

DAVID CULLEN BAIN

Appellant

5

v

THE QUEEN

Respondent

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Hearing: 2 March 2009

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

Appearances: H A Cull QC with P A Morten for the Appellant
K Raftery with C L Mander for the Respondent

CRIMINAL APPEAL

15

MS CULL QC:

May it please Your Honours, I appear with Mr Morten.

20

ELIAS CJ:

Thank you Ms Cull.

MR RAFTERY:

And I appear with Mr Mander.

ELIAS CJ:

5 Thank you Mr Raftery. Now, again, we make an order for exclusion of all except members of the press and those associated with the Court and I ask members of the press who are in the Court to identify themselves please, what organisations they come from.

10 **MEDIA REPRESENTATIVE:**

Anne-Marie May from Radio New Zealand.

ELIAS CJ:

Thank you.

15

MEDIA REPRESENTATIVE:

Simon Bradwell from TVNZ.

ELIAS CJ:

20 Thank you.

MEDIA REPRESENTATIVE:

Amy Vaughan, Newstalk ZB.

25 **ELIAS CJ:**

Thank you.

MEDIA REPRESENTATIVE:

Dave Williams, New Zealand Press Association.

30

ELIAS CJ:

Thank you. All right, there's an order prohibiting publication of the proceedings until further order of the Court. Mr Robertson, you may be here.

Thank you. The order for prohibiting publication applies to law reports as well at this stage, as our judgment will probably indicate. Yes, Ms Cull.

MS CULL QC:

- 5 Your Honours would have received the appellant's submissions which enlarge the submissions that were delivered last Monday on the leave hearing and if I may take Your Honours to those submissions and I wish to deal with matters within them as I go through those submissions. In addition –

10 **ELIAS CJ:**

Ms Cull, I should indicate that I have only skimmed them, other members of the Court may have had the opportunity to read them with more attention but I've only seen them this morning.

15 **MS CULL QC:**

Yes I appreciate that ma'am and I apologise to the Court for that but the pressure of time has been –

ELIAS CJ:

- 20 No, that's fine but don't assume too great a familiarity with them.

MS CULL QC:

- In addition to the submissions, there is also a casebook which the appellants have made available of, really, the cases that contain principles and
 25 illustrations of how the principles have been applied and, in addition, the Court should also have from last week, what is called the appellant's bundle of documents. This was a reconfiguration of the case on appeal from the Court of Appeal as it spanned several volumes, that is the first bundle and then there is a second bundle of documents that were supplied to the Court
 30 on Friday where we have supplied the Court with the working papers of the experts in preparing their transcripts and reports.

ELIAS CJ:

I'm not sure that I've seen those. Volume 2?

MS CULL QC:

There's a volume 2 in the first bundle, was not called volume 1, it was provided for the leave hearing last Monday.

5

ELIAS CJ:

Yes and the – is there a third volume?

MS CULL QC:

10 No, no, just those two.

ELIAS CJ:

Just those two, thank you.

15 **MS CULL QC:**

Just drawing to the Court's attention that the references in the submissions refer to bundle of documents 1 and 2. I just note on the front page of the first bundle of documents, it's not numbered – it's not named as volume 1 but that's what we're referring to it as.

20

McGRATH J:

It's called the appellant's casebook?

MS CULL QC:

25 No Sir, it's the appellant's bundle of documents. That's volume 1 and then the volume 2 was supplied on Friday. If I can take the Court then to the first part of the submission and the approved grounds of appeal pursuant to the leave judgment are whether the Court of Appeal has appropriately addressed the question of whether the disputed sounds represent speech and secondly,
30 whether the procedure suggested by the Court of Appeal in relation to this question is appropriate and in particular, the Court is referred to the matters dealt with in paragraphs 250 to 260 of the Court of Appeal's judgment.

Just by way of overview, the appellant's position in relation to the first ground is this, the disputed sounds do not have a tendency to prove anything and are therefore irrelevant under section 7 of the Evidence Act. The disputed sounds, therefore, are not evidence. Secondly, the sounds, if admitted, have an unfairly prejudicial effect under section 8 and cannot be cured by a judicial direction. Thirdly, the tendency to prove anything, which is the gateway analysis required under section 7(3) of the Evidence Act, depends on the sounds being words. The words, if construed in the way the Crown contends, are of a confessional nature. It is submitted they must be assessed at a proof beyond reasonable doubt threshold when admission of them may itself have a conclusive effect with respect to guilt. The fourth point is that the recording, and I refer here to the recording as opposed to the tape cassette, is unreliable and there are three grounds advanced under that head. Five, the opinion evidence of the experts cannot be substantially helpful to the jury because it not only primes the jury but invites speculation and guesswork.

The leave questions –

ELIAS CJ:

Sorry, can I just ask you, the recording is unreliable as opposed to the tape cassette, does that mean that the reliability of the tape cassette is accepted?

MS CULL QC:

Well Your Honour has – the Court has directed that we are not dealing with the authenticity or chain of proof, what this submission directs is that the trial Judge –

ELIAS CJ:

I see, you're just not dealing with that?

MS CULL QC:

I'm not dealing with that.

ELIAS CJ:

No, I see. Yes, thank you.

MS CULL QC:

5 But there are still questions raised about whether that tape is actually the original tape. Putting that to one side, the question still before the Court is whether the recording is the original recording and the unreliability head deals with three aspects about that.

10 The leave questions focus on an analysis of whether the disputed sounds are words and the appropriate mechanism for dealing with them. In my submission, this raises the central issues of admissibility on grounds of relevance, prejudice, reliability and pre-trial confessional statements. When I say pre-trial, it's confessional statements to be dealt with pre-trial.

15

Turning to the evidence, and really following on from the hearing last Monday, to assist the Court, these submissions have set out the relevant parts of the experts' evidence for ease. All the references are given and if the Court requires, I can take you to those in the volumes. Just at paragraph 1.4, the over-riding importance is that the Court accepted the expert evidence that, primed, the jury will hear what they expect to hear. The evidence is however, one, that the experts cannot discount the possibility of sounds being words and two, no one agrees on the content of those sounds. Everyone agrees that once told, the jury will then hear the words.

25

So I wish to focus on four Crown propositions and I say Crown because Professor French and Harrison are the Crown experts. It is important to remember that Professor French was told the words. He is the only expert that was told them at the outset of asking to provide an opinion. It is moot as to whether Dr Harrison, working alongside him, was actually primed before he heard the tape. That position, in my respectful submission, is unclear because in his working papers he does not prescribe those words to his transcript.

30

So, if I can come to the first proposition of the Crown experts and it is put this way, that they cannot discount the possibility that the disputed sounds are words. Taking you to paragraph 1.6, at its highest, the Crown experts say, it remains entirely possible the passage is not speech but they cannot discount the possibility that it is speech. The report, which is found at the first part of the first volume at page 8, has the reasoning in relation to this part of its conclusion. That's page 8 of volume 1 if Your Honours wish to refer to that but we have set it out, "Rather the material could be no more than an audible out breath that has in the distress of the moment been modified by a random and unfortunately sequenced series of movements of the tongue and lips so as to create a series of sounds that could, albeit with a little effort, be heard as the disputed words."

In the summary section of the report the report records and that's at page 9 of the first volume, "We cannot discount the questioned sounds being the disputed words. However, they could equally be simply an out of breath exhalation that happens to resemble those words but which in fact is empty of linguistic content or meaning. We would consider it unsafe to place the interpretation of the disputed words before a jury."

At paragraph 1.8, it is in my submission clear, that when Professor French uses the words "equally" he is not expressing himself in mathematical terms. Cross-examined at the voir dire he said, "But does it surprise you though that no one would include those words in the transcript they prepared?" "Well it depends what you mean by the transcript. I wouldn't have included them in the transcript either. That doesn't mean that I wouldn't or couldn't entertain them as a possibility and I would be very surprised if other experts wouldn't entertain them as a possibility."

And Dr Harrison expressed it at the voir dire, as you see at paragraph 1.9, "I have considered whether that segment, that portion of the recording is speech and personally I'm not able to say a hundred percent either way whether it is speech or it isn't speech. It has certain qualities which could be described as not sounding like speech, like when there are similar sounds

within a recording which are more speech like.” When he was asked in cross-examination whether he had changed his opinion in any way about the passage in the report Dr Harrison replied, “No, I would stand by what’s in the report.”

5

Just to clarify, Dr Harrison and Professor French work together. Dr Harrison was the expert that was looking at the tape for any alterations or deletions within the physical tape to see whether parts had been cut or spliced and he said he couldn’t find any.

10

ELIAS CJ:

I didn’t look to see where they qualify their – where they set out their qualifications and their area of expertise. Can you give me the reference to that?

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MS CULL QC:

Certainly. At page 11 of volume 1 there is a summary of Professor French’s curriculum vitae. That goes through to page 17 then at page 18 is the curriculum vitae for Dr Harrison.

20

ELIAS CJ:

But is there anywhere where they address – I’m just conscious that the experts have said, it’s not really a matter for expert assessment, these questions. I might be para-phrasing that wrongly but there are some indications to that effect in the evidence, are there not?

25

MS CULL QC:

The warning that the experts are giving is that the interpretation that they place on those sounds should not be placed before the jury because they are of such low quality, low uncertainty, and that transcript would not include the words for which the Crown contends, and indeed there is a low level of certainty for the other experts about what they are actually hearing in those sounds.

30

ELIAS CJ:

No my recollection was, and it may be astray, that at least some of the experts have said the sort of assessments they were carrying out is not really a matter of expertise. So that's why I'm interested in knowing how they qualify themselves to give evidence, both as to whether this is speech and also as to the disputed words.

MS CULL QC:

Perhaps if I could deal with Your Honour's concern this way. I wonder if at page 8 of volume 1 the qualification that Professor French, to which I think Your Honour is alluding, is just above the first bullet point. Halfway through that paragraph where he says "In respect to the questionable material, there is unfortunately no way of reading backwards from the sounds themselves to the psychological processes that give rise to their production."

ELIAS CJ:

No I'm not thinking of that. I think I'm thinking of something, I'll find it and put it to you but it may be that it was mentioned in the Court of Appeal judgment.

MS CULL QC:

The Court of Appeal did mention that the narrow focus of the experts was focused on the sounds and if I can just find that passage.

ELIAS CJ:

It's at paragraph 254.

MR RAFTERY:

Your Honours, it's page 31 of the bundle.

ELIAS CJ:

Thank you.

MR RAFTERY:

The bottom part of page 31.

ELIAS CJ:

Yes. “We are not actually –“

5 **MS CULL QC:**

“We are not actually trained to evaluate intensely”, and it is what this comes down to. But that –

ELIAS CJ:

10 “I wouldn’t agree that we are highly trained to determine breathing or whether it is speech.”

MS CULL QC:

That was an answer to the question, “You are highly trained to evaluate this”
 15 and, in my submission, that goes back to that part of the report to which I have just referred where he is saying, “I don’t think any speech orator can leap backwards from the former – the things that they hear to what the intention is behind this” and that flows on from the passage in the report at page 8. “We can’t read backwards from the sounds themselves to the psychological
 20 processes.”

ELIAS CJ:

You mean whether it was intentional speech?

25 **MS CULL QC:**

Yes.

ELIAS CJ:

But – or whether it was intentional breathing or intentional word forming, yes.
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MS CULL QC:

They can’t decipher from sounds whether that was the intention or not, so the most they can say, it meets the threshold of a possibility that –

ELIAS CJ:

How do they – is there anything else apart from their CVs that qualifies them to give their opinion on these two questions, whether it's more likely than not to be speech or – and what's said? Is there anything more than the CVs?

5 There may not be, Ms Cull, but I'd just like to be taken to it if there is anything more.

MS CULL QC:

10 Well, the Crown beat the defence to this expert, they are the leading experts in forensic speech science at its height.

ELIAS CJ:

What is forensic speech science? Perhaps that's what I'm asking you. Is there anything that says what it is?

15

MS CULL QC:

Unfortunately not in the materials ma'am, it's – it does involve a range of things which both Mr Harrison and Professor French cover, so it deals with, if I can just take you through the – so it includes the authenticity examinations referred to at 8 to 9, it involves listening to excerpts from the tapes and looping them so that they get high quality, they are called in forensic cases in Britain, and in fact in the High Court judgment, Justice Panckhurst refers to one of the decisions in which Professor French gave evidence, they are frequently called to deal with sounds on recordings, sounds on tapes. Now, 25 that's coming from the bar ma'am.

ELIAS CJ:

No, that's helpful, thank you.

30 **MS CULL QC:**

The only other place where such a high level of analysis is done is at the FBI and there are journal articles about the type of analysis that the FBI undertake in dealing with tape recording and sounds, and those analyses are summarised, as I say, at page 9 of the bundle of documents in volume 1.

Yes, the thumbnail sketch to which Mr Raftery is referring me, is at page 11, Peter French is described as an independent forensic consultant specialising in the analysis of digital and magnetic recordings, speech and language samples, as Honorary Professor in the Department of Language and Linguistic Science at the University of York, where he undertakes and supervises research and teaches courses in forensic speech science.

Then, if one looks at the type of publications that he has done, for instance at page 12, second to the last entry at the bottom of that page, "Caller on the Line: An Illustrated Introduction to the Work of a Forensic Speech Scientist", Journal of the Medico-Legal Society, and forensic speaker comparison cases, and then I think you will also see references to a number of the cases which appear on page 14 and following of the cases in which he's been involved – sorry, 13 and following.

15

BLANCHARD J:

Would it be fair to say that they're experts in the analysis of speech but not necessarily in the analysis of whether something is speech?

20 **MS CULL QC:**

I wouldn't go as far as that. The mark that they're – the distinction they're drawing is, "We can distinguish between vocalised sound, which has voice content, we can analyse words where we say they are words, we can hear them, we've done that test. What we can't say is whether there was an intention on the part of the person to speak or not speak." That is the –

25

ELIAS CJ:

That's why he refers to the psychological prompts?

30 **MS CULL QC:**

Yes.

GAULT J:

But he went further than that at page 31, didn't he? About line 33, "I wouldn't agree that we're highly trained to determine breathing or whether it is speech."

5 **MS CULL QC:**

Yes, I see that reference there. I see that reference there Your Honour, it's not in his report but I accept that that's what he said in the voir dire, but in this context, what Professor French is doing throughout the voir dire and in his report is saying, "This has a possibility which we can't discount as being
10 words, but equally it could be breathing", and he's not prepared to say whether it is speech or whether it is breathing.

ELIAS CJ:

Is the implication though, of what he says, is the implication that whether it is
15 speech depends on whether it is deliberately formed as speech?

MS CULL QC:

That's what it appears to be.

