expert witness Dr Davis did amount to a miscarriage of justice
 as the defence expert's evidence did assist the applicant with his defence and
 15 the Crown submissions in the absence of judicial direction on the matter, may
 have inappropriately influenced the jury.

The second point is that the suggestion by Crown counsel at closing to the
 jury that the applicant and the other defence witnesses had a motive to lie in
 20 order to avoid the appellant being convicted is contrary to the presumption of
 innocence in that it presumes that a defendant is guilty and therefore has a
 motive to be dishonest. It places defendants in a special category where their
 evidence is to be seen as more suspect than other witnesses and in the
 absence of judicial correction and indeed any comment by trial counsel,
 25 defence trial counsel, this amounted to a miscarriage of justice.

In terms of the narrative the background is that the convictions arise from a
 trial in the District Court at Timaru on an indictment containing 60 counts.
 There were 59 fraud related counts concerning ACC medical certificates –

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ELIAS CJ:

Mr Shamy, we actually have read the submissions through with attention so
 you might just really want to speak to them and expand on anything that you
 want to, or take us to any references that you want to take us to.

MR SHAMY:

Perhaps then I'll just go straight to the remarks of the Crown, which is at paragraph 10. The Crown said, "What did you make of the psychiatrist that the accused hired just before the trial and paid to try and get a defence to these charges? What did you make of Dr Davis' psycho babble? At the end of the day the doctor agreed that it was ultimately for you to make the decision about deceit or fraud, that's not for a doctor to make. You may well think that Dr Davis was a malingerer's dream who seemed to be able to come up with an explanation for everything the accused did as being consistent with chronic pain disorder. Do you think he came across as an independent and impartial expert or was he someone who was firmly in the accused's camp bending things around to suit the accused?" So that is in a nutshell what was said by the Crown in that respect.

I've gone through in paragraphs 15, 16 and 17 the evidence of Dr Davis and of the Crown experts which is notable for the effect that even the Crown experts had no difficulty with what had been said by Dr Davis and certainly did not say that it was patently ridiculous. In terms of the motive to lie what was said by the Crown was this, this is at paragraph 18 of my submissions, "Who's got the motive to lie? Burt White has got no reason to lie. I suggest to you, the neighbours have got no reason to lie. It's the accused who's got the reason to lie, he's got motive to lie, he's got the motive to go along and hire a psychiatrist and try to get himself off his ... out of this trouble. He's the one on trial, he's the one with the most to lose, him and his family. That's why they've got the motive to lie at this trial, those witnesses have got no motive to lie."

So effectively, in my submission, that was very clearly saying that because the accused was on trial he had a motive to lie and that in effect was saying that he was guilty, he was lying to get himself off a charge of which he was guilty.

The Court of Appeal, I've quoted that, but if the Court isn't needing me to go through it, I won't. But in a nutshell the Court of Appeal appears to have taken the view firstly, that Dr Davis didn't really assist the defence, the defence in

his defence. And secondly, that although the remarks in terms of motive to lie were unfortunate they didn't amount to a miscarriage because it seems to have been the reasoning of the Court that that's what the jurors think in any event.

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Dealing with the Davis issue firstly. Dr Davis wasn't a complete defence. He simply was a psychological psychiatric background to the extent that if one has suffered pain for a number of years this tends to affect one's perception of the pain and one's perception of one's abilities and I've quoted what Dr Davis
10 said in my submissions. There are obviously illusions to that issue scattered throughout Dr Davis' evidence and I'm just quoting now from an aspect in page 908 in volume 3 of the bundle which is of a like nature. This is at line 22 so it's page 908 and it's actually 817 of the notes of evidence but it's at page 908 of the casebook. This is part of the evidence in chief. "Question, you
15 were talking about anxiety and exaggerating and being part of the anxiety response to fears?" "Yeah, that fear of not being understood. I think for some patients that they've had a sense over the years they have not been understood or believed. They often get into a habit, a long term habit of sort of wanting to make sure that they are seen as genuine. They have genuine
20 pain, they believe they have, and they want the other person, particularly if it's someone in authority like a doctor, to make sure that gets across, but they are seen to be that way and at times that can present sort of looking like someone's exaggerating deliberately. In one way they are but not for the purposes of saying I've got a pain which I actually don't have. It's sort of
25 saying I want you to believe that I've got this pain, that it is genuine and I want it to be acknowledged as genuine and not thought of as it being in my head."

Then further down page 909 at line 21, "But I think equally certain, equally certain people who are just fearful about their pain just spontaneously come
30 out with these exaggerated phrases which is an expression of pain, of the fear part."

The consequences that, in my submission, the chronic pain disorder evidence given by Dr Davis was relevant to the jury assessment of Mr Stewart's evidence that when he filled out the form he thought he was being honest.

5 **ELIAS CJ:**

I'm sorry to interrupt but can you take us to – I haven't checked the indictment. What was the – because it's what the accused said to the doctor that is the gravamen of the charge, isn't it?

10 **MR SHAMY:**

I think in essence that is the case although one can see from the example of the certificate, which is the document which is at issue in the counts, that there appears to be two aspects. Firstly, a doctors certification and then a certification by the accused.

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ELIAS CJ:

Yes.

MR SHAMY:

20 As I understand it, that is a rather similar form throughout the whole period of the alleged offending so as I understand it the dishonesty is mainly due to the doctor saying, well look if you'd told the doctor the full amount of what you could have done then he wouldn't have filled out that certificate.

25 **ELIAS CJ:**

Yes.

MR SHAMY:

30 Although the doctor, the general practitioner, is rather equivocal in his evidence and seemed to be somewhat sympathetic to Mr Stewart.

ELIAS CJ:

I'm just thinking of, again this is rising out of the Court of Appeal's assessment that Dr Davis' evidence didn't really bear on the critical issue. As I understand

it, this maybe rather imperfect, that seems to have been because pain wasn't the issue, it was what activities he was doing at the time. So it wasn't so much what he was saying to the doctor about his level of pain but his actual representation or failure to disclose what he was doing so that the doctor
5 could make the assessment of whether he could work. Is that right?

MR SHAMY:

Yes, yes, I think effectively that was it and the Crown case I think stood upon two legs. Firstly, that Mr Stewart was able to do a fair amount of physical
10 activity, mowing the lawn, doing the garden and that sort of thing. And secondly, that he had misrepresented his level of ability to his doctor, Dr Small, when he saw him.

ELIAS CJ:

15 Yes.

MR SHAMY:

To which, as I understand it, the defence response was, well he couldn't do quite that much as the witness has said. But in any event his reporting to the
20 doctor was affected by this pain syndrome in terms of catastrophising, wanting to be taken seriously, saying I'm in pain, I can't do very much and that is what I understand was the import of Dr Davis. That there's this pattern of exaggeration which, on my understanding from Dr Davis' evidence, isn't necessarily just an exaggeration of how much pain I'm in but the corollary
25 being the exaggeration of what I can and can't do in order of wanting to be taken seriously and that –

ELIAS CJ:

Well that's helpful by way of background. So could you just take us quickly to,
30 yes I haven't looked it up, perhaps I should have, the indictment and also the certificate. I know there were different certificates but I'd just like to sight them.

MR SHAMY:

Well the indictment is at page 626 of volume 1 of the first bundle.

TIPPING J:

- 5 The crucial element for present purposes in the indictment was the old test of intent to defraud, wasn't it? That was the state of mind that the Crown had to establish, that he had an intent to defraud?

MR SHAMY:

- 10 Yes.

TIPPING J:

The corporation?

- 15 **MR SHAMY:**

Yes, yes. This trial went ahead in that period of time between the Court of Appeal decision in *Hayes* and the decision of this Court in *Hayes* and so the jury were directed very much in terms of – entitlement itself was not relevant to guilt but obviously the other elements of dishonesty were.

- 20 And consequently if there was an exaggeration, or perhaps a better word would be a minimisation in this circumstance, by Mr Stewart's Dr Small was that something which was explainable by the chronic pain syndrome, was he doing this because of his perception of pain because he wanted to be taken seriously –

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TIPPING J:

Was he deliberately trying to cheat the corporation or was he for some other reason, there was other ingredients if you like, in what was activating his mind?

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MR SHAMY:

Certainly and Dr Davis' evidence is notable for the fact that he speaks at length about the interface between the physical and the psychological and the cross-examination by Mr Murray is very lengthy but keeps trying to pin the

doctor down to various aspects and the doctor keeps saying, well it isn't black and white, there are numerous factors in play and that is why in terms of the accident compensation manual there is what is called yellow flags in terms of chronic pain and I can take the Court to that issue because it is very easy to

5 jump to a conclusion because there is a discrepancy between what someone can do and what they say they can do to jump to a conclusion of malingering but there are these yellow flags in the manual that say you've got to be very careful where there are psychological factors involved, that it may not be dishonest malingering if I can use it like that. I'm sorry Chief Justice I'll come

10 back now to the document you wanted to see.

ELIAS CJ:

No, well I see, but it is actually, because I was a little confused with reading the judgments. It is about use of the documents so it's really use in the

15 knowledge that it's based on false information that is the issue.

MR SHAMY:

Yes and I don't think, I must confess I wasn't trial counsel but you'll see from the fact there's 59 indictments, there's a large number of these

20 medical certificates and they changed form over the years. But I think the thrust of the case was false information of Dr Small and that really was what I can understand what the Court of Appeal said the case was about. That if he told Dr Small, well look I can do this that and the other, then Dr Small wouldn't have certified things or at least the corporation would have been on notice that

25 he could have done more and perhaps, I think –

TIPPING J:

So the falsity was in failure to convey full information?

30 **MR SHAMY:**

Certainly.

TIPPING J:

Yes.

ELIAS CJ:

But wasn't the falsity in the use of the document i.e. relying on it with the corporation, in the knowledge that the certificate was based on false
5 information?