20 **ELIAS CJ:**

Yes. So, for an audiologist, there's only speech, there's only sound and as to whether it's speech or other sound, that depends on the intention of the person making the noise?

25 **MS CULL QC:**

Well, ma'am in light of the reports and the way in which the, all the experts have approached this, they are trained to analyse sounds and whether they form words, which is why the transcripts contain brackets for low level of certainty, so they are saying, "If we hear a word which we think has a high
30 level of certainty in terms of the acoustic forensic speech analysis, then we will say that is the word", but where there is low certainty and obvious doubt, then either it's left out, as Professor French is recommending it should not be put in the transcript because there is such a low level of certainty, but in my respectful submission, I'm not sure that it would go as far as Your Honour has

put that proposition to me, because their analysis shows that they do give words that they are hearing a level of complete certainty, low level, or otherwise.

- 5 What is being questioned here is whether those exhalations of breath were intended to be speech and the experts have stood back saying, "Well, we can't say that, we can't give evidence about the intention", and with respect to Justice Gault's question to me, I think that has to be that last part of that answer has to be seen in the context of what Professor French is saying.

10

Just moving on with the submission, I just want to draw your attention to the other experts Dr Innes said she saw no evidence that the disputed passage contained words. Now, she is a phoneticist and she too examined this transcript, and the references we have given you to her evidence as well, she
15 could not hear the words and she could not put in the transcript anything that approached words, either, apart from a low level of possibility as to what it could be, but again, no confidence in what was being said within those words.

ELIAS CJ:

- 20 What evidence is a phoneticist giving here? Whether the sounds are recognisably words, is that – I'm just, how did she qualify herself here?

MS CULL QC:

- Her qualifications ma'am, are contained at page 78 or 79 is the beginning of it.
25 And she is a linguistics expert. She comments on research on intonation, small study on language tests, lectured and tutorialing in linguistics including socio-linguistics and conversation analysis as well as working in plain language, training forensic linguistics as well. Now that sets out her qualifications and then she's looking at it in terms of what speech she can
30 ascribe to those sounds in the tape.

ELIAS CJ:

So she says she's endeavoured to represent orthographically all the sounds she heard?

MS CULL QC:

Yes. That's just at the bottom of page 80. So she is analysing it from the point of view of looking for words.

5

ELIAS CJ:

Yes.

MS CULL QC:

10 And set that out at the bottom of page 80. And at page 81 in the transcript, at 22 through to 26, those are the sounds that she is transcribing as they're being said, so those are the sounds that make up the disputed passage. And just while we're on that page there is a distinction there between the out breath that Your Honours were referred to and have been referred to in the 15 Crown's submissions about the audible out breath of phone numbers in the following passage where it is clear that those numbers can be heard on an audible out breath.

Now just while we're on Dr Innes, if I could take you to page 84 of the same 20 volume. This is the subsequent supplementary report after she's been told what the disputed words are contended for and she describes what she then could hear or not hear but at paragraph 3 of page 84, "In my opinion most people would not hear the words you've mentioned to me unless they were somehow expecting to hear them or had been told they were or might be 25 there."

GAULT J:

Ms Cull, she says at page 80 about a third of the way down, "I have not enhanced the recording in any way." Did other experts technically enhance 30 the recording?

MS CULL QC:

Not enhance it in the sense of doing something to the recording. What they do is apply a software to enhance the sounds on the recording, as I understand it. So it's not an enhancement of the actual recording.

5

GAULT J:

I'm sorry I don't follow the distinction.

MS CULL QC:

10 In order to hear the recording the others have used a software programme through which the recording is played and that produces the background noise but enhance has a scientific meaning as in doing something to –

ELIAS CJ:

15 Alter, is it?

MS CULL QC:

Alter or deal with the tape in some way. So I was wanting to make that distinction and didn't make it very clearly. What Dr Innes is saying is I have
20 not applied any –

GAULT J:

She's simply listened to it?

25 **MS CULL QC:**

She's listened to it.

GAULT J:

Thank you.

30

ELIAS CJ:

Ms Cull, just because I haven't seen the transcript such as it is before and because the Court of Appeal's placed a lot of emphasis on the contextual, on the disputed words making sense in context, it's hard to see from this

transcript, I don't know whether it's accurate that conclusion can fairly be drawn.

MS CULL QC:

- 5 No, Your Honour's referring to the last part of paragraph 253 of the Court's decision and this is where the Court of Appeal is saying, "None of the experts appears to have reflected on the likelihood of random movements of tongue and lips operating so as to produce sounds corresponding to a sentence which makes reasonable contextual sense which the disputed sounds do if
10 construed as the inculpatory sentence."

ELIAS CJ:

Yes, it's not as if there's a question what happened for example?

15 **MS CULL QC:**

- No, that's correct, and if I may draw the distinction between, if we just use Dr Innes' transcript as an example, it appears in the others as well, but at page 81 when you look at the out breath of the telephone numbers, that is contextual. You have somebody hyperventilating, distressed, starting to tell
20 the telephone numbers, runs out of breath and says the numbers on the out breath, which, in my respectful submission, is a contra-distinction to a context of that speech as opposed to the passage above it. So there is no context for this and really in the framing of the Crown case, as we understand it, has little or no bearing on how David Bain would be reacting at that time. And can I
25 just clarify that, you'll recall last Monday Mr Raftery told you that it is going to be part of the Crown contention that David Bain was feigning all of this. He was feigning, fainting or fitting whatever it may be, he was feigning distress because obviously the inference is he had planned it. This is entirely out of context, exhalation of breath meaning words, if that is really seriously the
30 Crown's contention. It has no context at all.

So I've set out a passage at the base of page 3 of the submissions at 1.12 and this is the reference to Dr Foulkes, who's the appellant's expert if you like. He has the equivalent training, indeed he trained under Professor French so

he too is a forensic speech expert, does the same work as Professor French. Often they are in the same cases on either side, and he is saying what we've set out in that passage at the bottom there, "It is clearly a very difficult section because of the particular circumstances in which Mr Bain is talking. He is

5 clearly in severe difficulty with speech in general which is reflected in the fact he's speaking on breath and whisper throughout the recording in different sections. As experts we're having difficulty in resolving that because the acoustic evidence that we have is very difficult to resolve the speech and if it is speech it is impossible to decide what precisely the words are and the

10 sounds are." And then it was put to him that Professor French says he cannot resolve whether they're speech or whether they're audible sounds and he is in agreement with that.

So moving to the second proposition and what I've done here is just really

15 grouped the key things that the experts are saying. Second proposition is that there is no way of resolving the issue of whether Mr Bain did in fact whisper the words suggested and of course with that the appellant's experts agree. I've set out paragraph 1.14, Professor French agreed in a voir dire that a jury listening to the tape would not know whether the disputed sounds were words

20 or whether they were just audible breathing. He further accepted Dr Foulkes' view that it was impossible for an expert or a layman to resolve whether the disputed sounds constituted audible breathing or whether they were actual words. And just going down to the 1.17 in the supplementary report prepared, after he'd been told what the police thought the disputed words were,

25 Dr Foulkes agreed with the French and associates report that there was no way to resolve the issue of whether the questions section in fact constituted speech at all.

So I move then to the third proposition. The third proposition is if the disputed

30 sounds are words then the words are the disputed words. Even the Crown experts were not prepared to say that if the disputed sounds were actually words, the words were those. Professor French had not considered the possibility that if they were the words, the other words which possibly could be made out were possible. In order to comment on that, he said he would need

to go back and revisit the material. His assistant, Professor French's assistant Ms Cauley, who is trained to actually do the listening and was asked unprimed to write a transcript, could understand how others could hear those words might be there but she did not accept those were the words.

5

ELIAS CJ:

What's the reference to that?

MS CULL QC:

10 She didn't give evidence ma'am. We have her working report which appears in volume 2, at page 25 of volume 2. You'll see it's a handwritten memorandum from her. She's asked by Professor French to do blind, first draft of the transcript, i.e. no case info. "There are certain sections where there's speech whispered with heavy breath. I've transcribed possible
15 interruptions, however I would not include these in my transcript if I were producing a final version, as my level of confidence is not high enough. These are marked on draft one." The first draft of the transcript is at page 27.

ELIAS CJ:

20 This is her?

MS CULL QC:

This is her unprimed draft. You will see on page 28, the second line there, she has a question mark about, and I won't read out the words, but it's on the
25 second line at the top of page 28, those are some of the words that she made out that had such a low level of certainty she's put them in brackets. Then if you go back to 25, she then has the second part of her memorandum addressing having been told the words, the disputed words and that is the reference that we've put in our submissions, "Can hear how those words can
30 be heard" and then she makes her comment about that. She transcribed it as something different but had considered these could arise as feasible possibilities.

ELIAS CJ:

Where do we find where she said that she is the assistant who listens to a lot of these recordings, is there anything to give us that?

5 **MS CULL QC:**

It's in the notes of evidence ma'am, to which I think Professor French refers. Mr Raftery tells me helpfully it's at page 29. If we come down halfway through line 26 approximately, 27.

10 **ELIAS CJ:**

Sorry which volume?

MS CULL QC:

That's volume 1 ma'am, page 29 line 27. This is the question that was put to
 15 Professor French in cross-examination, "Indeed, one of your staff, is it Ms Cauley, do I have the name right, you have a staff member called Cauley?" So that was cross-examination on the basis of the working notes that we've made available to the Court in volume 2. So she wasn't actually called to give evidence by the Crown. This evidence, by the way, was taken
 20 by way of video conferencing to England, so the experts were in England, video conferenced and Professor French and Mr Harrison were together and Mr Foulkes was also in the same room. In fact, the video conference was taken from their lab, from their laboratory. Mr Morten quite helpfully pointed out, that page 27 of the volume 2, just going back to Ms Cauley's transcript, it
 25 just describes at the top of that page what the square bracket means, while we're dealing with these transcripts it may be helpful. At the top there, "Square brackets means speech in green brackets, means not leave in final transcript as level of confidence too low."

30 **ELIAS CJ:**

Is there anything that gives us any information about the experience of Ms Cauley? It's just that her blind transcript seems to be fairly important evidence for what you are putting forward here and clearly if she is somebody

who has listened to a lot of these sort of tapes, that would make it more compelling. So, there's nothing about her, is there?

MS CULL QC:

5 The defence expert Dr Foulkes, refers to Ms Cauley but there is no separate curriculum vitae that we've been given. What happened was, when Professor French, as you'll see he was requested to analyse the disputed words when he was first briefed and he then undertook that in the laboratory. So, Mr Harrison did the physical analysis of the cassette tape, Ms Cauley was
10 one of the people who were recording and what we have available to us is those working notes. At page 44 of volume 1, Dr Foulkes who at page 44, was asked, "Have you worked at all with Ms Cauley from Professor French's office?" He says, "I have worked with her in several capacities over several years now, yes." Then it's gone straight in to the evidence. I know that's no
15 very satisfactory in answer to Your Honour's question but both Dr Foulkes worked with, well was trained by Professor French and Ms Cauley clearly has worked with both of them for some years. That's as far as I can take it.

ELIAS CJ:

20 Yes.

MS CULL QC:

Just at the lower part of my submissions, at page 5, I have just been reminded. Mr Harrison has also referred to working with Ms Cauley, just to
25 give you all the references. That's volume 1, page 38, actually it's page 39, I beg your pardon. In the middle of page 38, sorry, I was seeing the reference on page 39. Page 38, "Ms Cauley did an attempted transcript blind, didn't she and then she did one after she'd been told the words to look out for, is that correct?" "That's my understanding, yes." He doesn't say that he's worked
30 with her but clearly she is part of the team that undertook the analysis. Those are all the references.

ELIAS CJ:

Yes, thank you.

MS CULL QC:

Mr Raftery has indicated to me that he can provide more detail about Ms Cauley.

5

ELIAS CJ:

Okay.

MS CULL QC:

10 In page 6, I have set out various matters that, really, I've dealt with the use of brackets indicates low certainty and if I could just take you to paragraph 133, which is a summary. In my submission, what is clear is that the Crown experts have such a low level of certainty about whether the disputed sounds are words and, if so, what words they are, that they would not include the
15 disputed words in any written transcript of the recording that they were asked to produce, both the appellant's experts agree.

I then come to the fourth proposition and that is the power of suggestion. The low level of confidence that the disputed sounds are words is such that it
20 would be dangerous to put before a jury an interpretation of the questioned material. All of the experts agree it would be dangerous to place before the jury an interpretation that the disputed passage contains the disputed words. There are two reasons for this. Firstly, there's a low level of confidence the passage in fact actually contains those words. The second reason is that
25 once the words are suggested a listener is likely or more likely to perceive the disputed sounds as words, and as those words, and there is a reference there to Dr Foulkes' supplementary report where he says, "Priming jurors to perceive the words would be unjustified and therefore potentially dangerous."

30 Now Professor French himself drew the analogy of prompting someone, you can see a picture in the clouds, enabling a spectator to discern the picture you think you can see. He was drawing the same analogy with the way in which clouds, merely vaporous water, form together but you can see clear pictures. Similarly it is illustrative of the dangers that fabricated sound files can be

made up from whispered utterances that have no linguistic content. I dealt with this last Monday but at paragraph 1.37 to 1.38 you'll recall that Professor French refers in his report to preparing a CD containing fabricated sound files which could easily be heard as whispered utterances. He did this to demonstrate the dangers of misinterpreting caller's audible exhalations as speech so the CD containing some sound files, the contents of which could easily be heard as whispered utterances were made. These have in fact been fabricated by editing together parts of out breaths from different areas of the call. Whilst they sound like speech they have in fact no linguistic content or meaning.

Now although the Court has taken in Dr Guillemin's affidavit de bene esse he has produced a CD demonstrating the dangers of misinterpreting the call as audible exhalations as speech and also indicating how tampering could occur without detection, that is by doing it digitally. He used Professor French's fabricated sound files to do this and I simply put in what I said on Monday that if the Court listens to the 111 recording at that – it is essential, in my respectful submission, that the Court also listens to Dr Guillemin's CD. The preferable course is that you don't listen to the 111 tape because this matter should be dealt with by way of principle. I mean no disrespect to the Court about that but the problem has been demonstrated I think by the Court of Appeal. You now know what you will hear. You know precisely where it will occur in the tape, which those of us who didn't know and have listened to it many times couldn't tell, once you know and once it's there, then you're going to hear it. And then we see the Court of Appeal say, well this is relatively obvious and in my submission that led to not analysing this matter in the analysis required of the Court. It is a dangerous use of out breaths and this is demonstrated by Dr Guillemin but I leave that matter there. I have described what happens and how he's done it and that's a matter for the Court.