MR SHAMY:

Yes, well, the Crown case appears to have been effectively that the false information was given to Dr Small, was reflected in the document and then
10 used by the corporation. The collateral is somewhat interesting is that there has since been an accident compensation review authority decision putting Mr Stewart back on ACC, that's not relevant to guilt, but there has obviously been a lot of movement in this area.

15 **ELIAS CJ:**

All right, well sorry, I've interrupted you and thank you for taking me to the indictment. Where are the certificates to be found?

MR SHAMY:

20 I think I attached those to my submissions I think. I'll just recheck. Sorry, it's number 1 in the bundle.

ELIAS CJ:

Mr Shamy, is this the binder –
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MR SHAMY:

Yes it's in the booklet of authorities, sorry, the first document in the booklet. That's an example from 1999.

30 **TIPPING J:**

It would be fair to say Mr Shamy that at heart the case against him was of putting a medical picture to the corporation which he knew to be false?

MR SHAMY:

Yes.

TIPPING J:

It seems to me what it boils down to that he was, through the instrumentality
5 of the doctor, putting to the corporation a medical picture if you like.

WILSON J:

And also linked to his own declaration at the foot of the certificate.

10 **TIPPING J:**

They would have to, the Crown would have to show that he knew that the
material which he was submitting or that his physical state was not as
represented.

15 **MR SHAMY:**

Yes. For instance if one looks at this particular certificate under number 3 it
has activity restrictions and there are four boxes ticked. Hand tool use, which
is obviously very relevant because he was a butcher in his occupation. Heavy
lifting, pulling or carrying. Repetitive movements and driving and then the two
20 declarations effectively say, well there are those particular restrictions.

BLANCHARD J:

Did Dr Davis in his evidence specifically address the significance of
exaggeration of what he could do rather than exaggeration of the pain he was
25 in?

MR SHAMY:

Dr Davis, it was put to Dr Davis, well if you'd known you could do all of this
and that and the other, would you have filled out the certificate in the same
30 way? And I think the doctor was relatively equivocal about it but eventually
said he wouldn't because he –

McGRATH J:

Was that he wouldn't have filled it in the same way?

MR SHAMY:

Wouldn't have filled it in the same way.

5 **McGRATH J:**

Davis or Small the same way?

MR SHAMY:

Small.

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McGRATH J:

That was put to Dr Small?

MR SHAMY:

15 Yes.

BLANCHARD J:

But did he address whether, I'm putting this a bit crudely, whether someone could honestly, because of his pain, fail to give an accurate account of what he could physically do?

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MR SHAMY:

This is Dr Davis?

25 **BLANCHARD J:**

Mmm.

MR SHAMY:

Well I don't think he gives a direct answer to that. There was quite some cross-examination on the point effectively to say well look if someone, because that of course was the nub or the thrust of the Crown cross-examination to say well look, you know, if someone's doing all this and they're telling you something else, that must mean you're a malingerer. And that was answered by Dr Davis to say, this is at page 929 of the

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casebook which is volume 3, I'll just quote it, this is a question from Mr Murray. "So you say that if this person is regularly distorting to a doctor, saying they're incapable of doing anything more than essentially sitting around and watching Trackside all day when they're actually out in the garden, you wouldn't see that as being a classic case of malingering to remain on ACC when they can clearly do far more than they're telling their doctors?" The answer –

ELIAS CJ:

10 Sorry, I haven't got it, is it 929 is it?

MR SHAMY:

Yes, 929.

15 **ELIAS CJ:**

Yes, thank you.

MR SHAMY:

And the answer at line 12, "Not inevitably, no, not at all." This is Mr Murray, "So is it part of the chronic pain disorder to misrepresent to the doctors what you're doing?" "I have an issue around the word misrepresent or distort and I mean that's, you know, like if that's truly happening and explainable the point can I take some time just to explain this." "Could you answer my question? Are you saying that that's now part of chronic pain disorder to routinely misrepresent what you're in fact doing?" "No it's around the issues of the word misrepresent. I'm just wondering if that's an assumption after the fact." You'll see some very long questions from Mr Murray but I think effectively what Dr Davis was saying is that there's psychological factors in play here as to the reporting of activity. That it isn't a black and white issue in that because of the psychological effect of long term pain, that can affect what they say they can do.

TIPPING J:

I think what the doctor maybe trying to say is that misrepresentation implies a degree of “knowing misleading” and it maybe “unknowing misleading”. That’s why he has the difficulty with the word misrepresent, I would have thought,
 5 which is quite understandable.

MR SHAMY:

And that’s, I think, the reason for the Crown attack on him. To say well look you just keep making excuses for people when in fact he’s saying well the
 10 human mind is a bit more complicated than that when there’s been these factors because you’ll see from the brief of evidence of the doctor which is in the Crown’s material, there’s quite an in-depth analysis of Mr Stewart about his personality type being slightly obsessive, fidgety, very intense type of person and that sort of thing. He runs through the various factors all in this
 15 chronic pain indicia. What the doctor seems to be saying, this is the previous page 928, when again Mr Murray is saying, doesn’t it point them towards being a malingerer, this is at line 21 on page 928. “It could present in my view a possibility they’re suffering from chronic pain disorder, that the full disorder, that would need to be further investigated because I mean it depends on what
 20 the word, I mean if they represent some or all of their pattern of behaviour and what they can and can’t do and all of that, that’s represented and it seems to be variable and consistent. I think that any doctor or person might wonder about what the motivation or the meaning of all that was and I would think based on my experience nowadays I would be absolutely certainly thinking
 25 that this person is suffering psychological or suffering from chronic pain disorder with psychological and behavioural concomitants and there maybe and/or there might be a malingering aspect.”

So effectively what the doctor says, it could be malingering or it could be
 30 chronic pain disorder and although the Crown, and to some extent the Court of Appeal, criticised Dr Davis for not giving a straight answer, on my reading of the evidence there’s very few of – his questions aren’t really straight, they might be a little bit long winded –

TIPPING J:

You don't often get a straight answer from a psychiatrist.

MR SHAMY:

- 5 Precisely. And just, if one looks perhaps at the question even by way of example, just to see whether he's being evasive, if one looks at the end of 927 and through onto –

ELIAS CJ:

- 10 Well some of these questions –

MR SHAMY:

Well they're submissions aren't they?

15 **TIPPING J:**

The Judge should have intervened to simplify this. It's all very well to say answer yes or no to a 10 line question.

MR SHAMY:

- 20 Well particularly if there's a psychological component to it. But if one looks he is giving one line answers on 97, yes indeed. "No." "No." "Yes I do." "No." Well they couldn't be any more clear than that and I think it's a little unfair to say that, well look the Crown got very frustrated because he wasn't answering the questions. He may not have been answering the questions the way they
- 25 wanted him to but he was giving them answers. So that, in my submission, is that Dr Davis can't be explained away as someone who is evasive, who obviously the other experts didn't agree with or anything of that nature. He had a valid opinion. His opinion said that people's representation of what they can do and their view of themselves can be affected by chronic pain
- 30 disorder and that's obviously something that a jury could take into account. And obviously the longer the pain went on, the more effective the disorder and it can be noted it was again that his evidence may have been more relevant to the later counts upon which in fact Mr Stewart was convicted. But certainly

Dr Davis just simply says, well I can't rule out malingering but I can't rule out chronic pain disorder either. So that's really Dr Davis' evidence.

5 The law in terms of prosecutor conduct generally is reasonably clear and I don't, unless the Court wishes me to discuss any aspect of it, wish to go through it in any particular detail. But I think it reasonably well accepted that the Crown must present the case fully and clearly with professional detachment and avoid unduly emotive language and inflammation. Obviously the inflammation or inflammatory aspect is relevant to the Davis matter. It's a
10 different issue that's relevant to the motive to lie. But in my submission it appears agreed by all, including the Crown, that the submission to the jury in terms of Dr Davis was completely unwarranted, was completely unfair and was wrong. The issue is whether it leads to a miscarriage. In my submission
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ELIAS CJ:

Before you get onto that, can you take us to who is the certifying doctor again? I've forgotten, sorry.

20 **MR SHAMY:**

Dr Small was the general practitioner.

ELIAS CJ:

Dr Small. Now you said in your submission just then that he indicated that if
25 he'd known about these other activities he wouldn't have identified these activity restrictions, is that right?

MR SHAMY:

Effectively —

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ELIAS CJ:

I think you should perhaps take us to that evidence.

MR SHAMY:

Dr Small's evidence is at, it's on page 424 of the notes of evidence. I'll just find it as in the numbering in the casebook.

ELIAS CJ:

5 It's volume 2 I think.

TIPPING J:

515?

10 **MR SHAMY:**

Unfortunately we don't have his written brief. I wasn't given a copy of it but we do have his evidence in chief which I don't think changes anything from his brief. The evidence in chief is really to the extent of saying, well look, Mr Stewart didn't tell you that, for instance, he could paint his roof or he'd
15 done various activities. And just clarifying the obvious, that the doctor fills out the medical certificates upon the basis of what their patient has told them and I think possibly it's there at 517 at line 25 –

ELIAS CJ:

20 Maybe at the top of page 2 because he's indicating that the activities that have been reported maybe consistent with his certification.

MR SHAMY:

Yes. "If those types of activities had been reported to you would they have
25 been consistent or inconsistent with the medical certification that the accused was fully unfit to do any work?" "They may have been." And then down –

BLANCHARD J:

What does that mean?

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MR SHAMY:

Well you see I think the interesting matter here –

BLANCHARD J:

He clarifies it though further down.