I come then to just one other feature of the evidence and it's something to which the Crown refers and relies on, that in looking at the disputed passage, the Crown has referred to the other words spoken on an out of breath by David Bain and that is the reference to the telephone numbers. In my

submission those other words spoken on an out of breath do not assist in the interpretation of the disputed sounds.

Now this is where the analysis involved vocal fold vibration. Although
 5 David Bain produces speech elsewhere in the recording on an out breath
 without actual vocal fold vibration, so instead of saying "3-4-2", he is saying
(whispers) "3-4-2" but the words are discernible as you can see in the
 transcript of Dr Innes and others, a process in effect aligned with whispering.
 The experts agreed that that does not assist in interpreting whether the
 10 disputed sounds are words. Now Professor French referred to this and the
 reference there is again to the report in volume 1, page 7B and page 8, that
 an utterance where David Bain gave the last four digits of his telephone
 number showed he could speak on exhaled air. He said it still remained
 entirely possible the disputed sounds passage was not speech.

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ELIAS CJ:

I'd just like to turn that up because it is one of the three reasons the Court of Appeal gave.

20 **MS CULL QC:**

If we go to the first volume and we go to page 7, it's under the little
 sub-heading "Content". And this utterance which is referred to and I've shown
 you where that comes in the transcript by looking at Dr Innes' transcript as an
 example, Professor French was saying this utterance provides a clear
 25 indication that Mr Bain could and did during the course of the call speak on
 exhaled air without vocal fold vibration. When this was revisited in
 re-examination of Professor French, Professor French in referring to this
 passage said, "The passage with the telephone numbers was rather clearer
 than the other one and simply showed that David Bain was capable of
 30 speaking on a whispered out breath." If I could take you to that, that's page
 34, lines 27 to 33, so if we take the question which appears at line 21 that "If,
 for example, we didn't have the next three lines after the passage 2-5-2-7
 whispered on an out breath and if we didn't have the ambulance officer's
 question in the form of response and the ambulance officer's confirmation, just

leaving it with a whispered out on breath passage would the same sort of comment reservation you've expressed in respect of the question utterance also apply to that out of breath utterance?" A long question but the answer was, "There would be some reservation but in fact I think that speech is rather clearer than the other one. If so that would be the same degree."

So if I could just pause there and just ask you to go to paragraph 25 because – page 25 of that same volume. It's just an example of the levels of confidence about what's being heard. If you look at the transcript that's prepared in the French report you see position of question utterance in square brackets, which is the disputed passage, and then you see this exhaled breath number sequence. Now there is no question that (a) the person who listened and prepared this transcript couldn't hear those words. There is no indication that there's any uncertainty about those words and even though there's no vocal fold vibration it is plain that those words are being said.

BLANCHARD J:

Ms Cull, what's a vocal fold?

MS CULL QC:

It's when you hear your voice – well I'm not the expert but as I understand it, it's where the voice cuts in and gives you the depth to the voice apart from –

ELIAS CJ:

You're using your vocal cords?

MS CULL QC:

Yes, your vocal cord starts to vibrate and you hear the vibration so it gives, instead of (*whispers*) "3-4-2", I'm saying "3-4-2" so – but that's how I've understood it. But in the whispered out breath the experts are clear, and I can say from the bar I'm clear, that you can actually hear what he's saying even though it's whispered. So the vocal folds have not enhanced the speech if I can put it that way.

Yes so I've taken you to that transcript because that illustrates, in my respectful submission, the difference and it appears to be the difference to which Professor French refers at page 34. Then Dr Foulkes also agreed with this and his evidence appears over at page 47, line 10 to 26. This comes

5 back to Your Honour Chief Justice's question about the context because the context is what Dr Foulkes actually refers to specifically, line 10, this is after the – at page 47. So after this again, rather long question, he says, "In principle, yes, in that context. I would just say that in context, the other sections that when taken on their own are difficult to decide on, are actually

10 resolved by the context. So we have already had a discussion with Professor French about the telephone number, you listened to the telephone number as it is first spoken by Mr Bain. On its own, it is not necessarily the case that it's clearly speech, however, what follows in the conversation where the operator repeats the question and then Mr Bain again says the number, the context

15 alone gives us an indication that that section was indeed speech, even though on hearing it on its own, it's not necessarily easy to resolve. There is no such contextual information from the section we are particularly interested in", which I think highlights Your Honour's question to counsel earlier.

20 Dr Innes, in turn, distinguished the disputed sounds from the telephone number section. She said in her evidence, appears at page 88, lines 29 to 37, "The telephone section was clearly identifiable because of the clarity of the sounds, the continuum of the sounds, and the fact that there were clearly beginnings of words and ends of words in a clear sequence of numbers."

25 Now that is the, it takes it from the top really, from about lines 9 through to line 37, so that's, I've summarised it there, but that's the way in which her evidence unfolds. "There were no clear words with an indisputable meaning, there were just some sounds", was her ultimate conclusion.

30 Now, turning then to the first question, whether the Court of Appeal has appropriately addressed the question of whether the disputed sounds represent speech. In my submission, the issue which was not addressed in the Court of Appeal or the High Court is whether the disputed sounds firstly tend to prove anything, which is the test under section 7(3) and are therefore

relevant within the meaning of section 7(3) and constitute evidence at all. Relevance is a question of law and is a threshold requirement. The only role of probative value, although I notice the commentators are calling it probativeness as opposed to probative value, which is referred to in section 8, in the determination of relevance under section 7(3) is that the evidence has a tendency to prove anything that is of consequence. Now, in my submission, the Court did not address the first threshold question of whether the disputed sounds are breathing or words in a proper section 7 Evidence Act analysis. If the sounds constitute breath exhalations, the passage has no probative value and is irrelevant, and is not evidence.

GAULT J:

I wonder about that Ms Cull, would not, if the sounds constitute breath exhalations, are they not still relevant as going to the state of agitation of the caller?

MS CULL QC:

If they're – well if they are breath exhalations, they would need to prove something.

GAULT J:

Surely the state of agitation of the caller is a relevant material factor in this whole case?

MS CULL QC:

Well, with respect, because of the issue – let's start at the beginning. Normally, obviously, sounds would illustrate the way in which someone is behaving, I have to accept that. The tape, as it unfolds, is full of those exhalations, which Professor French has identified as his CD exhalation no value fabricated edits file, the point here is that in leaving in the disputed passage, in the context for which the Crown contends, then the passage has no probative value because of the sounds, are simply sounds, and they invite speculation.

GAULT J:

I understand that is your argument, but I was just questioning this second sentence in 1.51, because I'm not sure I would accept it.

5 **MS CULL QC:**

If there were no other ways in which the exhalations are going to be dealt –

GAULT J:

It's not a question of whether there are other ways, it is whether it's relevant.

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MS CULL QC:

Well in my submission Sir, in this context, it doesn't have a tendency to prove and, for the reasons that I will advance, in my submission, they can't be adduced as being relevant sounds.

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ELIAS CJ:

It's very difficult to say that they're not relevant. Your argument is rather that, though relevant, because of the spec – they're not relevant as, that they don't have probative value as an admission, on your argument, but they must be relevant because it's real evidence of the state that this man was in, but your further argument surely must simply be that, though relevant, they shouldn't be admitted, because that is to invite very dangerous speculation.

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MS CULL QC:

Yes, and normally, and that's what, I agree with that, normally you would say, exhalations of speech are part of the context of the call, there are numerous other examples of that, but in this context where we have such a disputed passage, and the jury is being asked, on the Court of Appeal's finding, the jury is being asked to do three things, the jury is asked to say "Are these sounds or are they words?", first step, second step, "If they're words, are they these words?", third step, "If they are these words, then is it a confession?" So to, I understand the point Your Honour is raising with me, but in the disputed passage, in my respectful submission, that needed to be analysed about whether it had a tendency to prove, and what was it proving. So if I take Your

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Honour's reasoning and say, well, normally exhalations of sound would be, have a tendency to prove that David Bain was in distress, then in my respectful submission, that needed to be analysed along with the other evidence which then raises the question about whether it gets through that gateway, in section 7(3). So I understand that you're saying "it's not evidence" is going too far, but for the purposes of this passage, in my submission, that analysis needed to have taken place, and didn't.

Perhaps if I could move on from there, the Court approached the issue of, I call it probative value, at this stage under section 7, it's tendency to prove, I've called that probative value, by stating that it was open to the jury to conclude the disputed sounds should be construed as speech because, one, the hypothesis that the sounds are words is open on the expert evidence and as they can be interpreted as words, they are unlikely to be randomly generated, and on the basis of this reason, the Court reached the view the evidence was plainly relevant. In my submission, that is a two-fold error in the Court's approach to the probative value of these sounds. Firstly, an open hypothesis is not an assessment of probative value, and secondly, the Court has applied wrong or circular reasoning. The sounds are words because the jury may regard it as implausible that the sounds are sounds, not words. The correct approach is whether the sounds are words, random generation of words has nothing to do with that, it's just a matter of what can be heard, so, in my submission, the Court entertained circular reasoning, if the sounds are words, then they must be words. And if I can just pause there, as a demonstration from Professor French's own report, if I look up in the clouds and the random assimilation of water vapour shows me Barack Obama, do I say, "There's Barack Obama"? In the same way, the sound exhalations are sounds, or words and then one has to look at what is the tendency for that to prove.

It is submitted the principles are under 1.54, the evidence is relevant and admissible if it increases or diminishes the probability of the existence of a fact in issue, or of a fact behind a fact in issue. Now that's the statement from *Kilborne*, admittedly it was in 1973 but it's the text which everyone goes back to, or the case they go back to. Secondly, such evidence is probative, or

under section 7(3), having a tendency to prove and is therefore relevant, irrelevant evidence is inadmissible.

If I could just refer you to the High Court of Australia's decision in *Smith and The Queen* where those axioms are dealt with. That's at tab 1 of the appellant's bundle. This case, as Your Honours may be aware, was a case where the accused was caught on a security photograph and the question was, was that photograph the accused. Four police officers gave evidence as to their dealings with the accused in the past and whether they thought he was the same person. The High Court of Australia said that was inadmissible evidence, it's irrelevant what those four police officers thought, it was open to the jury to look at the security photograph and decide. Important distinction before we get to paragraph 6 is, at least there was a security photograph about which there was no question.

Here, we don't even get to that base, we have sounds and whether there is any probative evidence in those sounds. If I could take you to paragraph 6 and this is really, if you like, the principal statement. As is always the case with any issue about the reception of evidence, identification evidence being no exception, the first question is whether the evidence is relevant. No attention was given to this question and the arguments advanced at trial are on appeal but that question must always be asked and answered. Further, although questions of relevance may raise nice questions of judgement, no discretion falls to be exercised. Evidence is relevant or it is not. If the evidence is not relevant, no further question arises about its admissibility. Irrelevant evidence may not be received. Only if the evidence is relevant do questions about its admissibility arise. The Judges then refer to Thayer and the adoption by Wigmore, "None but facts having rational probative are admissible" and "All facts having rational probative value are admissible unless a specific rule forbids."

It should be noted and it's referred to in paragraph 7, that part 3.1 of the Act in section 55, relates to the New South Wales threshold and that is whether evidence, if it were accepted, could rationally affect, directly or indirectly, the

assessment by the tribunal of fact of the probability of the existence of a fact in issue in the proceeding. Now, as I have said, the majority held that the four police officers identification was irrelevant and in my submission, the New South Wales legislation has a lower threshold, the assessment of the probability of a fact in issue in the New Zealand section 7(3), tendency to prove. Here, in my submission, the evidence does not reach either threshold, it is only a discounted possibility that the sounds can be words.

BLANCHARD J:

10 Why was the identification by the police officers irrelevant?

MS CULL QC:

Because the jury could draw that conclusion themselves. They've got the accused in front of them, they have –

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BLANCHARD J:

So it was unnecessary to have the opinion of the police officers because they were in not better position than anyone else. It's rather a different case, isn't it?

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MS CULL QC:

It is a different case but I've come back to the decision on the principled approach to relevant and I have said that the difference in this case of course is that we don't have a security photograph, we don't have something where one can say, that is the evidence then can you draw proper conclusions from that evidence or inferences.

Just looking at other ways in which the Courts have dealt with irrelevant evidence. In *The Queen and Holtz* which is Your Honour Justice Gault's decision at tab 2 of the bundle, this was on allegedly similar fact evidence. It was argued that the similar fact evidence was irrelevant on the grounds it was not the accused whose previous acts were admitted as evidence. The Court approved the trial Judge's direction that required the accused to be linked to the offences committed on other occasions so that you can logically conclude

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that the same person must be responsible for committing all of them. In delivering the judgment and this is at paragraph 47 in particular, on page 9 of the copy of the case, "Where the evidence is truly probative and cogent, admission is appropriate so long as the circumstances are such that while
5 allowing the probative value of the evidence to be availed of, the risk of improper use can be avoided by appropriate directions to the jury."

BLANCHARD J:

That looks like a section 8 analysis rather than a section 7 analysis?

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MS CULL QC:

Yes, although it's really, while we're in the case, it's really the logical conclusion that you draw, that the person is linked which is the first step in submission, then the second part is, as Your Honour rightly points out, that
15 the probative value to be availed of must avoid improper use but there must be some analysis of the probativeness, or the probative value of the evidence even under the relevant head.

ELIAS CJ:

20 Sorry, I missed the paragraph reference in the case?

MS CULL QC:

Paragraph 47 ma'am.

25 **ELIAS CJ:**

Thank you.

MS CULL QC:

Page 9. In my submission, it's the second half of that paragraph, it starts "But
30 where the evidence..."

ELIAS CJ:

How does the legislation – because it occurs to me that at the moment you are probably right that the similar fact threshold is comparable. How does the Evidence Act deal with that question?

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MS CULL QC:

Under section 43 of the Act, the weighing of prejudice as opposed to –

ELIAS CJ:

10 What about the linkage, the prior question?

MS CULL QC:

Yes, it sets it out in section 43(3). There are a number of matters that the Court is addressed to in dealing with similar fact evidence, or propensity evidence as it is now called under (3)(a) to (f). So, the connection in time is the extent of similarity, the number of persons –

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ELIAS CJ:

That's about the cogency really of the similar fact evidence. Does section 43 deal with linking the accused to the previous occasions? Because that does seem to me to have some parallels.

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MS CULL QC:

Just looking at section 43, the Court must still weigh the risk of probative value and in taking that into account, the frequency with which the acts, admissions, events or circumstances which are the subject of the evidence have occurred, I think it's implied that the connection in time, the extent of similarity, is all to be connected to the accused. It doesn't say so but –

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ELIAS CJ:

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It doesn't say so, no.

MS CULL QC:

No.