MR SHAMY:

5 He talks about, I think, at line 25 as well. One matter to take into account on my understanding is that the unfitness to work is within the context of unfit to work at the job at which the patient was undertaking at the time of which they went on ACC. They go on ACC because they aren't fit to carry out a particular occupation. In this case Mr Stewart was working as a butcher and
10 on my understanding the unfitness to work is interpreted, was he fit to undertake work as a butcher, and that's why he's back on ACC because I understand the finding was he wasn't able to be a butcher. So Dr Small was a little bit equivocal, he kept saying it may have done, which I suppose is neither here nor there because at the end of the day the focus is really on what was
15 Mr Stewart doing, what did he tell Dr Small he was doing, and what was effectively between his ears, or his intention. If he wasn't fully frank was it a deliberate dishonesty or was it his view of the world shaped by his chronic pain disorder and that appears to have been effectively in a nutshell what the case was about. So I suppose at the end of the day what Dr Small may or
20 may not have done if he'd been told the whole story is probably not relevant. It would only go to the issue of entitlement which as this Court in *Hayes* has said is not particularly relevant to guilt.

ELIAS CJ:

25 Well yes he does say, it depends what you mean by regularly undertaking the work and all those sort of things.

MR SHAMY:

You see as I understand it from reading Dr Davis' evidence and indeed
30 Dr Alchin who was a Crown expert, this fibro, I can't pronounce the word, chronic pain disorder.

TIPPING J:

Fibromyalgia.

MR SHAMY:

Thank you Your Honour, appears to be something that perhaps is more relevant to repetitive work. One might be able to do something once or twice

5 but one couldn't keep doing it all day and that's, as I understand it, if he's chopping up meat on a bench all day and he gets this pain he might be able to at home chop up a chop but he may not be able to do it all day for the purposes of employment, and so the defence case was well look okay, I moved the caravan, I pulled the caravan into the garage. Well that doesn't

10 mean I can do it all day because as I understand it with this particular disorder you can have good days and bad days. You can have some days where you're having to watch Trackside, as Mr Murray said, other days where you can get out and do something. That it seems to be inconsistent and so the fact that various neighbours saw him mow the lawn, do the garden, over the

15 period of the indictment which was quite a large number of years, doesn't fly in the face of the diagnosis. The diagnosis is still that he's limited in terms of being fit for full time work so that really appears to be the nub of it.

TIPPING J:

20 This business about how it's taken to be related to the job you were in when you had the original accident or whatever, was that the context, if you like, in which this medical evidence should be viewed?

MR SHAMY:

25 Well I don't have the Act in front of me and obviously the legislation has changed a little bit over the years but the definition of unfit for work is unfit for your occupation.

TIPPING J:

30 Right.

MR SHAMY:

To that extent there's a particular section in the Act which I can find later –

TIPPING J:

Well no I don't want you to go to that detail.

MR SHAMY:

5 But that's the context of being unfit for work.

TIPPING J:

Yes, well that's rather what I thought.

10 **MR SHAMY:**

It's not, well look, I've got a sore leg, I can't do my job which involves walking but look the hands are okay so you're not unfit for work, you can sit down at a bench and do everything. I think the phrase is used in section 4 of the certificate, is fit to return to normal work and on my understanding normal
15 work is the work which he was doing when he qualified for ACC. That's certainly my understanding as to what it is.

TIPPING J:

Well it could hardly mean anything else in that context could it?

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MR SHAMY:

Well I think you may – I'm certainly not in any way an expert in ACC. I think the corporation does sometimes retrain people and try and do other things.

25 **TIPPING J:**

Yes but you see what –

ELIAS CJ:

There was some suggestion of being retrained as a plumber of something.

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TIPPING J:

You see what's puzzling me is at the top of that page you referred to as 517, the question was directed to fully unfit to do any work. This just seems to me

to – there wasn't a clear enough focus, at least in some minds, in the trial as to exactly what was being examined.

MR SHAMY:

5 Yes and it seems that, that definition of fit for work must have been in the minds of the players particularly Mr Stewart –

TIPPING J:

He, if he honestly thought he wasn't fit to return to work as a butcher, it would
10 seem that he had a complete defence.

MR SHAMY:

Well I don't know if he would with respect. I think, I think that the form is more specific than that. The form says this is an accurate reflection of my activity
15 restrictions. It doesn't say, is a reflection of whether I'm fit to work.

McGRATH J:

By absolute, by reference back to section 3 of the form?

20 **MR SHAMY:**

Yes.

McGRATH J:

Which is a factual matter, not a question of assessment of his condition.
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TIPPING J:

Well maybe I overstated it.

MR SHAMY:

30 I think it would be very nice for him if that was correct but that part of the background is relevant to the extent, I think probably of the answers given by Dr Small because you would think that if it meant well could he do anything, could he push a pen, could he do anything at all, then obviously if he'd been told, if Dr Small had been told about all this activity it wouldn't be well it may

have changed my assessment because his assessment would be could he do any sort of work. Well obviously if he was able to pull a caravan and mow a lawn, he can do something. But Dr Small's assessment, one would think, would be based on whether he could return to work as a butcher and that's why it seems to have been equivocal in terms of the answer. But again –

TIPPING J:

Well it's the equivocality point that it seems to me that you can be far too harsh about the, about that in the light of the way the questions were put.

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MR SHAMY:

Well it seems to me that Dr Davis was trying to be both sides. He says he can't rule out malingering, it could be chronic pain. The Crown case seemed to be very black and white. If you're not telling the full story you're obviously lying, you're doing it for the getting a benefit, and it's relevant because look if you can do anything at all then you can go back to work, which doesn't seem to be the legal, or in the psychological matrix within which the case really fitted. I can't deal with matters particularly much further in terms of Dr Davis.

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20 **ELIAS CJ:**

I'm just looking through. Dr Small does indicate at page 528 what he was doing but there's also evidence there that he was relying on assessments that the pain was suffered by the patient, the patient self-reported pain for about 70 percent of the time.

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MR SHAMY:

Which page is that?

ELIAS CJ:

I'm just feeling a little concerned about aspects of this. At page 526 he was asked about how much of the time he was in pain and at 527, after refreshing his memory from his notes, or from the preliminary hearing, he said that sometimes he'd report more times, sometimes less, but probably 70 percent was the average so he wasn't suggesting that he was in pain all the time.

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MR SHAMY:

Certainly, as I said –

5 **ELIAS CJ:**

And then the doctor is saying what he's doing in his assessment at page 528 at about line 14 when he's filling out these forms, we consider whether a person is capable of physical work as opposed to light or less physical work, for how long and so on.

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MR SHAMY:

Certainly and down at line 24 in terms of coming through assessment as to fitness for work or otherwise, one of the elements you consider is whether the person is able to perform tasks at a fixed time, on a fixed day every week for weeks on end, that's part of the process. If his condition is such that while he maybe able to perform the task, you cannot predict whether he will be able to during the week, does that influence your decision?

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ELIAS CJ:

Yes. Just in what you said to us I had thought you had said that Dr Small would not have signed the certificate if he had known of the evidence that was given as to the activities in the garden, but I can't find, I haven't yet found a place where he says that as clearly. He's saying that he would be interested in it but –

25

MR SHAMY:

I must confess that was my understanding that Dr Small had said that. I think the nearest it comes is on page 518 of the casebook at line 6 and perhaps even previously but it says, "Would you have then used that information you got from him to make an informed decision about his work capacity?" "Yes." So that probably is the closest that it comes.

30

ELIAS CJ:

Yes, thank you. So you were going onto miscarriage of justice?

MR SHAMY:

Yes. It seems to be accepted that the Crown's closing remarks in terms of Dr Davis were wrong and were inflammatory and emotive and the like and
 5 unfair. The issue then comes to an assessment of whether this conduct constituted a miscarriage of justice. To an extent perhaps I'd rely upon the analysis of this Court in *Matenga* which judgment was issued on after the Court of Appeal decision in this case, which appears to involve a two stage approach. Firstly, to see if the error or mistake was so trivial that it couldn't
 10 have affected the outcome because if an error is so trivial then it isn't a miscarriage. If it is not so trivial, or in other words it is capable of affecting the outcome, can the Appellate Court be satisfied that a finding of guilt was inevitable. The Crown say, well look this was a lengthy trial. This was a reasonably lengthy closing address and these were, I think, three or four
 15 paragraphs of throw away lines. The jury wouldn't have been influenced by them. It's notable that the Judge spoke about experts generally in his directions but certainly didn't correct the Crown approach and I'll just go back to my submissions.

20 **ELIAS CJ:**

Do we have information about, I mean accepting that the trial was a lengthy one, how long did the Crown prosecutor address for? I'm just trying to put the remarks in the context, not of the trial as a whole, but in terms of his address.

25 **MR SHAMY:**

Well I can only be guided by the length or the number of pages.

ELIAS CJ:

50 pages, yes.

30

MR SHAMY:

50 pages, yes. The trial Judge didn't refer to Dr Davis particularly except when in summarising the Crown case to say, this is at paragraph 222 of the Judge's summing up, the suggestion, this is as what the Crown have said, the

suggestion on the basis of Dr Davis' evidence that chronic pain disorder in some way negates dishonest intention can be dismissed as patently ridiculous. So the Crown submission was effectively reinforced, in my submission, by the trial Judge. Now as the Court will be aware there are in every trial, long or short, there are points which are of more significance than others. Now the defence, or in other words the case which the Crown had to meet or destroy in order to get a conviction, effectively stood mainly on the evidence of Mr Stewart and Dr Davis. Dr Davis as an interpretive tool in relation to what Mr Stewart had said to Dr Small and also at the trial. So although the Crown closing may have occupied 50 pages, a lot of that would have been the recital of evidence, of Crown evidence, effectively of people seeing what Mr Stewart could do, also obviously the definition of elements of the crime and the like.

In my submission one of the high points of the Crown case was this attack on Dr Davis because the Crown had to attack Dr Davis and it had to attack the bona fides in Mr Stewart and that was really the nub of the Crown closing. In my submission there is quite a lot of inflammatory remark. The myriad of modern disorders, the psycho babble.

ELIAS CJ:

That's an appeal to prejudice it seems to me.

MR SHAMY:

And also to invite the jury to put to one side this diagnosis as an airy fairy modern invention that lets guilty people off the hook which indeed certainly doesn't seem to be echoed by the Crown expert witnesses so the psycho babble, the myriad of modern disorders, the malingerer's dream and then –

BLANCHARD J:

Well the worst is almost a suggestion that he was recently hired and paid to come up with something for the defence.

MR SHAMY:

So effectively there's the four elements in terms of Dr Davis and the difficulty is that the Bench, the trial Judge not only did not correct that, either during the closing itself or afterwards, to say look you must extend respect to Dr Davis. He's qualified, he's proved, he's even had his report, his brief peer reviewed
 5 by Dr Alchin. In fact I think Dr Davis is a consultant for ACC ironically. But he then effectively in summarising the Crown case said it again. You can disregard Dr Davis' evidence that chronic pain disorder in some way negates dishonesty intention and that's patently ridiculous so in my submission that's the imprimatur of the trial Judge. Although he's only saying it as a summing
 10 up of the Crown case, he's certainly not disagreeing with it and saying it was inappropriate.

In my submission, if one reaches the stage of saying that this was a miscarriage, it wasn't so trivial that it couldn't have affected the verdict, then
 15 it's a major step to say in terms of the second investigation well look he would have been convicted anyway because obviously it came back to the jury's assessment of Mr Stewart.

McGRATH J:

20 Are you saying Mr Shamy then that regardless of whether or not the Court of Appeal was right in its assessment that Dr Davis' evidence did not provide an innocent explanation, if you look at the matter in terms of the question of Mr Stewart's bona fideness, the attack went directly to that and the Judge in paragraph 22 was indirectly supporting the Crown's attack on bona fideness.
 25 Is that the way –

MR SHAMY:

Well he's indirectly supporting the attack on Dr Davis and thereby kicking away one of the legs of the defence.
 30

BLANCHARD J:

Well he's actually doing that in the context where he's already told the jury, at paragraph 189, that the crucial expert evidence, which is being given during the trial, was that which was given by Dr Davis.

MR SHAMY:

There is obviously a flow on effect from an attack on Dr Davis on the bona fides of Mr Stewart. Firstly, in terms of –

5

ELIAS CJ:

Well that's why Dr Davis is called.

MR SHAMY:

10 Certainly. But even this contention that Mr Stewart was wriggling around trying to buy a hired gun to get him off the hook, that remark about Dr Davis being a hired gun also slides onto Mr Stewart as being a man who would hire a gun.

15 **TIPPING J:**

Who would be hired.

MR SHAMY:

20 Yes, so in my submission it's very difficult indeed to say that in this type of case where the good faith, the assessment of the accused who has given evidence is really the major point in issue, that it would be inevitable that a guilty verdict would have been entered.

TIPPING J:

25 We did say something a bit like that in *Matenga* didn't we?

MR SHAMY:

Yes. I'm paraphrasing *Matenga*.

30 **TIPPING J:**

Yes.

MR SHAMY:

So it seems to me that in terms of the first stage of enquiry this is not so trivial that it couldn't have affected the verdict. That if that bar is reached then the case certainly was not black and white and that it would be difficult to say that guilt was a foregone conclusion if one put to one side the remarks in relation to Dr Davis. Unless I can assist any further those are my submissions in respect of the Dr Davis issue.

Turning to the motive to lie, the remark is very clearly an invitation to say he's got the motive to lie, he's got the most to lose, he's the one on trial, which must be taken as a submission that the accused, that because he's the accused, he's got a motive to lie. Now that does not spring from the inflammatory emotive basis of complaint. It's more a black and white mis-statement of legal principle. If I can use an analogy, there is the statutory prohibition on the Crown commenting on the failure of an accused to give evidence. That's statutory but effectively it's a recognition of the right to silence and Crown remarks deprecating that are therefore forbidden. In my submission Crown remarks saying that an accused has a motive to lie because they are the accused is similar, because it's a complete inversion of the presumption of innocence. It is saying that because you're charged with an offence you're guilty and you've got the motive to try and wriggle off it.

TIPPING J:

In a sense it is a worse vice than a direction reversal of the presumption because that's so obviously wrong that everyone will correct it but this is a sort of insidious –

MR SHAMY:

Yes.

TIPPING J:

– reversal in a sense.

MR SHAMY:

Yes.

ELIAS CJ:

Well it's been directly endorsed by the Court of Appeal.

5 **TIPPING J:**

Well not quite but sort of.

MR SHAMY:

Well sort of. Perhaps on a well everyone thinks like that anyway approach –

10

ELIAS CJ:

Yes.

MR SHAMY:

15 Which is –

TIPPING J:

Well you shouldn't be thinking like that.

20 **MR SHAMY:**

Well exactly. If a juror comes to the jury box presuming guilt then we're always telling them they have to be presuming someone innocent. The –

ELIAS CJ:

25 Well it's worse too because it's all the defence witness evidence really that's tarred with this because Dr Davis has been paid and the family members also have the same motive.

MR SHAMY:

30 Certainly. So it really does strike to the heart of the common law protections for an accused and obviously over the period of time the law has developed protections against unfair reasoning that – and we only need to think of perhaps a recent complaint or something of that nature, there are strict rules of evidence which prohibit evidence which people might think was common

sensically relevant from going to a jury. In the same way if there was some thought, which is not accepted by the appellant, that jurors think people who are charged by the police are necessarily guilty, then all the more need for very, very strong judicial directions and for everyone to safeguard that right

5 including the Crown. The Crown reasoning appears to have been well look the defence is saying that some of the Crown witnesses are lying, well look at the defence, they're all lying, which again is flawed reasoning because this balancing of who's got more of a motive to lie, the defence or the Crown, isn't really part of our law in terms of – it's inconsequential to say that well these

10 people are lying because the accused is the accused. The law is very clear, most of the overseas authority in fact mainly deals with judicial comment on the motive to lie but I think it's not in dispute from the Crown that the same prohibition relates to prosecutors and the Crown can never say that because he's the accused he's got a motive to lie and that's black and white what the

15 Crown said. I note my learned friend has phrased it as saying look it's a rhetorical question but it isn't a rhetorical question because the answer is given. It's the accused who's got the reason to lie. He's got motive to lie. He's got the motive to go along and hire a psychiatrist and try and get himself off his, out of his trouble. He's the one on trial, he's the one with the most to

20 lose.

WILSON J:

Is it – on your argument is it acceptable for the defence to submit that prosecution witnesses have a motive to lie but not for the prosecution to make

25 such a suggestion about the accused?

MR SHAMY:

Certainly not. The prosecution can point to relevant factors which don't offend the presumption of innocence. They can say, look he's told you three different

30 versions of events, he's lying or, for whatever reason but they can't do it by inverting the presumption of innocence and prosecutors often say look he's got a motive to lie because of one, two and three and that's fair. Prosecutors don't have their hands tied behind their back, particularly in modern times, but there are certain, in my submission, black and white rules. Motive to lie

because you're the accused. Comment on the failure to give evidence which are the untouchables, which are black letter law. They're not inflammatory, they're not emotive, they're not appealing to emotion, they are an invitation to illegal reasoning and for that reason they must always be prohibited and that's what was done here. And unfortunately again neither defence counsel nor the trial Judge stepped in to correct it. Indeed the trial Judge spoke about you've got to be careful about witnesses who have some motive of their own. Well –

10 **McGRATH J:**

Where was that at Mr Shamy?

MR SHAMY:

I'll just find it Your Honour. There was a standard direction on –

15

TIPPING J:

Well actually that standard, I don't want to expand this, but I didn't think that standard direction in this context was at all helpful. It was apt to be misunderstood but you're quite right. He did give a sort of what you might call a bench book type direction.

20

MR SHAMY:

Yes. And that's what concerns me is that when the Crown have put forth motive to lie, motive to lie, motive to lie, and the Judge goes, well be careful of people who've got motive to lie, then there's game, set and match.

25

TIPPING J:

It's the non-specific direction that we keep on trying to get people to avoid. The sort of general, it's got to be homed in on the specifics otherwise you're going to create a mess at the best but we seem to talk about that forever and it doesn't always get through.

30

MR SHAMY:

I can find the motive assessment.

McGRATH J:

You may have referred to it in your submissions. It's certainly familiar what you're saying.

5

MR SHAMY:

I did refer to it in my submissions. The difficulty is I did my submissions before the casebooks had been bound and so I didn't know what page it was going to be so it made it difficult.

10

McGRATH J:

Well come back to it. If you just remember to tell us in reply if it hasn't come up in the meantime.

15 **MR SHAMY:**

Certainly.

McGRATH J:

What do you say about, I mean that passage seems to me to be important because it goes to what the Court of Appeal said about this which really was that nothing could be done once it had been said –

20

MR SHAMY:

Yes.

25

McGRATH J:

– so it was better left alone or something like that?

MR SHAMY:

Well in a way it's a bit like the prohibition on, a comment on the right to silence. If the Crown say, oh look he never said anything. Well you can think he's guilty, he's got something to hide. There would have to be some sort of direction or something from the Judge. There's – I found after writing my submissions a decision of the Court of Appeal which was on that same issue

30

that right of silence. This is the case and I've got copies of the bench. It's a case called *The Queen v T*, 22 November and it's only analogous, I don't know if the Court needs it, but I'll just quote it because that was dealing with an issue where the Crown had commented on the right to silence and had

5 said, well look he was silent, he didn't give his explanation. This is what the Court of Appeal said, this is at paragraph 25, a contravention of the statute but in my submission a similar situation. "We have no doubt the appeal must succeed on this ground alone. There can be no room for degrees or graduations of the right to silence within the law as it stands in New Zealand."