ELIAS CJ:

It does strike me though that it is a comparable case, that there is an initial question whether the previous offending was offending of the accused.

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MS CULL QC:

Yes. Perhaps the – I think perhaps the answer is in section 41, sorry, I've overlooked this. Propensity evidence means evidence to show that a person's propensity to act in a particular way, or to have a particular state of mind, being evidence of acts, admissions, events or circumstances with which a person is alleged to have been involved. So, the propensity evidence is being offered by the prosecution for instance, then it is propensity evidence about that person's propensity to act in a particular way and before the Judge can admit it under 43, propensity evidence offered by the prosecution about the defendant has a series of hoops to jump through, section 43(3).

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ELIAS CJ:

It seems to me that it's again, sort of threshold enquiry you're urging on us here because it has to be in 41(a), evidence that tends to show a person's propensity to act, so there is some threshold issue as to whether the previous acts were the acts of the accused.

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MS CULL QC:

By analogy with the present case, in my submission, to have probative value, the sounds must link the accused to the commission of offences in a way that is clear, or, as Justice Gault put it in *Holtz*, in a way that is truly probative and cogent, normally recorded sound will be of sufficient quality to be truly probative and cogent, even if that depends on assistance from expert listeners, but that is not the position here, in my respectful submission.

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So just, as I've set it out at 1.61, it is submitted the correct approach to assessing probative value of the evidence as to whether the sounds are speech in this case, required an evaluation of the strength of the evidence. This evaluation should have included the role of suggestibility and the role of

experts. The Court therefore dealt with the first question inappropriately, in my submission, by, at the very least, overlooking the four propositions of the Crown experts to which I have just taken you. The highest the evidence reaches is either a possibility that the sounds are simply exhalations of breath
 5 or that there is a possibility which the experts cannot discount that the sounds are words. Secondly, there's no definitive evidence that the sounds are words or that the words are the disputed words. The Crown is therefore, in my submission, in the position of inviting the jury to draw an inference that the sounds are words, and further, that they are those words for which the Crown
 10 contends. The expert evidence can only reach a threshold of a possibility that the sounds are words, or that the sounds are simply exhalations of breath.

Now, the Courts in New Zealand have been cautious in ensuring the jury do not draw conclusions that are no more than speculation. In my submission,
 15 speculation is not proof and cannot be called in aid of an accused or in aid of the prosecution. There are authorities, obviously *The Queen v Harbour* and *The Queen v K*, where those questions have been raised. More pertinently, where two inferences of equal weight are open, it is impermissible to draw either one. Now, this was the position where, and I've referred to *Newson and*
 20 *The Queen*, which was an Eichelbaum decision, that if you have inferences of equal weight, it's impermissible to draw either one, but put more succinctly in *The Queen and Puttick*, the Court said, "It must be equally unhelpful to tell jurors that if proven facts support two references of equal weight, they should accept one and reject the other. To draw an inference either way from such
 25 facts would be pure speculation. Jurors should not be directed to accept or reject inferences when they have no logical basis for either step." In my submission, the evidence here reaches the lowest threshold of possibility. On the Crown contention, it is an equal possibility, which, in turn, invites the jury to draw two possible inferences, and in my submission, the same way that the
 30 Courts have condemned such speculation in the area of drawing inferences from two possibilities, jury speculation –

GAULT J:

Are there inferences? Are they two possible inferences, are they not two findings of fact competing here rather than inferences?

5 **MS CULL QC:**

I'm saying this is comparable to requiring the jury to draw from evidence that has low probative value, if not questionable probative value, so if the threshold is only a possibility, you're inviting the jury to reach conclusions on two possibilities and in my respectful submission, that is equivalent and analogous
10 to the Court's preventing speculation of the jury in drawing inferences which are of equal weight.

GAULT J:

There must be numerous cases in which jurors are required to determine
15 whether a factor's X or Y, that doesn't involve inference.

MS CULL QC:

Well in this case Sir, I think the difference with this case and it's the difference with all of the cases, in this case, we have a threefold step that the jury have
20 to go through before they even get to drawing the conclusion which goes to the speculation. That threefold step is "Are the sounds sounds or are they words", "If they're words, they're these words", third step, "If they're these words, then they are incriminating." So here, we have, if you like, a very low threshold on two potentially equal possibilities and in my submission, what is
25 the jury to do with that? And further, they're not going to be presented with the possibilities without being told what they're going to hear. So it gets into a further speculation, but just on this threshold, when you've only got the highest threshold of possibilities, then you are inviting guesswork. Just by reference to – sorry ma'am.

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ELIAS CJ:

No, well I was just wondering whether you're stirring some fairly deep waters but I had a look at Thayer before coming in, and he says evidence does invite inferences, even if you're finding facts, so I think there's an awful lot of

theoretical baggage behind the ambition of the Evidence Act and it may be that you might be right on a theoretical level, but it's not an inference in the sense of circumstantial evidence, that sort of leap, it's not of that nature.

5 MS CULL QC:

But it isn't a leap to say, "Listen to this tape unprimed then we're going to tell you what other people have heard", and I should just say that it's not just the experts, in the last four days, we've received briefs of evidence which has now got a detective saying what he heard when he took the tape to be played at
 10 Strawberry Sounds in Dunedin, so we have level of suggestion, experts warning about "Don't take anything out of this", but if the Court of Appeal's ruling remains, the jury are going to be told what those words are, so there is a problem that if the jury are then told, "You can't rely on that", what are they going to do? Are they going to guess that that's what they heard so therefore
 15 that's – nobody's going to tell them anything different, or are they going to say, "Well, okay, of all these possibilities, what are we doing?" And that's speculation, that's really the point, I accept that the whole area of inferences is difficult and it does have deep waters, but the principle that comes out of *Holtz*, and indeed *R and M*, is that there has always been a rigorous
 20 requirement that prevents the jury placing inappropriate weight on evidence which is unjustified and avoids the risk of improper use. So evidence which has no logical value can not necessarily be saved by a judicial direction, and indeed, Justice Gault warned about that in *The Queen and M*, that where there's a real risk that a proper direction as to the use of the evidence will not
 25 be sufficient to prevent the jury placing weight on it, beyond that which is justified by its logical value, it should be excluded.

WILSON J:

Ms Cull, are you still submitting that these are questions of inference, coming
 30 back to Justice Gault's point, I would have thought that we're not concerned here with inferences in the legal sense, but with competing possible interpretations of the disputed sounds.

MS CULL QC:

Yes, that is the correct analysis. I'm using inferences by way of analogy, because if you have equal possibilities that the jury could draw inferences from, the Courts have been quick to say "Look, that invites speculation" but in
 5 the same way as Your Honour has just put it, I am saying we've got possibilities that the jury can draw conclusions on, and equally, we should not be inviting the jury to entertain guesswork or speculation on that. That's the really the point, so I'm grateful to Your Honour.

10 Now just moving to, and this of course is new territory under section 7(3), where the academics are quick to come in and look at ways in which they can be analysed, and that is just under 1.71, the reference to the Evidence Act text by Mahoney, Optican and others is suggesting that the test of relevance under 7(3) contains two prongs, one is materiality –

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ELIAS CJ:

Where are you in your –

MS CULL QC:

20 Paragraph 1.71, sorry ma'am.

ELIAS CJ:

Thank you.

25 **MS CULL QC:**

Materiality and probativeness. Materiality relates to whether the evidence is offered on a matter of fact at issue in the case of consequence to the determination of the proceeding. Probativeness relates to whether the evidence has a logical tendency to prove or disprove the material proposition
 30 on which it is offered, and to pass the section 7(3) relevance test or gateway to admissibility, the authors are suggesting both prongs of relevance must be satisfied. Whichever way the Court proceeds, or whether it adopts that analysis, in my submission, in this proceeding, the Court of Appeal has treated relevance as if it were only a question of materiality, i.e.

consequentiality, and I say that because of the way in which I set out the hypotheses, the Court has heard the evidence, it has heard the words, so it's gone to that second threshold, it then says, "It's obvious they are words, and then it's obvious that those words are a confession." So, on that basis, it said,

5 clearly, they are relevant. Now, if one looks at that analysis, in my submission, that's whether it's material. Obviously, if those sounds were words and were words that the Crown contends for, then that has a material effect on the proceeding, but equally, the Court has to stand back and say "What is the tendency to prove? What is its probativeness as the

10 commentators say?", and in my submission the Court has not fully addressed those requirements under section 7(3).

ELIAS CJ:

Is it convenient to take the adjournment?

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MS CULL QC:

Yes it is, yes, thank you.

ELIAS CJ:

20 Thank you, we'll take 15 minutes.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.57 AM

MS CULL QC:

25 Recommencing at page 15, if I could just give you an overview of the inclusion here of the, I call it the science of judicial proof, that is actually taken from Wigmore's article which I have actually included in the casebook where the Courts have traced through the admissibility of audiotaped recordings. So it was really to give a background of where the cases had gone to in the various

30 jurisdictions and on what basis they had done so. So at tab 5 there is just a brief article which was referred to by the High Court of Australia and if I may just refer Your Honours to that at tab 8, this is *Butera v Director of Public*

Prosecutions, High Court of Australia, and in that decision although it concerned the admissibility of a transcript as opposed to the taped recording, it is a useful collection of all of the relevant principal decisions almost throughout the world of the admissibility of tape recordings and you'll see that

5 at page 2, paragraph 4.

ELIAS CJ:

Thank you.

10 **MS CULL QC:**

Tab 8, second page, paragraph 4, and this is just the High Court reviewing the authorities, confirming a tape recording may be used to produce a form of evidence different from oral testimony and documentary evidence and that the rules which govern the admission in evidence of tape recordings and the

15 procedure to be followed by a Court must be moulded so as to deal with the technical and logical conditions which must be satisfied before a tape recording can furnish proof of what is recorded. You'll see there at paragraph 4 a number of these decisions form the basis for Courts in England, Australia, United States and indeed New Zealand to look at the

20 prerequisites of admitting tape recordings and at paragraph 11 of that decision on page 3, the Court reinforces having looked at all of those decisions, that provided the provenance of the original tape, the accuracy of the copying process, and the provenance of the copy tape are satisfactorily proved, there is no reason why the copied tape should not be played over in court to

25 produce admissible evidence of the conversational sounds originally recorded.

Now I've put that before Your Honours because the Court of Appeal referred to *Robson* in its judgment but in looking at both this High Court of Australia

30 decision and also the United States decisions to which the Court refers, at paragraph 1.76 I have summarised at the top of page 16 that the Courts have sounded a warning that sound recordings, more so than photographs or other demonstrative evidence, are susceptible to alterations that may be impossible to detect. The United States decisions refer to the fact that "admitting sound

recordings into evidence at a criminal trial presents discrete dangers to which courts have been justly sensitive.”

Now by reference to *Butera* one of the principal decisions they refer to is
 5 *United States v Biggins* which I have referred to at tab 9, and in that they refer to the way in which the Courts have formulated a seven pronged test about the admissibility of tape recording. This appears really as a footnote to this decision which is at the reported page of page 66 down the bottom –

10 **BLANCHARD J:**

Ms Cull, isn't this argument directed to authenticity on which you haven't got leave?

MS CULL QC:

15 Yes Sir, I'm aware of that. I'm giving you basically the background of where the Courts have gone in relation to the admissibility of tapes and the concern about how they are to be admitted. So I accept Sir that a lot of these are in relation to making sure that the recording is the original recording, but it leads to the New Zealand Court of Appeal in *The Queen v Harder* which I have
 20 included in the bundle at tab 11, that a tape recording is admissible in a Court of Law where the evidence is relevant is otherwise admissible and the accuracy can be proven.

In *Harder* particularly, the Court confirmed the Judge has a discretion to
 25 exclude a tape recording if it would be prejudicial or unfair to admit it on the usual principles. Now I accept Your Honour's warning that the proof of the circumstances and the provenance with which the tape recording has been kept does go to the question of authenticity. At paragraph 1.81 of my submissions I simply refer in light of one question that came out of the leave
 30 hearing on Monday that the absence of two and a half words at the beginning of that tape does raise questions about the originality of the recording as opposed to the tape. So I note that the Crown have been submitting to the Court that the Judge was in no doubt that authenticity was proved. He does it

in relation to the tape cassette, there was a difference about the recording and I simply –

ELIAS CJ:

5 We're not dealing with that Ms Cull.

MS CULL QC:

No. I'll take you to paragraph 1.83, *R v Robson*. This is the reference the Court made to Justice Shaw's decision –

10

BLANCHARD J:

But this is the same point.

MS CULL QC:

15 That it must be fair and reliable assessment of the conversations that were recorded and that with an appropriate warning the jury would not be led to an interpretation unjustifiable adverse to the accused. Now I take your point about that but the question or the reference by the Court of Appeal to the "postulated tamperer" was also raised and I simply do that in the context of
20 *Robson* that, one, there was a difference there but two, the judicial warning was seen to be an important aspect to ensure that inferences adverse to the accused could not be drawn.

I'll then take Your Honours to section 8 which is the evaluation of prejudice.

25 And of course this is the general exclusion section having ascertained the sounds are of low probative value section 8 requires the Court to weigh the probative value of the sounds against its unfairly prejudicial effect. And as the section makes clear it's a general and overriding requirement for exclusion of evidence that is otherwise relevant under section 7 and not excluded or
30 rendered inadmissible by some other specific provision of the Act. The Judge must exclude evidence that contravenes section 8.

Clearly that section 8 test is a balancing of probative value against the risk the evidence will have an unfairly prejudicial effect on the proceeding or under

8(1)(b) needlessly prolong the proceeding. Section 8, in my submission, should render inadmissible evidence posing a risk of unfair prejudice disproportionate to its probative value. And that again is a reference to the commentaries that have been written on that section.

5

Now in the assessment of relevance the Court has already referred to, formulated the competing hypothesis at paragraph 2.2 of its judgment and rejected the opinions and conclusions of the experts who agreed it would be dangerous to place the interpretation as the disputed words before the jury.

10 Now it is submitted that placing the interpretation of the words before the jury in addition to allowing the sounds to be played will create unfair prejudice to the accused. Now I've set out various ways in which prejudice has been described or defined. Clearly there's more to prejudice than just wrong reasoning. There's giving of improper weight to evidence through suggestion.

15 Bias, improperly giving reduced weight to defence evidence because of the perceived confession and, in my submission, that also goes to a section 8(2) analysis, the right to offer an effective defence.

If I can take you to paragraph 1.93, the assessment of prejudice that the Court did undertake at paragraph 256 was that the jury may wrongly construe the disputed sounds as an inculpatory sentence. But in my submission, the Court dismisses the risk that the trier of fact may get the facts wrong as being an inescapable part of the trial process. The Court then states there's no prejudicial effect which warrants evidence exclusion and you can see the way

20 in which the Court describes that at paragraph 256 of its judgment.

25

At the foot of that paragraph in the judgment, apart from saying well this is simply a trier of facts may get facts wrong, at the last sentence the Courts say, in this case there is an obvious risk mainly suggestibility which must be

30 addressed, but providing this happens we see no reason why the evidence should not be admitted. Now in my submission, the Court firstly has overlooked the assessment it's required to carry out under section 7 and 8. If Your Honours accept my earlier submission that the Court focused on materiality only to assess relevance, it led to the Court not undertaking a

proper consideration of the prejudicial effect on the accused in the proceedings and whether the jury is left to draw conclusions rather than inferences along an impermissible chain of reasoning.

- 5 But secondly, further prejudice to the accused arises from the risk that the fact finder will not be able to ascertain what the evidence is without being influenced by suggestion. The Court, whilst it acknowledges the need to be careful because of the power of suggestion, that is when primed the jury will hear what it is primed to hear, the first suggested perception of words will
- 10 prime subsequent listening so that with each repetition the perception of words is reinforced. The Court has not given consideration as to whether the jury may give disproportionate weight to the sounds by misconstruing them as words. In my submission, this is the risk that the evidence will have an unfairly prejudicial effect which a Judge must undertake under section 8(2).
- 15 This is a Judge function, not that of the jury.

- The evidence of the lack of certainty as we have seen on the part of the experts, the high risk of suggestibility and the risk of circularity, at paragraph 1.98, that other evidence might be used to influence what is heard, has been
- 20 overlooked by the Court and, in my submission, cannot be cured by a judicial warning, because a warning will operate to increase suggestibility to the jurors. And if I can just pause there. If the judicial warning is given at the time of the summing up, a matter to which I refer later in the submissions, that is too late. The jury are already primed to hear the words at the time the Crown
- 25 evidence is called, eight weeks or 10 weeks later may hear from the defence experts and by that time they have already heard those words, so any other warning, interpretation, is essentially lost.

- The other concern is circulatory of reasoning, where it might be suggested
- 30 that other evidence might influence what is being heard, was addressed by Justice Tipping in *R v McIntosh*, where he warned of the inherent risks of allowing evidence that was highly prejudicial and of little probative value being left to the jury and he said, "The proposition that some evidence which ex hypothesi is highly prejudicial and of little probative value to the extent that it

ought to go out if standing alone can be saved because there is other unchallenged evidence which tends to prove the same point, has in my view some danger of circularity. How is one ever to know if one leaves the objectionable evidence in, whether it might have been that evidence which

5 finally tipped the balance in favour of the Crown and that may be so in spite of the giving of any necessary warnings. There will then be a risk that the final nail will be one of prejudice not proof.” In my submission, that is particularly so here because in a sense this evidence has got such great prejudicial value. It comes early, very early in the trial and if there is a suggestion by the Crown,

10 as I have heard the argument before, that this is just but one of a matter of other material that the jury will hear as part of the evidence in a mix, then in my submission that leads to one, the dangers of circulatory of reasoning but two, this is the only evidence that has ever been led of a supposed confession, or inculpatory statement of this nature and really, does not form

15 part of the Crown case certainly to date.

So moving then to section 8(2) and this is the right of the defence to provide an effective defence and that is a requirement on the Judge to determine, as well, the unfairly prejudicial effect on the proceeding. The Court approached

20 the issue of prejudice, referring to an obvious risk as I’ve said, namely suggestibility which must be addressed. In my respectful submission, there are two errors here. The first error is the factual one, so on the Court’s mistaken view of the expert evidence, the jury are going to be primed or told what the disputed sounds mean after hearing the recording unprimed.

25 Professor French did not say the jury should hear the disputed words. All the experts agreed that should not happen. What he did say was, that there are two views about whether the disputed sounds should be –

ELIAS CJ:

30 Sorry, when you say “should hear the disputed words”, are you using that in terms of see a transcript, are you?

MS CULL QC:

Or hear the evidence of what other people have heard of the disputed words.

ELIAS CJ:

Yes, yes.

MS CULL QC:

5 As well as the transcript, yes. That is a double –

ELIAS CJ:

Yes.

10 **MS CULL QC:**

The second error, is a legal one, namely that there is prejudice by a failure to recognise the danger of erroneous reasoning by the jury. So, just dealing with factual error, there are three points really that I make, at paragraphs 1.104, 105 and 106 on page 22. So, just dealing with those. Firstly, priming forms
 15 the basis of suggestibility, that's paragraph 1.104, page 22. Court has overlooked, in my respectful submission, that the Crown will have the first opportunity to tell the jurors what it contends, that's page 22. On the analysis of the experts, the jurors will hear those words because they've been told what to hear. Secondly, there is further prejudice to the defence because the
 20 other sounds which could be nothing or sounds quite different to the disputed words, will fall on primed or deaf ears, if I may use that analogy. Once the jury hear the disputed words, it will be impossible for the defence to undo what they've heard. In my respectful submission, the Court has not considered this. Thirdly, the Court has overlooked that any warning from a Judge in
 25 summing up will be too late, the jury will have heard the evidence from the Crown eight to 10 weeks before the defence evidence is led.

ELIAS CJ:

Is this really a different point than the section 8(1) point? I'm struggling to see
 30 that the effective defence limb comes in here. It all just seems to be unfairly prejudicial effect on the proceeding?

MS CULL QC:

Section 8(2) is part of that consideration and if it's – breaking this up like this is straining at the different sections –

5 **ELIAS CJ:**

I just wondered whether section 8(2) was directed at something different because you're not, on one view, impeded in putting up the defence that you wish to put up if this evidence comes in. It's just that you're saying that it's too prejudicial.

10

MS CULL QC:

That's true ma'am, it is prejudicial. I think the key words are "effective defence", so if one looks at section 8(2), "The Judge must take in to account the right of the defendant to offer an effective defence." Certainly, the defence can call evidence. The defence will need to call evidence if the Crown is permitted to call the evidence it proposes but that, in my submission –

15

ELIAS CJ:

Well, it will mean that Mr Bain would have to give evidence.

20

MS CULL QC:

That's correct.

ELIAS CJ:

25 But that's really one –

MS CULL QC:

That's one of the matters but –

30 **ELIAS CJ:**

So, are you putting that forward as an inhibition on the right to make an effective defence?

MS CULL QC:

The analysis has not included the Bill of Rights section on being required to give evidence, the right to silence.

ELIAS CJ:

5 I don't think you can build that, myself, in to section 8(2).

MS CULL QC:

No, no but my point is simply that it won't be effective. By the time the defence calls the evidence, we've got jurors' ears that are primed. The jury
10 are not going to be able to hear other words once they know what's there. That's the only point about that. So there are three things, the priming with suggestibility, the fact that they have already heard it and then if they're told "Well, that's not what's on the tape, this is this", then the jury are going to say "Well, you know, we've been told that's what somebody else thought, we
15 heard that so that's the end of it." That's the risk, as well as the fact that any judicial warning is going to be too late. That's simply the point that –

ELIAS CJ:

I still think that section 8(2) must be directed at a different point because all
20 you're saying there is, on your view, it would just be doubling up. If prejudicial evidence is admitted, then by that reason on your argument, the defence is deprived of the opportunity to make an effective defence.

MS CULL QC:

25 I understand the difficulty here. Section 8(2) is not a stand-alone section and perhaps I've been wrong to separate it out. It's one of the factors the Judge takes in to account in determining –

ELIAS CJ:

30 Yes.

MS CULL QC:

– the probative value.

ELIAS CJ:

Yes.

MS CULL QC:

5 So it is but one of the factors. I think I can put it no higher than that but what I
am saying is, not only did the Court not address that but in saying what it did
in the paragraphs referred to, in my submission, there were two errors about
that. One goes back to the facts, the other is the legal error and it's really,
again, comes back to the weighing of probative value against prejudicial
10 value.

Mr Morten has referred me to the Mahoney Evidence Act 2006 with the
possible interpretations of how section 8(2) can be used. I think that's a
matter for the Court to decide. It can be used either way, conversely 8(2)
15 might result in finding the limb inadmissibility, where prosecution evidence
risks an illegitimate prejudicial impact on the accused's defence. On the other
hand, section 8(2) requires the admission of evidence – nothing in
section 8(2) requires the admission of evidence where its unfairly prejudicial
effect on a proceeding is held by Court to outweigh its probative value. So,
20 it's two – there are two potential hypotheses about the way in which to
approach the section 8(2) analysis. I have approached it, really, as being part
of a reasoning process and the weighing of probative value against prejudicial
effect.

25 **GAULT J:**

Ms Cull, is part of your argument to invoke section 8(1)(b)?

MS CULL QC:

Well Sir, the – you will see that the Court of Appeal did not address that. We
30 did raise that at the hearing before Justice Panckhurst, that there are going to
be many witnesses called, one to deal with chain of proof, two to deal with
what is being heard, and then the expert evidence. There will be about four
days, I would have thought, in evidence. Justice Panckhurst didn't regard that

submission as having much weight and the Court of Appeal also rejected it, so in dealing with this aspect of the argument, I have tended to –

GAULT J:

5 So the answer's no?

MS CULL QC:

The answer's no, I haven't put it in the submissions, it was done earlier but overruled. It is a factor that we did urge the Courts to consider, but in the
10 course of a, I think we were told, in the course of a 10 to 12 week trial, this is but a small part.

WILSON J:

Ms Cull, at your paragraph 112, little 1, you make the submission that
15 Professor French did not say that the jury should hear the disputed words, isn't the answer that the Professor gave in cross-examination recorded in the top lines on page 31 of your volume 1 really evidence that he didn't see a problem with the jury hearing the words?

20 **MS CULL QC:**

Hearing the passage Sir, I think. That was, if I'm correct, I'll just – the top of page 31 Sir, this followed cross-examination about whether the passage should be edited or excised, and the answer is given then, he was asked, "If they can't determine it, it would be dangerous for a jury, if they heard it, would
25 you agree with their view?", "No." He's talking about just having the tape played as opposed to having it played with the excision, that's the passage. So it's not about the interpretation of the words, in my submission, they're not suggesting that the words should actually be told to the jury. In fact, he's quite clear on that, the jury should not hear the disputed words as given by others.

30

So then just coming to the legal error, and again I'm going back to the Court's analysis in *The Queen v M*, *The Queen v Holtz*, and indeed *The Queen v Bull*, that the Court has overlooked the prejudice that warrants evidence exclusion because, one, it causes the jury to reason wrongly, two, it causes

the jury to give inappropriate weight to that or other evidence, it causes the jury to misapply the law to the evidence, and I've already set out at paragraph 1.109 where the prejudice arises and the risk of circularity, but it is also submitted these matters create a risk of jury bias that affects the right of the

5 defendant to offer an effective defence.

Now, the Court of Appeal in *Queen and Bull*, emphasise the need to protect the accused from improper use of evidence. Now, of course, that was the similar fact case again, by explaining that if the necessary specific feature or

10 features cannot be identified in a way which can clearly be put to the jury as being the basis upon which they are entitled, if they accept the evidence, to regard it as probative, there must necessarily be doubt as to whether the evidence qualifies for admission. Now, in my submission, this means the necessary specific feature of the sounds as confessional words must be

15 identifiable in a way that can clearly be put to the jury as probative evidence. Here, there is necessarily doubt that the evidence even qualifies for admission, in my respectful submission. And I have referred to the judicial tightening, it's a reference by one of the commentators, at the top of page 24, of the need for the protection for the accused against a legitimately prejudicial

20 effect of evidence, this is a trend both in New Zealand and internationally emphasising the need for fairness to the accused. It is submitted the sounds must be excluded under section 8.

I have, and I've tried to condense it into a passage of comparable rulings,

25 because this Court has encouraged counsel to look elsewhere on ways in which such problems have been encountered before. Without providing all of the cases, but they are available to the Court if they are requested, the importance really comes to an audible and distinct – and without probative value, the Courts say they should not be admissible and we have a reference

30 to a decision of *The People and Sacchitella*. Now, a lot of these cases have been referred to in other cases, so I apologise for that, but I've referred to that and included it at tab 13, where the Court, at page 2, summarises all of the decisions where if you have inaudible and indistinct passages, you'll see that on the left hand side of the column under tab 13, page 2, a reference to each

of those decisions where they're garbled, full of static and other foreign sounds that a jury must speculate as to their contents, they should be ruled inadmissible and where it was a matter of pure conjecture as to the number of different and varied interpretations that could be placed upon what the recordings conveyed to the jury, there's a reference there to *The People and Stephens*, and I've provided that decision at tab 14 and in particular in that decision, page 5 of *Stephens*, the Court said at 1(c), the conversations were not only inaudible but unintelligible as indicated by reference to the reporter's transcript where on many occasions the official reporter inserts the word unintelligible, apparently the reporter recorded what she heard and couldn't understand but left out what she could not. How many different versions of what was said there were in the jury room is a matter of conjecture and again, at page 6, if you've got different and varied interpretations being placed upon the recordings conveyed by the various jurors is a matter of pure conjecture and the Courts were dismissive of that occurring and ruled it inadmissible.

Now, I've referred in paragraph 1.117 to the *United States of America and Davis*, which is another decision I see that unfortunately got excluded from the bundle but I do have a copy here, of similar effect, however, is the decision of *The People and Hurt*, which is contained at tab 10. This is where the Courts, both in *Davis* and in *Hurt* went through the objections to a tape recording that had been played at an earlier trial, it was the Criminal Court of Appeals of Oklahoma, I accept, but both Courts looked at what parts were probative and admissible, what parts were inaudible, irrelevant, non-probative and inviting speculation and edited the tape. At tab 10, the last page, 485 of *Hurt*, the Court reaches the conclusion that the Court acted properly in editing the tape recording and eliminating the irrelevant matter, and it's just an example of where the analysis has been done of what invites speculation, what is not probative, and therefore the Courts have ruled irrelevant and edited the tape. And that is the contention for which the defence contends here, that that part of the tape, the two or three seconds should be edited so there is no question of conjecture, speculation or irrelevant evidence, bearing in mind Justice Gault's question to me, but there is no evidence that does not have proper, probative value.

And just in passing, the Supreme Court decision of *Nagree* in India, unfortunately we couldn't get the all Indian reports, they're somewhere in Australia, they didn't come through in time, but I have given you a summary of the decision which appears at tab 15, where the Court noted one of the features of magnetic tape recordings, the ability to raise and reuse and it must be received with caution. Again, that goes to authenticity but that again is the way in which the Courts have approached tape recordings before they're admitted.