10 Then they talk about the United Kingdom. "The examination in chief of the detective should not have occurred." That's because there was a great play made by the Crown saying to the detective look he never said anything did he. "Even though there was no objection from T's counsel the intrusion on the utility of the right must have been apparent and should in any event have

15 been stopped. There was an intolerable position for defence counsel to have to cope with. Questioning about it in cross-examination only succeeded in drawing more attention to it. Had the matter not gone further the Judge may have been able, by careful and judicious direction, to have lessened the problem. However prosecuting counsel then used this material in a final

20 address. The damage became irreparable when the Judge in summing up repeated what Crown counsel had said without criticism or comment."

In my submission that's very similar to here because the Crown have said it. They've said it very strongly. It's the nub of the case. The Court hasn't

25 criticised it and when I reply I've found –

TIPPING J:

It's paragraph 152 of the summing up on page 70 of volume 1 and it's exactly as you have. Sixthly, and finally you are entitled to take into account whether

30 the witness has any personal interest in the outcome. The witness, in other words a generic direction of the outcome of the trial or whether he or she could have any motive to lie or to give a false account of events. Again generic.

MR SHAMY:

Yes. So in my submission that is effectively a reinforcement of what the Crown have said without criticism and again runs the risk, in my submission,
5 of being a Judge's imprimatur to the jury that look if you think this chap has a motive to lie and the Crown has told you as the servant of the state that he does, well you can take that into account and that is the major problem.

TIPPING J:

10 As I've always understood it, Mr Shamy, all counsel can suggest to the jury that a witness might have a specific reason for lying by reference to certain suggestions or demonstrated facts but certainly when it comes to the accused you can't do this generic stuff and even if it comes to Crown witnesses you can't make a general suggestion that they have a motive to lie unless you've
15 laid some sort of foundation for it.

MR SHAMY:

There must be an evidential foundation for a submission made to a jury.

20 **TIPPING J:**

So I mean it isn't particularly complicated if you like.

MR SHAMY:

And that, that is really the issue, isn't it, because of course there was no
25 evidential foundation laid by the Crown.

TIPPING J:

Other than an a priori presumption that he must be guilty.

30 **MR SHAMY:**

If he's here, he's guilty. So that, in my submission, is the nub of it. In my submission again this was more than a trivial, couldn't have made any difference error, and again because it goes to the heart of the issue at stage 2 of the enquiry, one could not say that convictions were inevitable. Obviously

there was a lot of evidence given and obviously the jury assessed the evidence and looked at it. There were acquittals on the earlier counts and that's quite interesting because Dr Davis' evidence would have been more relevant to the later counts on which he was convicted. I couldn't speculate as to why there were acquittals on the earlier counts but it may have come back to an assessment of those Crown witnesses for the earlier counts. But in my submission it doesn't meet the argument to say that well look because there were acquittals that means the jury weren't influenced by the Crown. As we are always telling juries there were 60 trials within a trial and each count has to be looked at separately. In my submission this was a significant error and it is not a case wherein it can be responsibly said that the verdict would have been guilty notwithstanding that error. Unless I can assist the Court, those are my submissions.

ELIAS CJ:

Thank you Mr Shamy. Yes Mr Pike?

MR PIKE:

Yes, may it please the Court. The respondent's submissions address rather a different case from the one that's been advanced in some respects. The starting point for the respondent is the issue as to the conduct in closing and in part in some of the cross-examination conducted by the prosecutor at the time where taken the question posed by this Court especially as there was no particular addressing of the correctness of the Court of Appeal's decision as to the relevance of the Dr Davis evidence. We've taken it to be rather accepted that Dr Davis' evidence was in the ultimately irrelevant to the question –

ELIAS CJ:

I don't, I must say I have trouble following that in your submissions Mr Pike because why would we be here if it were irrelevant. So I had assumed that it was not accepted that the Court of Appeal was right in that conclusion. I'm surprised to see it.

MR PIKE:

We're here Your Honour because the Crown accepts, and as my friend has submitted he has sought to put the comments about Dr Davis' evidence in some of the cross-examination. Most of it was simply difficult, utterly long
 5 winded questions which were difficult to cope with but not misconduct. Some of them were indicated as sarcasm, which is inappropriate and we accept that. But we're here, not because of whether Dr Davis' evidence is relevant or irrelevant in the sense that does it matter if it's irrelevant because my colleague's case is pitched as I would take it, and his submissions go this
 10 way, from the subtitling of inflammatory conduct. So of course it wouldn't matter if Dr Davis' evidence was irrelevant or wrong or inadmissible. What does matter is the perception of the trial when one sees an uncorrected comment in closing –

15 **ELIAS CJ:**

But it bears directly on miscarriage.

MR PIKE:

Yes it does but in a different, not in the way that you've got a guilty verdict
 20 when you should not have but the fact that you, because of the state of the evidence, but you got a guilty verdict when it doesn't matter if this person, the appellant, is guilty or not. What matters is that the trial conduct has been such that the Court simply in a nutshell cannot live with the appearance of an address which is demeaning or belittling or appeals to emotion and so there's
 25 no difficulty with this it's sound –

ELIAS CJ:

Well for my part I wouldn't want you to think that you don't need to address miscarriage. Is that really what you're saying, that you're –
 30

MR PIKE:

Oh it is a, we are addressing miscarriage but we come at it from a different point. I mean we're addressing a point of what's essentially an incurable miscarriage so we accept, we accept the –

TIPPING J:

Are you really invoking the –

5 **MR PIKE:**

The *Randal* –

TIPPING J:

– proviso?

10

MR PIKE:

No.

TIPPING J:

15 Are you saying that the verdict was inevitable?

MR PIKE:

No, not at all. I'm saying that –

20 **ELIAS CJ:**

Are you giving up Mr Pike?

MR PIKE:

No what I'm saying with respect is that first, the Court of Appeal was right
 25 about Dr Davis' evidence. Secondly, my friend doesn't really advance in this
 Court a summary ground A that Dr Davis' evidence was relevant and wrongly
 excluded or seen to be irrelevant by the Court of Appeal is not addressed in
 his submission. Nowhere does he take on and consider *Owen* and cases
 relevant to honesty and mens rea. His case is essentially that even if his
 30 client is guilty on the evidence the verdict should not, the Court of Appeal
 ought not to have upheld the verdict because the conduct of the Crown
 prosecutor crossed the line into the area where we're dealing with the *Randal*
 type situation in the Privy Council where we say it matters not, the transcript

may scream of guilt but the conduct was such that the verdict cannot stand and there must be, if it's appropriate, a new trial.

McGRATH J:

5 Because it was a miscarriage of justice?

MR PIKE:

Yes it is a miscarriage of justice. I mean ultimately everything that goes wrong in the courtroom is a miscarriage of justice. We had that out in
10 *Matenga*.

McGRATH J:

But what I think you're saying Mr Pike is that if we go beyond that into whether the Court of Appeal was right or not, we're going beyond what we've approved
15 is the ground of appeal.

MR PIKE:

Yes. We're dealing with this case on another basis, that is that the Court of Appeal was wrong to conclude that the trial was not unfair. We're in *Randal*
20 territory in this one, in this case. That is that the Crown prosecutors unfortunate and unhappy remarks, which nobody, the Court of Appeal nor the Crown could support –

TIPPING J:

25 On both heads. On both aspects.

MR PIKE:

The lies we say is the –

30 **TIPPING J:**

Motive to lie?

MR PIKE:

Well lies is not misconduct, it's a mistake.

TIPPING J:

It's a fundamental error of principle which the Judge didn't correct if he could have at that stage.

5

MR PIKE:

There is a danger in it. I'm not, with respect, I wouldn't see it as so fundamental as my friend or indeed perhaps possibly initially the comment from the Bench here today because it was at least directed to the fact that the accused, or the appellant as he now is, who had got into the dock and had made it very clear, he testified and said that certain of the witnesses against him had a grudge and were lying, he's put it in those blunt terms, they essentially attacked their character and so what the Crown purported to do was to simply say well, this is essentially a character attack. It was mishandled, no question, it was mishandled.

10

15

TIPPING J:

Well never mind how we put it, it shouldn't have happened?

20

MR PIKE:

It shouldn't have happened in the way it happened but it was proper –

TIPPING J:

And how do you see –

25

MR PIKE:

I don't want to play with words –

TIPPING J:

How do you seek to get out of that at least presumptive entitlement to a new trial with two significant things that shouldn't have happened?

30

MR PIKE:

Well the getting out of it is that I certainly do not, with respect, see the case as, the comment as reversing the onus of proof. That is simply, with respect, untenable. The person, the Crown, the hapless prosecutor obviously realised
 5 as he spoke that he was getting into the issue of, oh my god, am I in the – why, what's the motive of the complainant to lie territory of course which is now –

TIPPING J:

10 It's nothing to do with the complainant, it's to do with the accused.

MR PIKE:

I know that Sir, with respect. I'm saying it is the, the fear is that you're getting into that territory that we do in sexual cases where the –
 15

TIPPING J:

Oh I see you're saying –

MR PIKE:

20 – agonising, so he –

TIPPING J:

– he didn't really know what he was doing so he just was sort of firing at random?
 25

MR PIKE:

He immediately realised he'd got lies. He'd said the accused got a motive. The only person got a motive to lie out of the ACC as it were or the other witnesses and him, is him, therefore it could be seen is that he's lying
 30 because he's guilty, that's the only –

TIPPING J:

What do you say about the Court of Appeal's observation there was nothing really wrong with it because that's the way jury's think anyway?

MR PIKE:

Well I would take the Court of Appeal's observation to be in the context that the Court did not see it as an invitation to reverse the onus of proof but saw it

5 in the context of the trial where there had been, say the appellant did testify and he did blacken the character of some of the witnesses -

TIPPING J:

Are you really saying Mr Pike that although there were these two significant

10 errors, that the man is so clearly guilty that we should apply the proviso? I just don't understand the structure of your argument at the moment.