So I move then to the nature of the statement, now this of course means that we've got past the thresholds, one, of the sounds being words, two, the words are those for which the Crown contends, and three, the effect of those words being an incriminatory or confessional statement. Now, in my submission, the Court of Appeal in addressing probative value and weighing prejudicial effect, also needed to address the issue of, one, reliability and two, the conclusive effect of an incriminatory statement. So dealing with the latter first, dealing with incriminatory statements, namely confessions, the Courts have always regarded their admission more strictly, particularly where such evidence is central to the prosecution case and there are questions of voluntariness. Now of course all the cases normally do rely on the circumstances surrounding the making of the confession, whether there was overbearing and now, of course, under section 29, oppression has been defined. It's accepted from the outset the present situation does not fall within the accepted framework of voluntariness as such i.e. this was not a statement borne of oppressive violent or degrading conduct towards the accused which is the definition under section 29(5).

It is at best of questionable probative value but if admitted can be accepted as a confession whether it was actually made or not. Now I just refer, because the Court of Appeal paid particular attention in its earlier part of the judgment to three articles, two by Professor Pattenden and one by Professor Mahoney, on proving preliminary facts. And I simply draw the Court's attention to tab 16 where I have included the Mahoney article because in this article, and

admittedly written well before the introduction of the Evidence Act, the author was focusing on the *R v McCuin* and the way in which the criminal standard of proof should be applied to preliminary facts. I've set out at 1.121 a summary there that although the reasoning of *McCuin* was not about reliability as such,

5 the author takes the statements in *McCuin* and argues that proof beyond reasonable doubt attaches to voluntariness and thereby to reliability so that the prior question of whether there is in fact a statement at all should be proved beyond reasonable doubt.

10 The author deals with that and Your Honours may simply wish to just refer to it, but at page 237 of that article under "Reliability Rules" he specifically raises the question that at times we allow the juror the choice to accept or reject the evidence while at other times we deprive it of that option. Applying a rule which excludes the evidence at the top of 238 at tab 16.

15

ELIAS CJ:

I don't know where the page is.

MS CULL QC:

20 238 is right at the back. It's two, three from the back. Sorry, I understand from my friend that the page numbers have been – I beg your pardon. It's the passage under "Reliability Rules" and it's five pages back from the back. So just, it is actually 237 under "Reliability Rules" and then at the top of 238. This is where he is talking about the whole point of such a rule is that evidence of

25 the sort caught by the reliability rule where it's been pre-determined to be subject to such dangers of unreliability that the jury would be unable to deal properly with it, there's not enough that the jury is convinced of the accused's guilt beyond reasonable doubt, if the tainted evidence comes before the jury the resulting threat of a wrongful conviction results in a reversible verdict. The

30 treatment of possibly unreliable evidence must be remembered in our consideration of preliminary facts. In the case of the law promoting reliability of evidence, the preliminary facts themselves provide the minimum safeguards of reliability. And he finishes at the end of that paragraph saying, "Opposing views may be held on such an issue of cause but I for one adopt a

solution of requiring proof beyond reasonable doubt. The alternative is to support a conviction despite a real doubt that it was obtained on the basis of unreliable evidence of the sort which in a required safeguards against unreliability being more obviously lacking would never have been allowed to even come before the jury.”

Now I accept that it's a commentator and I also accept that that article was written before the Evidence Act was passed because of course, and I'll come to reliability in a moment, the Evidence Act has a threshold of on the balance of probabilities, but the Court, in particular the Court of Appeal, referred to that article as basis for Professor Mahoney would have let this tape in and I depart from that in my submissions because going back to *McCuin*, and I deal with that at 1.22 and I have included *McCuin* at tab 17, the next tab over, the Court refers to *R v McCuin* as authority for the criminal standard of proof for voluntariness of any confession but fails to recognise its implications for proof, and I accept proof of authenticity shouldn't be there, and to the ultimate issue. If I can just take you to that at page –

ELIAS CJ:

I'm just really wondering whether it's necessary to consider the standard of truth. Perhaps it is?

MS CULL QC:

Well I understand that caution ma'am because often it's not a question of the standard of proof. It's the way in which the analysis should be undertaken to reach that weighing of the probative value because you've got these factors which have such high prejudicial effect that it needs to be at the higher end and I put it on that basis because the Court of Appeal, as you've seen in the earlier part of the judgment, had looked at those thresholds. I'm submitting really that on the common law basis, *R v McCuin* and indeed the Supreme Court of Canada in *R v Egger* is really reminding the Courts, and I have at 1.125, though it refers there to requiring proof beyond reasonable doubt when the admission of the evidence may itself have a conclusive effect with respect to guilt, the Courts view such evidence with particular caution and

whether you say it's at the beyond reasonable doubt level or whether even on a balance of probabilities that it's at a sliding scale as you've found and said, the important thing is that that must be a factor that should weigh in the prejudicial probative effect analysis under section 8.

5

And if I can just remind the Court at 1.126, the importance of, I put it, involuntary confessions has been reflected in section 29 of the Evidence Act. Of course it's under oppression but it is the threshold of beyond reasonable doubt and I say over on 1.128 at the top of page 27 in its commentary on both
 10 the reliability rule and the oppression rule in the Evidence Code, the Law Commission noted that both sections replaced the common law voluntariness rule and its limited exception under the former Evidence Act. But they emphasise those sections were not intended to abandon values protected by the voluntariness rule but rather to protect those values more
 15 effectively by simplifying and clarifying the rules. So rather, in my submission then, reading down the rigor with which the courts would look at statements obtained in circumstances of oppression or unreliability, the Law Commission was not suggesting that they be narrowed but rather to ensure they're more effective. And, in my submission, whether the way in which you approach a
 20 statement and the nature of a confession is under section 29 or under section 28 and, if neither fit, then section 12 of the Evidence Act where evidential matters are not specifically provided for, allows the Court to go back to the common law. So at the very end of the day you still have the ultimate conclusive effect of the evidence being weighed as you do in *Egger*, as you
 25 did in *R v McCuin* and I am saying there is no bar to doing so because of the exclusionary rules in the Evidence Act.

So I then turn to the question of reliability and the three factors there. Now, the reliability of the disputed sounds being words, the second one does go to
 30 authenticity, so I'll leave that, and the reliability of the inculpatory statement. Obviously, the reliability of the sounds being words overlaps with the considerations which I've already canvassed of the probative value of the sounds. Reliability of the tape sounds has always been a factor in the consideration of admissibility of the tape recording. The question here of

reliability is whether the sounds can be construed as words and the words are those which the Crown contends.

5 Moving then to 1.135, the third aspect of reliability is whether the confession was actually made. A defendant's statement may be excluded under section 28(2) using the reliability head, if the circumstances in which the statement were made were likely to have adversely affected its reliability.

WILSON J:

10 Ms Cull, it seems to me that section 28(2) is mandatory rather than discretionary in its effect isn't it?

MS CULL QC:

Yes it is mandatory, Sir.

15

WILSON J:

And indeed, it seemed to me that it may be possible for you to argue, based on 28(2), that the words, the circumstances in which the statement was made are of sufficiently wide import to extend to the difficulties of interpretation of the tape and accordingly, 28(2) may therefore provide a ground quite independent of the other grounds on which you rely for excluding the disputed sounds.

20

MS CULL QC:

25 Well, yes, I'm grateful to Your Honour to highlight that. There are two things I would like to submit in relation to this, there has been no analysis by the trial Judge or the Court of Appeal in relation to section 28(2), Justice Panckhurst referred to section 28(2) by analogy but that was really in relation to the issue that's not before the Court, so in my respectful submission, that is, it is a matter that is open and I would adopt your observation, because –

30

WILSON J:

I was just raising it as a possible argument you may or may not want to advance.

MS CULL QC:

Yes, well I've really dealt with that under 1.35 where I'm saying the defendant's statement may be excluded under section 28(2) if the

5 circumstances in which the statement were made were likely to adversely affect its reliability, clearly in relation to the submissions I've made on relevance and the probative value, the circumstances are such that its reliability is seriously under question. Neither the Court or the trial Judge have addressed the standard of reliability in each of these aspects of the sounds,

10 the recording, or the confession to ensure that the evidence may be safely admitted. And reliability questions are addressed once the section 7(3) gateway is satisfied, so clearly, you have those steps which then take you to reliability, but I am submitting that that was open and hasn't been addressed, and I would further submit that obviously on the factual analysis which I've

15 taken Your Honours through, that that is open by the defence and we will rely on that as well.

So then I come lastly to opinion evidence, I'm conscious that the Court of Appeal did not address section 25, I'm informing Your Honours that the trial

20 Judge addressed the substantially helpful test under section 25, when admitting the tape in the expert evidence and that appears at paragraph 53, that's in the second volume of the appellant's bundle, I'll just take you to that, at page 150. Sorry, I beg your pardon, it's paragraph 55.

25 **ELIAS CJ:**

What page?

MS CULL QC:

Page 150 of the second bundle ma'am. This was Justice Panckhurst saying

30 "I'm in no doubt expert evidence should be received", concerning the interpretation of the disputed words, I won't go back over the – why the defence is submitting that was wrong, but he says at the end, "This issue, I think, is one in relation to which the jury is likely to obtain substantial help from experts in order to determine both whether there are spoken words in the

disputed segment, and if so, their interpretation under section 25(1).” Now, this aspect of the trial Judge’s reasoning was not specifically considered by the Court of Appeal apart from saying that they adopted the trial Judge’s reasoning, but if I could take you to paragraph 1.140 of my submissions on

5 page 28, the Law Commission believed the rule of substantial helpfulness was a significant additional control on the quality of expert evidence and would operate to exclude unreliable evidence as well as evidence which is valueless and time wasting. It is submitted that on the view of the factual matters here, expert opinion fails the substantial helpfulness test. No priming of the jury

10 should be permitted, as all the experts have accepted. On its own, the challenged parts of the tape are poor quality evidence of what the Crown alleges, and their probative value was low while the prejudicial effect is extremely high.

15 **ELIAS CJ:**

Ms Cull, is your position that you don’t want expert evidence, not only of what the words might mean, but also as to whether they’re words or not? I would have thought that there’s a difference between the two, I’m not sure what your submission is being directed at.

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MS CULL QC:

The submission is being directed to what I’ve dealt with at the end of the submissions, that the safest course is to edit the tape and have no expert evidence, or any evidence from a detective saying what he heard on the tape

25 and then what other people heard when he was with them. That is the safest course, and for that reason, I’m saying the expert opinion evidence is either going to do one of two things, it’s either going to prime the jury, if what the trial Judge and the Court of Appeal allow, that they can say what the interpretation of those words could be, or it’s going to re-enforce the suggestibility that

30 they’ve got to listen hard and that there’s something there, and I do address that just later on as to the remedy, because if the passage is left in, and no experts are called, I understand from the Crown’s submissions Mr Raftery intends to cross-examine David Bain if he’s called, and invite the jury to listen attentively to the background noises on the tape. The two risks are, the jury

may hear the sounds as words and speculate on them, if they've been told, the second risk is that a member of the jury may already have been primed, and it should not be overlooked, the substantial numbers of people who are already privy to the tape content, and its potential, these include journalists, police, families, academics who are receiving judgments, court staff, lawyers and Judges. I just should tell you that before we even knew of this, we were told about this by another lawyer from another town and New Zealand's a small place and those risks are high, and indeed we were informed from other people and that's before we had even, (a), received a copy of the recording, and (b), had even heard it, and I have to say, going to the Electronic Crime Laboratory myself, I didn't hear those words and didn't know that they were there, to which I should be aware. So there are risks about simply leaving it there because of the way in which information has, not deliberately, but has been flowing through various circles, so when I come to the top of page 29, by allowing experts to give evidence as to their interpretation of the disputed sounds, the Court is requiring the experts to do the very thing they've warned against, and that is priming the jury. So this is not allowing the jury to decide what the words are, it's the experts telling the jury what the words are, and in my submission, is the antithesis of the substantial helpfulness test, so either way, we say the safest course is to edit the tape.

I move then to the second question. The procedure suggested by the Court of Appeal, in my submission, is inappropriate. So then again it comes back to priming, and at paragraph 1.146, with respect, the demonstration of priming has occurred with the Court of Appeal. The Court was primed, it heard the recording, it reached the view, it was reasonably obvious that the disputed sounds can be heard as the inculpatory sentence. Of course they reached that view because they knew precisely where the disputed passage was and what the words were. This demonstrates the very warning about priming and overlooks the important evidence of the unprimed experts as well as those that have been subsequently primed. So, the problems with the procedure suggested by the Court of Appeal, I've put them as five.

Firstly, the jury has been left with the question as to whether this is real evidence. Is it sounds, is it words, are they those words, is it a confession? In my respectful submission, this is a Judge issue under section 7 and 8 and as Justice Wilson has raised, should be and can be treated as unreliable under section 28(2). The jury are going to be primed, contrary to the experts' advice. Once primed, there is, I'm saying, no ability because the opportunity to persuade someone to hear what they have heard once and not hear again, is almost impossible for the defence to persuade them otherwise. The graphic indication of the power of suggestion has no place in the standard of proof in a criminal trial and I'm referring here to the Court of Appeal's reference in paragraph 258 that we think – I'll just refer to it, I'm sorry. Second part of that paragraph, "If the jury initially do not hear the disputed sounds as an inculpatory sentence which we think is likely given past history but once primed subsequently do hear the disputed sounds in this way, this should provide a graphic indication of the power of suggestion." In my respectful submission, you can see what has happened when the Court has gone down that path and they are saying well, this is reasonably obvious and even in their hypothesis have presented us with closed hypotheses that the sounds are words and the words must be words because that's the path they've gone down. So it translates equally to the jury that that's a clear graphic indication of the power of suggestion but in any event it should not be left to the jury because of it's high prejudicial effect to the accused and it certainly demonstrates the dangers warned of by the experts, it also has no place in the standard of proof in a criminal trial.

Lastly, the obvious risk, namely suggestibility, cannot be addressed by a judicial warning or other means as it will be too late. In my submission, the mechanics of the Court's process will cause real prejudice to the accused, as the jury will not be able to ascertain what the evidence is without being influenced by a suggestion. Once the Crown requires the jury to listen attentively to the tape then calls expert evidence, the jury is primed and will only hear the Crown's contention.

GAULT J:

This issue of priming troubles me a little bit, Ms Cull, in that the fact that anybody does not discern something immediately but having been told it is there then becomes aware of it, doesn't mean it's not there.

5

MS CULL QC:

Well and equally, turning that around because you see Barack Obama in the clouds does not mean that he is there, equally the –

10 **GAULT J:**

I agree but the huge emphasis on priming and suggestibility, it doesn't seem to me to be an answer in itself. It is a risk but it doesn't seem to be any more than that. You are rather advancing your argument on, it's not there but people will discern it's there when told but that doesn't follow exactly, does it?