MR PIKE:

The structure is, with respect, that he has – the Court of Appeal was right to

15 say that Dr Davis' evidence was not satisfactorily, was not enough to give him a defence so therefore he had no defence of some sort of psychiatric condition which had the effect of inducing him to tell lies. Dr Davis didn't go that far and the Court of Appeal said that wasn't the issue. If it is right, with respect, to say that Dr Davis did not help him, then he essentially has no

20 defence once it is accepted that there is more than sufficient evidence to indicate that he seriously under-reported his physical abilities to his doctors.

TIPPING J:

He has no defence so a conviction was inevitable, is that your argument?

25

MR PIKE:

Yes, on that point it is. This case, I would suggest the principle in this case is nothing to do with whether he had a defence at trial and was, it was lost to him, as to do with whether the Court of Appeal in its rather economical

30 treatment of the last point, was right to say, assessing the trial as a whole, the comments of the Crown prosecutor, or the prosecutor's comments, were not such that we get this – of that class of case where even although there is sufficient evidence of guilt, the verdict cannot stand because the trial was an unfair trial. As we know if we take the definition of –

ELIAS CJ:

But was there a substantial miscarriage of justice, that's all the appellant needs to get to unless you apply the proviso, isn't it?

5

MR PIKE:

Yes and I'm –

ELIAS CJ:

10 So I mean do we really need to discuss fair trial? If there's error?

MR PIKE:

If there's trial error, and we're not dealing with an unfair trial, then the issue of course is whether essentially there was, you know, it is proviso territory to say
15 that there was enough evidence to convict.

ELIAS CJ:

Right, well that's what Justice Tipping put to you some time ago.

20 **MR PIKE:**

That is so but my answer with respect to that too was the one that we accept that the proviso cannot save an unfair trial.

ELIAS CJ:

25 I see. So your argument is really about the gravity of the error?

MR PIKE:

Yes the perception. The Court of Appeal –

30 **ELIAS CJ:**

If it didn't go to fair trial...

MR PIKE:

If it didn't go to, if fair, trial fairness wasn't engaged the Crown's argument is the Court of Appeal was right to take the view it did of Dr Davis' evidence, that it did not –

5

ELIAS CJ:

And apply the proviso?

MR PIKE:

- 10 Yes. They'd apply the proviso because the conduct, the statement in the – the Crown prosecutors belittling of the evidence which we do not support and he doesn't support either, we can report that. I mean we have a process of indicating where people have gone wrong and accepted that he has gone wrong so there's no question of trying to rehabilitate anything that happened.
- 15 We agree with the Court of Appeal's perception and so to does the prosecutor, that it just was a trial that for a number of reasons, unsatisfactory reasons across the board, wasn't a model trial by any manner or means, including his role in it. But what we're saying is that his comments about the doctor's evidence don't rob the appellant, don't affect the verdict unless the
- 20 doctor's evidence is relevant and therefore there's a risk that relevant evidence was unduly diminished in the jury's eyes. We know the trial Judge really didn't come back and say, well hang on a minute, there's been a reasonably moderate description of the doctor's evidence. This wasn't put to him. The Judge ought to have rehabilitated the doctor's evidence in the trial
- 25 to say that that is overstating it and it's not acceptable. He should have done that and he didn't. But –

ELIAS CJ:

- 30 What about the fact that the remarks, irrespective of whether they caused the jury to ignore relevant evidence, were an appeal to prejudice. These malingers who keep, you know, sort of buying doctors and blaming everybody as is the modern trend, that sort of flavour?

MR PIKE:

That's right, that's the second – because the point is one can say all right, the Crown prosecutor has said, in his closing has said things and not only in his closing, too the psychiatrist which were belittling and demeaning and impolite
5 so –

ELIAS CJ:

But not just of the psychiatrist.

10 **MR PIKE:**

No, no I'm sorry Your Honour I'm obliquely answering a question. Irritating I accept that for a moment but to put it into the context of our submission, we accept that there are these two phases. The first phase is trial impact. Did it actually get, did the conduct of the prosecutor in the way he addressed this
15 doctor's evidence, and the other witnesses if we like, and the way he spoke to the doctor and the way he summed up about this doctor, did that actually rob the accused of a defence which was available in which, because the Judge didn't correct it there's an appearance of a, there's a miscarriage of justice and it's substantial because the doctor's evidence was relevant if it had been
20 accepted there would likely have been an acquittal. That's phase 1. We say we're not in that territory.

But we come back to the very same comments, the very same points that Your Honour made, to say well does that matter now because now we're
25 going fair trial. Was the trial fairness affected and that question, as I accept from the Privy Council in *Randal* and a host of other cases, and Canadian material we've cited, that question is answered irrespective of whether the Court feels that there is a, the conviction was right on the evidence. That just doesn't matter and on that side of it that's where I see this case is pitched.

30

The question is whether the Court of Appeal was entitled to say, look this prosecutor really stepped over the mark, which he did. He has belittled and I accept Your Honour's view there has been injection of personal views because he talked to the jury about, "we" expected to believe such and such

whereas the prosecutor should stand detached and say “you” and not say, put himself or herself as part of the fact finding machinery. They’re a neutral agent. So there was that. There is an appeal to emotion. There is conduct which indicates that scepticism, which was unwarranted by the evidence, 5 unfortunately didn’t put it to him. I mean one can be sceptical of Dr Davis’ evidence if one advances a basis for the scepticism. Unfortunately our prosecutor didn’t, he basically belittled. So these were the problems.

What the Court of Appeal did, it comes down to a question of judgement and 10 that’s the difficulty in the case. The Court of Appeal’s view of the trial as a whole is it was not so pervasive that it could be seen as one of those hopefully very rare instances around jurisprudence where, of which there are some and we’ve sighted them, like *Harley* and so on, irrespective of guilt, the Court cannot countenance this as being proper administration of justice and that is a 15 judgment that the Court makes.

TIPPING J:

It must come pretty close Mr Pike, if it’s not quite there, it must come pretty close.

20

MR PIKE:

It comes close and I think the Court of Appeal dealt with the case on the basis that –

25 **ELIAS CJ:**

Because it’s about the way the jury is being invited to consider the question of guilt.

MR PIKE:

30 Yes it’s the injection – the problem here, and as I say we’ve sighted the, there’s a rich and unceasing unfortunately bounty of case law from Canada on these points, is that it’s very clear –

TIPPING J:

We should tell the Canadians they're leading the field in this area, are they.

ELIAS CJ:

Did you say unfortunately?

5

MR PIKE:

Well unfortunately because of the, especially in the Eastern, I won't bore you with this, but from the middle of Canada going east for reasons that no one can understand, there's just a constant warfare between the Bench and the
10 and the two bars and it's chronic.

ELIAS CJ:

So are you saying really that the case comes down to a very narrow judgment call about which there's very little to be said apart from the assessment
15 whether in the end the trial was fair or not?

MR PIKE:

Yes I do Your Honour. This is one of those cases where the Court of Appeal has said well this expert was, he wasn't, I mean he's a very nice man as you
20 probably all know –

ELIAS CJ:

But hang on a moment –

25 **MR PIKE:**

But he was evasive.

ELIAS CJ:

Hang on a moment.

30

MR PIKE:

He was evasive. The difficulty was I think they tried to put it in the trial context that the accused himself had not done himself any favours by a certain amount of pantomime in the witness box. There was -

ELIAS CJ:

But wait a minute. Aren't you undercutting the submission you've just put to us because the Court of Appeal relied on the fact that the evidence wasn't
5 relevant in its assessment, in its judgment about trial fairness?

MR PIKE:

No, no I don't think it did with respect.

10 **ELIAS CJ:**

Right.

MR PIKE:

It took the two steps. It's rather telescoped at the end of the judgment but
15 there were the two steps. Did it cause an actual, if we use the word an actual miscarriage of justice, i.e. the verdict is wrong on the evidence? The answer was no and that was because of the irrelevance. But then was their trial unfairness to which the issue of was there an actual miscarriage i.e. the evidence is now irrelevant, we put that to one side. Even if the accused
20 confessed in the dock, we still put it to one side and we say –

TIPPING J:

This judgment was given before *Matenga* in this Court, wasn't it?

25 **MR PIKE:**

Yes, yes.

TIPPING J:

Well I don't think the analysis follows *Matenga*. I don't think your analysis
30 follows *Matenga*.

ELIAS CJ:

I think we'll take the adjournment but I would like you to take us to the authorities that support your analysis. There's a sequential approach here.

MR PIKE:

Yes indeed.

5 **ELIAS CJ:**

Thank you.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.52 AM

10

MR PIKE:

May it please the Court. Before the morning break, the issue that I was requested to address was what is called or has come to be called a two stage approach to a matter which is relevant to the application of the proviso.

15 Now, I'm not at all sure whether there has been a miscommunication of the sort which has led the Court to that question which I'll try to rectify. The only two stage approach that I would, or two approaches approached, that I would make a submission as to, is on the question of whether there has been a substantial miscarriage of justice in that having arisen, or allegedly arisen,
20 from the conduct of the prosecution, the two sets of propositions I sought to divide, and possibly not very elegantly at all, were first that the prosecution may behave in a case in a way that is not such misconduct that the verdict, whatever it might – the verdict of guilty has to be set aside irrespective of the impact in the trial of the prosecutor conduct.