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MS CULL QC:

There's several answers to that. I understand what Your Honour is putting to me, but the dangers of taking exhalations of breath has been amply demonstrated by the use of Professor French's exhalations, fabricated edits we'll call it, used to insert in this disputed passage area and then run, knowing that we have fabricated edits which you can then make out as being words. So, what Your Honour is proposing to me is because you don't hear it, it doesn't necessarily mean that it's not there but equally, if the exhalations of breath are simply all that is there and you do see a Barack Obama in the exhalations of breath doesn't mean to say that is there either and that comes back to the equal possibilities, no greater than that which concerns the way in which the threshold test has to be looked at because it is dangerous. It has a risk, high risk and it can be taken either way.

25 30 **GAULT J:**

That's just an assessment of the expert evidence. It doesn't seem to me that priming adds a lot to it. It's either there or it's not there.

MS CULL QC:

With respect Sir, the Court of Appeal has demonstrated what happens when you are primed, when you hear what you are supposed to hear in the particular place that you hear it and then you say "Well, this is obvious."

5 When others who don't know are saying "Well, it's not, that's, one, not sure it's words, it's only sounds but if you're going to try and make some words out of it it's not those words" but once you hear it, because the jury are going to be asked to listen and then listen again and after they've been told what's there. So the priming that the experts are saying is to ensure that when they do their
10 analysis they are not being told what to listen to and it's a particular feature of auditory sound. If you can make something out of it you are going to hear it, that is the critical risk. It's not just my submission Sir, the experts have all warned about it and warned against it.

15 Moving on to the cases that were referred to by the Court of Appeal. In my submission, the reference to *R v Wickramasinghe* and *R v Taylor*, both are distinguishable on their facts. The Court of Appeal in *R v Wickramasinghe* doubted the evidence should have been admitted because if that were the only evidence implicating the appellant it would have been but because there
20 was other evidence then they allowed it in. The Court specifically addressed the fact that that was allowed in because there was other evidence supporting what happened. There, the interpreter, as interpreting the conversation between the two, identified one of the speakers because he knew them and there was a question about whether that was unsafe. I refer to that at tab 19
25 and in particular on the fourth page of that report.

The other case *R v Taylor*, was whether the transcripts of poor quality recordings should have been admitted. The question raised by the defence is whether the passages on the tapes were reliable because parts were
30 inaudible and indistinct and the Court of Appeal looked at this and said other parts of the tapes were held to be clearly comprehensible and had definite probative value. The transcripts were admissible in those circumstances because other parts of the tape reinforced what was in the transcripts in any event and in that case it was only about the admissibility of the transcript.

It is submitted those cases do not provide a proper foundation to leave the disputed sounds in the expert evidence to the jury. In effect, in my submission, the Court of Appeal's decision allows a series of sounds to be treated as evidence by a jury who will eventually be primed. Any warning of suggestibility will be rendered nugatory. In my submission, the unfair prejudice to the accused that such sounds are to be treated as words and as a confession, has not been properly assessed or considered by the Court and further, the unreliability of it has also not been considered. The mechanics suggested by the Court invite jury and media speculation on sounds which have no meaning, are not probative and therefore are irrelevant. They serve as an experiment in suggestibility and in my submission, that causes maximum prejudice to the accused and should not be admissible in a criminal trial.

The remedy that's referred to follows from the Crown submission. In my submission, the fairest and most appropriate remedy is to admit the tape with the disputed passage excised, just as the Courts in America have done. No expert evidence needed or should be called. Witnesses who purport to hear words should not be permitted to give evidence on that. Once excised, the evidence is inadmissible and David Bain if he gives evidence, should not be cross-examined on it. I have already dealt with if the passage is left in and no experts are called, what the downside of that is, but in my submission, at the end of the day section 6(c) of the Evidence Act is to promote fairness to parties and witnesses. That can only be achieved in this case, by excising the disputed sounds from the tape recording and ruling inadmissible all interpretations of those sounds. Those are my submissions.

ELIAS CJ:

Thank you Ms Cull.

MS CULL QC:

I have – yes, Mr Raftery is referring to the –

ELIAS CJ:

The relevance of the schedule. I must say –

MS CULL QC:

5 – appendix, the subsidiary issue –

ELIAS CJ:

– I don't think it is relevant Ms Cull, thank you.

10 **MS CULL QC:**

Right. Thank you ma'am.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.18 PM

15 **ELIAS CJ:**

Yes Mr Raftery.

MR RAFTERY:

Your Honour the starting point and the ending point for the Crown's
 20 submissions is that the issue really here for the jury is, are these sounds on
 the tape puffing and panting? Are they one set of words, "I shot the prick" or
 whatever. Are they "I can't breathe", a proposition put forward by the defence
 expert and the jury will have to grapple with that issue. The Crown says that
 in that sense it's not different to what is faced in a multitude of drug
 25 interception warrant cases. Quite often there is a passage that is either said
 to be "X" by the Crown and "Y" by the defence and they have to make up their
 mind or others where I can think of where you had something that's been a
 dot dot dot on the original transcript and then when the transcriber listens to
 the number 1 tapes on better equipment in Court he says "Oh I can fill in the
 30 dot dot dot and it's this."

Then there's a dispute by the defence about whether it's the original unheard sounds, the new text or something else that they put forward. In the Crown's submission, this case really falls into that type of situation and while I'm not in any way saying we shouldn't undergo the analysis that we're doing in this

5 case, there's a danger of over-refining our analysis and losing sight of the fact that those are the various ways of looking at it by the jury. Whereas in my learned friend's submission, it seems to be that the test under section 7 is there is a threshold of the Judge having to decide are these words or not. And only if he decides that they are words, can the issue of what those words

10 are go onto the jury? In the Crown's submission, that is the wrong way of looking at this matter.

In terms of section 7, and I'm just looking at section 7 alone, the issue of course is, is it relevant and while we can –

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ELIAS CJ:

What's "it" though?

MR RAFTERY:

20 Well what is said on the tape and I'm just going to come to that in a minute. I'm just dealing with Your Honour's question then. This tape is a piece of real evidence. It is something that is said by the accused and by the person he's speaking to and there are other noises on the tape. It is made by someone who is either the last remaining victim of a criminal offence that's just occurred

25 or he's the perpetrator of it and made within minutes/hours of the offending itself and his first alerting the world to the crime that has happened at 65 Every Street. So as a piece of evidence it is both important and relevant.

Obviously the disputed passage is particularly important because on one

30 view, for which the Crown contends, there is an admission against interest. The issue is, can that be heard there or not? And that, the Crown says, is a jury question. If it is that for which the Crown –

ELIAS CJ:

Insofar as it's an admission against interest, is it real evidence? It's real evidence when one is listening to drug deals being undertaken but is this in the same category?

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MR RAFTERY:

In the Crown's submission, yes, because it's not like an admission made to a police officer in an interview later on which is different. This is someone before any police involvement, is actually expressing, if the Crown version is correct, his connection with the crime is not that of victim but of perpetrator.

10

ELIAS CJ:

But it's admitted for the same purpose. Its quality is as an admission of guilt?

15

MR RAFTERY:

Yes.

ELIAS CJ:

Of course different considerations arise than in the usual sort of police confessional evidence and questions of authenticity in that context –

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MR RAFTERY:

Yes.

25

ELIAS CJ:

But it is the same sort of evidence?

MR RAFTERY:

It is. I call it evidence of an admission rather than a confession to make that distinction but yes it is similar but the sort of issues that were being discussed with my learned friend before lunch, the section 28 type of issues, and I can address those at a later time if that's convenient, if I can just deal with section 7 at the moment. In the Crown's submission, the section 7 threshold is a relatively low one. In other words if there is some evidence that could be

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interpreted one way then it should go to the jury. The Judge does not, at that stage, at the section 7 relevance test, set any higher threshold for himself so that the – nor does the law set one for him, so that the questions that my friend has raised, in the Crown submission, are putting that threshold too high.

5

Just looking at the Crown's bundle of authorities for the moment, just to take one example from that which is the case of *Robson*, which is in tab 1 in the booklet. *Robson*, if Your Honours have had the opportunity of reading it, will remember –

10

BLANCHARD J:

Robson or Robinson?

MR RAFTERY:

15 No I'm sorry *Robinson*, *Robinson* I apologise yes, it's *Robinson*. *Robinson* was where the widow of the deceased was telephoned on probably the night her husband was murdered, or her partner was murdered, with a blackmail threat being made to her demanding money or else. And she could hear her husband alive so that's why I – so that there were two short calls made
20 demanding money and she spoke to the police about those but they were from someone totally unknown to her, had no idea who it was. Nine or 10 months later the trial of the accused began and she gave evidence in that and then sat in the public gallery listening to the rest of the case. When the accused Robinson went into the witness box she said to the police officer, "I
25 recognise his voice and that's the man from the telephone, at least I think so, I'm not a hundred percent sure but I think it may be that man." The first trial was aborted and at that trial just for further background, the Judge had ruled that evidence inadmissible arising, one of the factors I don't know, was arising when it did, so he felt it unreliable for a variety of reasons but in the second
30 trial some short while later that evidence was admitted because the co-accused wanted it in to show that Robinson had committed the crime and not he. Then it went on appeal by Robinson to the Court of Appeal so that's a brief résumé of the background.

The passage, really, that I want to draw to Your Honours' attention as one way of expressing it, I know I've cited several others in the submissions, but the – at page 226 of the case and it's paragraph 19 of the judgment where, if Your Honours have that page, it says "What is the basic test? It does not appear that a test was formulated for either Judge Goddard, that's the first Judge, or Judge Forrester. Mr Suckling, who appears for the Crown before us, suggested a test of our invitation. Mr Grimwald who appears for the appellant did not object to it. We found it helpful, it is this: "Is the evidence such that no reasonable jury properly directed as to its defects could place any weight upon it? Put the other way round, if the evidence is such that a jury properly warned could place some weight on it, it should be admitted. It is our view that this basic threshold of admissibility is a low threshold." And obviously in respect of that low threshold the words "could" and "some" are – but used in a sentence –

ELIAS CJ:

I wonder about that test Mr Raftery. I wonder whether it shouldn't be – could rely upon it as opposed to place any weight upon it particularly – now this isn't confessional evidence of course.

MR RAFTERY:

But no I – it's a voice identification.

ELIAS CJ:

Yes. In the context of confessional evidence one would have thought that the test should be, could a reasonable jury rely upon it? Or convict upon it, indeed.

MR RAFTERY:

In the Crown's submission that would be the wrong test because you're looking at that in isolation. In the Crown's submission when you introduce some evidence of this sort, the Court is entitled to say well here's a piece of evidence that could have some probative effect on the proceedings and then it's up to the jury to assess what probative effect, if any, that it has. So in that

sense it is for the jury to determine not the Judge whether they rely upon it. But if you say is there some evidence that they could place some reliance upon rather than total reliance upon, which seems to be the implication behind Your Honour's suggested amendment to the wording, then it may be a
5 distinction with not much difference.

But the important point that I would emphasise is, in the Crown's submission in this case, which does not seem to be what I might call out of line with authority, a sort of case on its own and a frolic that seems removed from
10 reality, but they say the threshold for admissibility at this stage, threshold test for relevance is a low threshold. The Judge just has to make that assessment. If he decides yes it has some relevance to these proceedings then he goes on to look at other issues as well. I appreciate that. That's not the be all and end all of the question but just looking at it as a pure relevance
15 issue under section 7 in the Crown's submission the Judge was not required to use any higher test in that formulated here.

In my submissions, and I haven't put it in the bundle of material for you, I cite at paragraph 9 of those submissions the Australian Law Reform Commission
20 explaining the rationale of section 55 of their Evidence Act. Now in fact paragraph 8 refers to section 55 of the Australian Evidence Act of 1995 where it says, "Evidence that is relevant in a proceeding is evidence that if it were accepted, could rationally effect, directly or indirectly, the assessment of probability of the existence of a fact in the proceeding." The Australian Law
25 Reform Commission explains the rationale of section 65 as follows, "The definition requires a minimal logical connection between the evidence and the fact in issue. In terms of probability, relevant evidence need not render effect in issue probable or sufficiently probable, it is enough if it only makes the fact in issue more probable or less probable than it would be without the
30 evidence", that is it affects probability. The definition requires the Judge to ask "Could the evidence, if accepted, effect probabilities?" Thus, where a Judge is in doubt whether a logical connection exists between a fact asserted by evidence and a fact in issue, he should hold that the evidence is relevant, if satisfied that a reasonable jury could properly find such a logical connection."

That's of course the Australian Law Reform Commission talking there, using that word "could" throughout which suggests a very different threshold to "would" or talking about they must be able to rely on it rather than place weight on it.

5

In the passage my friend read to you this morning, that the text by Mahoney and others divides the section 7 test into materiality and probativeness. Now, in the Crown's submission, there can be little doubt that this evidence, on those sorts of tests, has that potential materiality and when you look at probativeness, again, in the Crown's submission, you're looking at that minimal test of which the Australian Law Reform Commission talk about. It's irrelevant, the fact that the evidence can be contradicted by the defence, can be discredited or rebutted or may eventually, by the jury, be disbelieved. The test at the beginning of the trial is simply, in the Crown's submission, that low threshold of could the jury place some reliance upon it, to advance the Crown or the defence case, whatever it may be. In the Crown's submission, the section 7 analysis is easily met in this case, and the real issue as the Crown sees it, and it may be the Court sees it differently, though really falls for consideration of section 8.

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ELIAS CJ:

I can accept that that is correct, once you have got to this being an admission. Clearly then, it's connected and there's no question, but that section 7 is engaged, or permits it – or requires it really, to come in, but it's the – what Ms Cull has suggested as the threshold question, is "Is it an admission?", and I would have thought that, and that's why I asked you, what is it, the evidence, I would have thought that perhaps some of the cases like *Ewing* are more in point, or the similar fact evidence cases, because *Ewing*, of course, the, was the question that the handwriting samples are from which you could springboard into the comparison with the handwriting of the accused, that had to be established to be the accused's handwriting, or there was no evidence. It was simply an assertion.