25

So what I've tried to distinguish between is essentially what is set out in *Randal*, and I'll come to the passage which I'm relying on in a few moments, but that there is the overarching duty, or possibility, that the trial will be an unfair trial irrespective of the verdict. The other – sorry, irrespective of what
30 the English call the safety of the verdict. The other one is where the conduct of the prosecution is relevant. There has been a prosecution, either misconduct or error of some sort, but is not such that it is per se likely to lead to a determination the trial was unfair. Now, in that context, the question is what does the Appellant Court make of the mistake or misconduct relative to

the, as I say to use the English term, the safety of the verdict. In this case not to endorse it with respect –

ELIAS CJ:

5 No, no, I was just saying, music to my ears.

MR PIKE:

10 It simply with respect a, because I'm coming to *Randal* and that is the test I mean it would just clash if I didn't use the same test. In this case our proposition is that because the Court of Appeal was right and is not, at least in his written case, is not challenged as being wrong on its findings as to the relevance of Dr Davis' evidence, the case is, in that second class of case where the Court of Appeal has made a judgment as to the trial overall on the question of well, never mind the strength of the case, is the trial nevertheless
15 an unfair trial.

If it is an unfair trial, now I have to go on and say, there has been a substantial miscarriage of justice. In those circumstances you cannot, and we accept this, the Crown accepts it and has done for a long time, you cannot save an
20 unfair trial by the proviso and we've just simply added that as a concomitant rule from the Bill of Rights Act and so – and international jurisprudence and we do that on the basis of saying that for a rare case in the words of Lord Steyn in *Brown v Stott*, which is much cited, that it's a grave conclusion to reach the outcome the trial was an unfair trial and that the administration of
25 justice in such case must be seen to have wholly failed. So it is a grave conclusion but if you reach that grave conclusion no amount of appeal to the proviso can save the trial outcome.

Where I rely on it in the main is the – as there are these two approaches is in
30 *Randal* which is under tab, which is in the appellant's booklet of authorities, under tab 8 is the Privy Council decision in *Randal v Queen*. I refer to the passage which is essentially para 28 which is at page, of the report page that I'm talking of is 2251 of the Weekly Law Report that's reproduced here.

Perhaps for the full, for completeness, para 27 at the bottom of 2250. In fact *Randal* could almost be this case in many respects, it might be thought.

5 The Board sees great force in many of the points made by Mr Perry and so on
for the prosecution. The case against the appellant does indeed appear to
have been a very strong one and the explanations proffered by him might well
have been properly rejected by a jury. On the material before the board there
appear to be grounds for criticising the conduct of the defence and the
evidence of the appellant. It would be wrong to infer all the faults lay with the
10 prosecution. The board is mindful that it has seen a relatively small part of the
trial transcript. However, it's really para 28 and para 29 that go onto really
exemplify, to at least illustrate in counsel's submission the point.

TIPPING J:

15 What point of principle are you addressing by taking us to this case?

MR PIKE:

The point of principle is that, is against me in a sense, is that we'll never,
irrespective of whether the Court, the Appellate Court finds that the conduct or
20 misconduct of the prosecutor was such as to affect the verdict, it can go on
beyond that where it is of course not at all material as to what effect it had on
the verdict. One can go onto that second strata or that second limb of the –

TIPPING J:

25 Is this just to support the concession you've already made?

MR PIKE:

Yes. That was the, that there are –

30 **TIPPING J:**

That there are circumstances if the trial is unfair, that's the end of it?

MR PIKE:

Yes, if the trial is unfair that is the end of it and the prosecutor –

TIPPING J:

That's clearly the law in New Zealand. We said so in *Matenga*.

5 **MR PIKE:**

That's right.

TIPPING J:

So why do we need *Randal*?

10

MR PIKE:

Well we don't with respect but –

ELIAS CJ:

15 It's quite nice.

TIPPING J:

Well it's good colourful stuff.

20 **BLANCHARD J:**

And I think we've cited it before.

TIPPING J:

I thought there was something in here that I was missing Mr Pike but
25 obviously not.

MR PIKE:

No I'm sure there isn't Sir. No the point I was making is that this is a *Randal*
case in the Crown submission. That's – what I was saying is that the words of
30 the, where the board saw – in fact the words of 27 could almost by the
Crown's submission in para 27 as to the case.

BLANCHARD J:

You just want a different result?

TIPPING J:

Yes.

5 **MR PIKE:**

Yes. Well I don't necessarily – well I mean *Randal*, I wouldn't possibly seek to criticise the Privy Council's determination but here it comes down to a question of judgment and we have this word, the words in *Randal* which at least are helpful. I mean they don't focus narrowly on any point. There's no touchstone, but they do talk about a point where departure from good practice is so gross or so persistent or so prejudicial or irremediable that an Appellate Court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. So I saw my friend's case as really being in that category. That he has to bring it within that and instead his entire submission

–

TIPPING J:

No I don't think he seeks to bring it within that necessarily except as a fallback. He says in terms of *Matenga* this was a miscarriage, it was capable of affecting the jury and you can't say on all the evidence, bearing in mind the errors, that the jury would inevitably have convicted. That's his argument before he gets to a fallback position of unfair trial. You're just going straight to his fallback. You're not addressing his primary argument at all.

25

MR PIKE:

His primary argument is in his submission under –

TIPPING J:

30 Well no I'm interested in what –

MR PIKE:

– 33.

TIPPING J:

I'm going on what he, how he addressed us and that's how I understood Mr Shamy. But he only needed fair trial if we were of the view that the evidence was so strong he was inevitably guilty but he says it doesn't reach
5 that point anyway.

MR PIKE:

Well with respect he doesn't, he doesn't advance any reason as to why –

10 **TIPPING J:**

Yes he did.

MR PIKE:

– the Court of Appeal was wrong.

15 **TIPPING J:**

Well yes he did.

MR PIKE:

As to Dr Davis' evidence. Nowhere has he been able to point the Court to –
20

TIPPING J:

He did Mr Pike, he did. You may be taken, I wouldn't have thought, or you shouldn't be taken by surprise, but he did. He told us where in his submission Dr Davis' evidence was relevant and couldn't be said to be, just put it to one
25 side.

MR PIKE:

Well we only get the written submissions to begin with Sir.

30 **TIPPING J:**

Well yes but you've heard what he said Mr Pike.

MR PIKE:

That's right.

TIPPING J:

You've been around long enough.

5 **BLANCHARD J:**

The Judge himself said to the jury that Davis' was the most important expert evidence in the case.

MR PIKE:

10 Yes, he did. But he was wrong. Isn't that the point? Isn't that what the Court of Appeal has found with respect?

ELIAS CJ:

Well but it's not in. It's their opinion.

15

MR PIKE:

Indeed but Dr Davis' evidence exculpates a person who is otherwise to be seen as telling lies to doctors, only if he comes up with a medical reason for a person to actually believe that they cannot pick up 25 kilograms –

20

ELIAS CJ:

But it's the question of whether they were lies. That's really what his evidence is directed to.

25 **MR PIKE:**

With respect it can't be because that is essentially getting into oath helping on credibility. These are objective facts. Certainly if the issue was –

ELIAS CJ:

30 Nobody objected to his evidence.

MR PIKE:

No they didn't.

ELIAS CJ:

The Crown didn't object to his evidence.

MR PIKE:

5 No well normally you don't get much notice to do that and of course you don't know what he's going to say so I think you know the trial process is such that when the new Act comes into force there will be some considerable penetrating analysis to be done from the Bench if the Crown doesn't object because it will, from now on, get expert briefs but it doesn't or didn't.

10

But the point is, with respect, here is that there are two very clear issues and they're quite simple in the counsel's submissions. One is Dr Davis spoke of pain and the accused's perception of pain in DSM.IV in the characterisation of him suffering chronic pain syndrome. What the doctor was able to say was
15 that people who have this syndrome, and he pointed to the symptoms with 10 or so yellow flags I think he called them, he pointed to the syndrome, they all had to do with a perception of pain. People may get into a psychological state where their perceptual fear of pain is such that it affects their perception of pain so when they report their perception of pain, which is totally subjective for
20 all of us, they report their perception. They can say that they are in acute pain in circumstances where one would find no real physical reason for that but there is a psychological reason for it and if that is established then you can never say that the person is dishonestly reporting their perception of pain because they're in a situation where they don't have the mental capacity to
25 make choices or to be accurate.

But with respect the doctor said nothing, and my friend was asked this question, he didn't answer it, or couldn't find anything to suggest that there was anything in DSM.IV which indicated that you were, if you were suffering
30 from chronic pain syndrome you couldn't, for a psychological reason, come around and say that, well I'm able to lift 25 kilogram bags of potting mix and I can pull a caravan and I can paint roofs and I can mow lawns, I can do lots of things. All of those are objective facts. Now was his reality so distorted by

chronic pain that he honestly believed he wasn't doing any of those things and the answer is no, he wasn't, well at least there's no evidence of it.

TIPPING J:

- 5 Well assuming you're right in all this, what about motive to lie? That can't be cast aside on the fact that the evidence was unreliable.

MR PIKE:

No as I said it was -

10

TIPPING J:

Or didn't prove anything relevant.

MR PIKE:

- 15 It was – the difficulty is it was a response to a character attack. The appellant had called the, had said that the –

TIPPING J:

- 20 So that's why it was justified, it was a response to a character attack on the witnesses for the prosecution. Is that the submission?

MR PIKE:

- 25 Yes. There's – the way the Court of Appeal saw it it's still a – the way it was done was clumsy and could lead to difficulties but we say that the equally not particularly elegant addition straight after that of the Crown prosecutor realising of course that he was stumbling into an area where there were warning flags, was he – he was obviously alive the fact that oh this could reduce, could actually be seen as reversing the onus. I better, you know, pull up pretty quickly.

30

TIPPING J:

But not only do we have the clumsy Crown prosecutor, we have the Judge appearing, in his generic direction on paragraph 152, to be endorsing it. It was not the sort of direction that you would expect from a trial Judge on a

motive to lie where there's a focus on a particular reason founded in evidence for that motive. It is a blanket, out of the benchbook, generic direction which in my – my concern is that it was wholly inappropriate, particularly in the light of the Crown prosecutor's address using that very same language. 152.

5

MR PIKE:

Yes indeed it really speaks generically there and of course goes, they're talking in a way that could sweep across all of the witnesses before –

10 **TIPPING J:**

Exactly.

MR PIKE:

– the trial then he comes back and he then mentions that, at 159 that he tells
15 the jury, "I've discussed the issue of credibility in the context in Mr Stewart's evidence because Mr Murray said yesterday there are special rules." Then he comes to that in 204. The fourth matter relating to the evidence I must direct you relates to Mr Stewart.

20 **TIPPING J:**

The, tripartite did he?

MR PIKE:

He gives, essentially he gives –

25

TIPPING J:

204?

MR PIKE:

30 And then he makes it very clear at 210, "If you're not prepared to reject Mr Stewart's assertion he acted honestly, the Crown will not have proved that case against him." Then he goes on to say that you mustn't bring guilty verdicts because i.e. there's still an onus of proof even if you do go against Mr Stewart's evidence is untruthful, you must go back to the Crown case.

BLANCHARD J:

The difficulty is though Mr Pike that at paragraph 206 in introducing what he's going to say he refers to what Mr Murray said yesterday with obvious
 5 approval. Now I know he's not repeating the part of what Mr Murray said that is being so criticised, but it is highly likely, it seems to me, that the motive to lie point that was being made by Mr Murray the day before, will still be hanging around in the jury's mind and he hasn't stamped on that.

10 **MR PIKE:**

No he hasn't. I accept those points. There's nothing can be said so this comes back to the, as to the perception of the Court of Appeal well did it matter –

15 **TIPPING J:**

Well isn't that capable, that is capable surely of misleading the jury?

MR PIKE:

It's capable of it yes.

20

TIPPING J:

Therefore it crosses that threshold in *Matenga* so the ultimate question then is whether we can nevertheless be satisfied that the verdict was inevitable and Mr Shamy says no we can't and you haven't said anything yet on that.

25

MR PIKE:

Well one would submit that with Dr Davis' evidence going to one side, one has to predicate that the jury without that extra additional help –

30 **TIPPING J:**

Is that because it's inadmissible do you say or irrelevant?

MR PIKE:

Yes, yes. But without that you have to go the point of saying that the jury would have, could well have rejected all of the testimony of the doctors who said they were misled and of all of the neighbours who said that the appellant was engaged in a great deal of physical activity.

5

WILSON J:

It doesn't follow from that that the appellant is acting dishonestly surely?

MR PIKE:

10 Well it does with respect if there's no explanation from him. Why did he tell the doctors or under-report, hopelessly under-report his physical abilities? For what possible reason could he do that in reality other than to sustain his entitlement to a benefit? The pain is to one side, we accept that, we accept Dr Davis, if the pain was relevant, Dr Davis would provide an explanation that
15 goes to honesty, no question. But the difficulty is the transcript is now barren of any evidence that suggests why the under-reporting over such a protracted period of time as to his physical abilities which was clearly untrue, why you would do that, except to get a benefit. It's not explained by the mental condition so what is it? I mean in real life, with respect, you could say in a
20 reasonably robust way it was exactly as he was accused of doing, was maintaining a benefit to which he was not entitled and to which he knew he was not entitled. So that's what I would say on the proviso point on the lies and I can't say anything more.

25 **TIPPING J:**

So in effect this case comes down, I think Mr Pike, to whether the Crown can show that the verdict was inevitable?

MR PIKE:

30 Yes –

TIPPING J:

If you can't show that the fair trial considerations are irrelevant. If you can show that then we have to go onto the fair trial issue.

MR PIKE:

That's right. Yes. Indeed and we've made our point of view.

5 **TIPPING J:**

I'm just trying to get some structural thing in my head over this.

MR PIKE:

Yes that is – thank you. That is the structural point I would like to leave it on.

10 I'm not sure I can actually say very much more.

ELIAS CJ:

Thank you. Mr Pike, perhaps you can help us. What's the position with the appellant?

15

MR PIKE:

Sorry I just made a mistake when I addressed you and my colleague's just pointed it out. There was a hearing on the admissibility of the evidence, it was a short notice hearing, I'd forgotten that I'm sorry. It's actually in the materials.

20

ELIAS CJ:

Yes there was a ruling.

MR PIKE:

25 There's a ruling, I'm sorry, I've just completely overlooked it.

ELIAS CJ:

And that was on Dr Davis' evidence was it?

30 **MR PIKE:**

Yes, yes and I completely overlooked it.

ELIAS CJ:

What page is it?

MR PIKE:

41 and 42 of volume 1. It was during the trial, a ruling of 12 March. Just the beginning of the –

5

TIPPING J:

It's in volume 1 is it?

MR PIKE:

10 Case on appeal, volume 1, the slim volume and it's at page 41.

TIPPING J:

Thank you.

15 **MR PIKE:**

And the date of the ruling there is, there's a ruling of 12 March, obviously when the defence opened.

ELIAS CJ:

20 Do we have, did he go onto make a ruling because this is sort of deferment until after.

MR PIKE:

No it doesn't look like he has done anything further than that. There's no
25 other note.

ELIAS CJ:

And it's really, it may well have been overtaken by the delivery of the brief.

30 **MR PIKE:**

Mr Shamy says there was, the Crown and the defence had an agreed brief ultimately.

ELIAS CJ:

Yes.

MR PIKE:

5 So it wasn't necessary.

ELIAS CJ:

All right. So it wasn't objected to in the end.

10 **MR PIKE:**

No.

ELIAS CJ:

This objection was if he had seen the brief. Yes, can you just help us?

15 What's the position with the appellant? Is he serving the sentence?

MR PIKE:

No.

20 **ELIAS CJ:**

Was he bailed?

MR PIKE:

He's been reduced, yes, reduced sentence on appeal and since released.

25

BLANCHARD J:

He's actually served his sentence?

MR PIKE:

30 Yes.

TIPPING J:

It came down to two years I think from three.

MR SHAMY:

Yes sir it was reduced on appeal earlier this year after the granting of leave in this Court.

5 **TIPPING J:**

And he had been in custody for long enough if you like –

MR SHAMY:

He had been on time served so because it came down to two years it came
 10 back to a point wherein the Judge on sentencing had effectively said, well look
 you received all this money you shouldn't have got, \$200,000, and their point
 on appeal was well there wasn't a finding by the jury that he'd received that
 entitlement due to *Hayes* isn't an issue, and as I've said the ACC review
 authority instituted his ACC again so the Court of Appeal agreed that because
 15 he hadn't been shown to have actually received all that money that he
 shouldn't have got then three years was a bit much and it went back down to
 time served.

TIPPING J:

20 Right.

ELIAS CJ:

When was the time served because he was on bail until the Court of Appeal,
 oh had he already served some before the Court of Appeal hearing?

25

MR SHAMY:

Yes he was imprisoned at various stages from sentencing whenever the trial
 was, I think now two years ago, then he was granted bail by the Court of
 Appeal for a few months prior to the conviction appeal. Then on that
 30 conviction appeal not being allowed he then went back into custody then
 leave was granted by this Court and eventually bail was granted and the
 appeal was successful. I think he'd served nine months so that the sentence
 came back to an 18 month sentence and so he was released on the basis of
 time served.

ELIAS CJ:

Yes thank you. Can I just ask Mr Pike, if the appeal is allowed, presumably the Crown's not seeking an order for retrial?

5 **MR PIKE:**

No.

ELIAS CJ:

No, thank you. Yes, did you want to be heard in reply Mr Shamy?

10

MR SHAMY:

Just three very brief matters. The first is a matter that was discussed between myself and the Bench when I first spoke and just to clarify. There was the issue about fitness to work and I thought that for completeness sake I'd just
15 refer the Court to it. At section 103 of the Injury Prevention Rehabilitation Compensation Act 2001, which was in force from April 2002, so relates to counts 52 on. However, the wording was the same in all of the previous legislation and effectively it says, "The question that the corporation must determine is whether the claimant is unable, because of his or her personal
20 injury, to engage in employment in which he or she was employed when he or she suffered the personal injury." So just to clarify that for the sake of completeness.

The only other two points very brief. I certainly was of the understanding that I
25 had put fair and square that the appellant didn't accept the Court of Appeal finding that Dr Davis' evidence was irrelevant. I put that in the application for leave and also in paragraph 35 of my submissions wherein it was said, the conclusion of the Court of Appeal that the evidence of Dr Davis did not provide the appellant with a defence, was, with respect, incorrect. The
30 evidence of Dr Davis did provide the appellant with a defence, based upon the central plank of his defence at trial, namely the element of dishonesty. Dr Davis' evidence was relevant to an assessment of the accused's perceptions of his own limitations. The doctor's evidence cannot be

discounted as being neutral. So I had hoped I'd put that issue fair and square.

5 The final matter, there was discussion about how Dr Davis' evidence came to be before the Court and it was perhaps intimated that the Crown had been taken by surprise? However, I've referred to it in my submissions but also at page 469 of the casebook is the evidence of Dr Alchin who's the Crown expert and he says, I see I just said, question, "Now you've been provided with a copy of the report for Dr Davis' psychiatrist?" "Yes I saw that this morning."

10 So the Crown had had a chance to read his report.

TIPPING J:

And no doubt Alchin was cross-examined on the report?

15 **MR SHAMY:**

I haven't read that but he was obviously provided with it and then the brief was agreed –

TIPPING J:

20 Well he was because he made various comments about it and how it looked fair enough to him –

MR SHAMY:

Yes.

25

TIPPING J:

But he disagreed in certain respects and so on, so he was clearly given an opportunity to address it.

30 **MR SHAMY:**

So obviously there was the argument in respect of admissibility then the Crown and the defence agreed on the form of Dr Davis' brief. In terms of that I can't take matters any further unless the Court has any particular enquiries it wishes to make of me?

ELIAS CJ:

No, thank you Mr Shamy. Very well, thank you counsel for your assistance.

We will reserve our decision in this matter.

5

COURT ADJOURNS: 12.21 PM