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MR RAFTERY:

I see Your Honour's point, but just leaving *Ewing* to one side and looking at the similar fact evidence that you talked about, discussed with Ms Cull, if you have, as Your Honour appeared to suggest, if you had to have, as

5 Your Honour appeared to suggest, evidence that showed the accused did in fact commit the other offending, then that, in the Crown submission, is too high a test for admissibility. There has to be some evidence from which the jury can properly infer that he did. For example, leaving aside those cases

10 where you have prior offending that the Crown wishes to introduce as part of a similar fact at evidence, you may have, in a particular case where an accused has been tried for offending against child A and child B, before they can use the evidence of child A in respect of child B, they have to be satisfied that the accused has indeed committed the offending by child A but the Judge doesn't

15 have to be satisfied of that in order to allow the jury to grapple with that very problem, did he commit the offending against child A and that would be so just as much as if child A was not a complainant in the case but someone who had previously made a complaint. You sometimes have cases where they've previously made a complaint, it's been to Court, the accused has been acquitted but if certain – appropriate safeguards of that, the evidence might

20 still be led at a second trial to – of the accused for child B. So again, the jury don't have to be satisfied, sorry, the Judge doesn't have to be satisfied, exercising the gateway role, to say "Well, I am satisfied, there is evidence that actually this man did it therefore I'll let it go to the jury then decide whether he did or he didn't." All he has to be satisfied is that there is some evidence that

25 the accused did indeed do those things and what weight or what reliance the jury place on it, if any at all, is for them and them alone and it would be wrong for him, in the Crown's submission, to exercise a much higher threshold and say, I'm not satisfied that he is connected with this crime at all, or I'm not satisfied he's connected at such a high degree, therefore I'm not going to let it

30 go to the jury. Providing there is some evidence that can properly connect him to that earlier crime then it should go to the jury.

BLANCHARD J:

Subject to section 8?

ELIAS CJ:

And 28?

5 MR RAFTERY:

Yes. I appreciate that. I mean, the Crown's – section 7 doesn't really matter in this case, it's a section 8 case if it's anything at all. I'll leave section 28 for the moment because it's also talking about reliability but the – you're looking, if the Court is with me on section 7, I can go straight to section 8 but the

10 Crown says, this is of course if you accept the Crown's submissions as far as the threshold that has to be exercised and it's premised on the proposition that I began with, that the Judge is not required to resolve – let's just suppose there were only two contestants. The contestant is the Crown's phraseology or out breaths and there's no third scenario such as put forward by the

15 defence expert of "I can't breathe" and so there's only those two things. In the Crown's submission, it is a jury issue not a Judge issue, providing there is some evidence that can go to a jury on those issues. In the Crown's submission, there is here, you've got the evidence of experts and I include Dr Foulkes, the defence expert that says those words can be heard, not

20 answer the question of whether they are there but they can be heard. The manner in which he speaks within that telephone conversation on another occasion is out breaths with no vocal filled vibration, so we know from that one minute slice of his life at that time that he was certainly speaking in that way at a slightly later occasion. That, in the Crown's submission, is enough to put

25 that issue very much before the jury because those are the issues directly there. Just as much as if the issues were a contest between, "I shot the prick" and "I can't breathe." It's just another possibility to put in that equation, it was mumbling, not words. That again, is jury issue very much because it's not as though the experts say "Look, there's no words there at all it's just mumbling."

30 They just say, "You can hear words there, they may or may not be there because they may in fact be unvoiced out breaths. As expert forensic analysis of speech with all our equipment, we can't say that because you need to – we as experts aren't trained to say what the intention of the speaker was because that's a totally separate question" and that's where the jury

comes in to play because they will hear a lot of other evidence which, in the Crown's submissions, suggest that David Bain is guilty of this crime. So that is something that may inform the jury to answer the question which Professor French says he can't answer by thinking back to what was the

5 intention of the speaker at the time and that's why it falls very much in to the jury province with the other factors in the case – to help them say, whether they are able to say "Well, we can say that there was intention behind these out breaths just as much as there was later on behind the telephone number itself." That is how the Crown would approach the section 7 analysis.

10

Now, unless there's more that the Court want to debate on that and I'm quite happy to do so, I was proposing to move to a section 8 analysis, where it seemed as though the issue, especially from what a couple of the comments

15 of the bench this morning to my learned friend, that the focus of the ultimate decision of this Court might well impinge more strongly than on section 7.

ELIAS CJ:

Are you going to deal with *Ewing*?

20

MR RAFTERY:

Well, in *Ewing*, Your Honour, in the, I mean, I can't remember the detailed facts of *Ewing*, but –

25 **ELIAS CJ:**

All those cases, generally.

MR RAFTERY:

Again, it's – I mean, it is usual in a *Ewing* type of situation where you're

30 looking at handwriting or a fingerprint situation for example, where you're looking at fingerprints, and you have evidence from a fingerprint expert saying, "These, the ones taken at the police station, are the fingerprints of the accused." "These are the writing of the accused because he wrote this document at the police station", or "He wrote me this letter", then so I take

those and I compare those to this and I can say “Those are his fingerprints on the rifle”, or “Those are his writing on that document”, but in the Crown’s submission, it would not need to be, for the Judge to be satisfied that this matter should be – go the jury, if there was evidence, for example, looking at a

5 letter that came from someone and you look at the internal content of that letter, let’s say David Bain in this case and it’s written to his Aunt Jan, if he’s got an Aunt Jan, and he talks about family matters within it, and a lot of family matters so you can sort of, and you’ve got evidence from some other sources that he’s got an Aunt Jan, his name’s obviously David, the address

10 on the top of this letter at 65 Every Street is his, he refers to the “work we’re doing in the garden at the moment and we’re intending to pull down the house and build a new one”, all material that’s within the context of this trial is there on the evidence, you could say, “We have no one who says that’s his letter”, but you can safely draw the inference that that is his letter because his

15 address, his name, his aunt, the internal description of the content, we know that he was actually working in the garden trying to get the – he was preparing for the demolition of the house, so on and so forth.

ELIAS CJ:

20 But that would simply be evidence from which the Judge could infer that the sample was the handwriting of the accused for comparative purposes.

MR RAFTERY:

Yes, but it’s – you have, let’s say, go on to, adding to that, you’ve got a

25 complete denial by the accused that that letter was anything to do with him.

ELIAS CJ:

Yes.

30 **MR RAFTERY:**

Now, all I’m saying is you don’t have to have proof positive, all the Judge has to be satisfied is that there is some evidence that can properly be left to the jury that that is his writing. Let’s remove a few of the factors, so you’ve just got David, Aunt Jan and 65 Every Street at the top, it doesn’t prove who the

writer is by itself, but it's something that would pass, in the Crown's submission, a threshold test. It's a bit like the text messages in the *Anderson* case I think it was, that's in the Crown bundle, where you've got text messages on a cellphone received by someone, and they amount to an admission of the crime or the – actually the crime itself, the threat to kill, but the issue is, who sent those text messages? The mere fact that they're on her telephone call – her telephone, doesn't by itself connect them with the accused, but surrounding circumstances of that domestic disharmony, his assaults upon her and so on and so forth, may entitle a jury to infer that he sent those messages, but as far as the threshold for the Judge is concerned, he doesn't have to say "Well I'm satisfied he did", well there is some evidence upon which a jury could place some weight in coming to the conclusion that he wrote those text messages. So in the Crown's submission, that again is something else that's analogous to the sort of situation that you're talking about, and we don't have to have, for the Judge to exercise his gatekeeper function, a higher threshold than that, that that is his letter, because he acknowledged it, or that is his text message because he acknowledges it, or that is whatever else it might be. In the Crown's submission, all the Judge is required to do as gatekeeper, is say is there some evidence there than can go to the jury on –

ELIAS CJ:

And is there – there's no difference in terms of confessional evidence?

MR RAFTERY:

Leaving aside section 28 which I'll come to in a moment, but no, not when you're doing a section 20, section 7 is just purely seeing relevance, and in the Crown's submission, there's nothing in the wording of section 7 that suggests where you get an admission of the sort that the Crown contend for here, that section 7 requires a different test to be applied. Relevance remains the same, is it relevant? Does it have that tendency to prove or to disprove? So the Crown's submission, that remains immutable whatever the nature of the evidence is that you're looking at. The threshold test, shall I say, remains immutable. So that's the position that the Crown would certainly contend for

in this case, as far as any analysis of section 7 is concerned and if that will be all on section 7, then I will move to section 8 but I don't know if there's anything more that any of Your Honours have on section 7.

5 Obviously, in my submissions, I've mentioned other cases which were in the casebook which if Your Honours wanted to go through I can take you through but I was not going to do that because they, as Your Honours will see, mentioning for example, without going to the case in paragraph 14 of my submissions looking at the approach of House of Lords in *Randle* and the
10 speech of Lord Steyn where he says, "Whether the evidence is capable of increasing or diminishing the probability." Again, it's that capable of test there that's suggested, that section – paragraph 15 is the case of *Morris*, the man accused of conspiracy to import heroin in to Vancouver. He possessed a newspaper article concerning heroin traffic in Pakistan and the Court there
15 considered that was a very marginal but it was still relevant and was not prepared to exclude it. Then section – paragraph 16 is the *Anderson* case, the text message case that I was referring to. In paragraph 18, where I've dealt with something said last time at the leave application in terms of paragraph 21 of the appellant's overview that the Court must be sure that the
20 sounds constitute speech, I think I've addressed that issue and there's nothing more that I need say upon that. The Crown says that's far too high a test and not justified on authority. Without going through all of those cases, I was going move to probative value versus prejudicial effect which begins at paragraph 23 of my submissions.

25

I begin with what is an obvious comment, almost a platitude, that all Crown evidence is prejudicial or potentially prejudicial against an accused, either on it's own or when taken in conjunction with other evidence. The focus in section 8 as to whether it will be unfairly prejudicial and – but before you begin
30 to look at that, you look at what is its probative value because if it has no probative value then you don't have to worry about the prejudicial effect. Here, of course, as I said earlier under section 7, we are dealing with real evidence. So this isn't like the sort of identification type cases, the voice identification of the widow in the *Robinson* case for example, nine months

later trying to remember back to a rather more angry and aggressive telephone call compared with a calm person in the witness box but the – so you're relying on memory and all the frailties of the passage of time. Here, you've got a piece of evidence that's frozen in time from the time that it was spoken. As a starting point, that's quite important when you're actually trying to assess the probative value of the information in question. There are in the submissions a number of cases I've cited which are really more examples of how the Courts have sort of looked at this problem in different cases, on different fact scenarios. In the case of *Alburn* which is tab 9 in the Crown's bundle, this is a case where the Crown contended that on six words alone, spoken on four separate occasions over the course of a meeting that was being taped or intercepted by the police, the voice of the accused could be heard. I don't know whether in Your Honours' copies, you are better served than I am unfortunately because pages 2 and 3 of the report are missing, well, they aren't missing actually, they are to be found behind tab 5 and I apologise for that. The very last page of tab 5, is page 2 of *Alburn* and then the penultimate page at tab 5 is page 3 and I'm sorry about that, we were unable to correct it at the time, I brought it to someone's attention because we already had our bundles but the – so what the jury had in this case was the presentation by the Crown that these six words, some of them isolated from each other, represented the voice of the accused at the particular – of what was called the damage control meeting. It was one of those planned deliveries by the authorities of drugs and then the accused, there were more than one, realised that the game was up and they were trying to then decide what they could do to exercise a bit of damage control.

The jury of course when they came to decide the issue ultimately had the benefit of hearing the accused giving evidence. That wasn't something of course that was any issue that the Judge had to grapple with at that stage and the, of course they had the evidence of the transcriber who said "I've listened to it", as they do say in a lot of these number of calls, 158 calls with the voice of the accused on it which is other calls in the damage control meeting, and he was satisfied that this was the accused speaking those six words but what you've got is six not quite isolated, a couple of them were in consequence,

words spread over the whole of a meeting when others are doing a lot of the talking and on that alone the jury being asked to say that he was present at that meeting and therefore that indicated an involvement in it, and it was of course an issue about the degree to which he was involved anyway as a participant in it but the – from the reading of the report while it's not an appeal against the decision of the Judge to admit it in the first place, the – it's appeal following trial, following conviction, there really was no question but that this evidence shouldn't have been left to the jury and it's an illustration in the Crown's submission of a point that I'd been seeking to make before that there are some evidence from the transcriber that those six words he thought were uttered by this accused and the jury had a lot more information when they came to decide it but it was a lot less information when it was first placed before the jury by the Crown because they hadn't then heard the accused speaking.

In the *Taylor*, which my friend referred to before lunch which I think is the last one in her bundle, it's also at tab 8 in our bundle, that was where there was a lot of the conversation was difficult to understand and was clearly not – some of it not discernible at all. At page 50 of the report behind tab 8, before the Court of Appeal said at line 14 on page 650, the fact that much of the conversation on the tapes is unintelligible and that the full content of those parts which are distinct cannot be heard in their overall context does not mean that this probative value is destroyed nor does it mean that any prejudice arising from the incompleteness outweighs their probative value. The evidence of a witness who's overheard only part of a conversation will see only part of an event is not read inadmissible on that account. Similarly the value of an exhibit such a letter of which only a portion is available or decipherable is relevant and probative evidence of what it purports to establish. Clearly there's no evidential principle which would exclude evidence simply because it may not encompass the whole of the discussion or incident. The –

BLANCHARD J:

That's a rather different situation from this one?

MR RAFTERY:

It is slightly different, I agree with that, in terms of its factual situation but the – what they're saying in one sense has some relevance. They're saying, this is
 5 so indecipherable, the piece of evidence, it shouldn't – because their fallback position is edit this tape, take it out and then we're all right because then we don't have that in because –

ELIAS CJ:

10 But it didn't comprise a confession, the only evidence of confession?

MR RAFTERY:

I agree with that. I'm not suggesting that but in terms of – and that's something that we look at in the Crown's submission is more properly looked
 15 at in the context of section 28 when you're dealing with statements by an accused, it's the Crown introducing, but in terms of the section 8 analysis at this stage, and while I appreciate there's a bit of an overlap obviously because you're looking at reliability but the issue is, as the Court says, they're deficiencies of the kind that Mr Hampton complained about, may be dealt with
 20 by a comment directed to weight, not to admissibility of the evidence where no doubt a jury is capable of fully comprehending any criticism of the tapes and assessing their reliability, and that really leads into a comment that my friend made, while she was dealing in the context of 8(2), the ability to present an effective defence, saying well, "The jury will hear this evidence and then it's 10
 25 weeks before they get to hear our evidence." Put like that, it sounds rather bold but it's nothing like that at all. First of all, they'd have Professor French's evidence, and that itself is – comes with a caveat to be careful and Your Honours have read it, you don't need me to take you through it, so they know that. Professor French will be cross-examined and all the competing
 30 viewpoints will be put to him in the same way that Mr Reed put them in the voir dire, and so the – it isn't as though the jury will just be presented with evidence that these are the words and that's it, and they'll hear nothing for 10 weeks, they will know already, from that, that there is a serious dispute by the defence about those words. If, and it will be a matter for the trial Judge, but

the Judge might well think it appropriate to say, as sometimes they do, “Keep an open mind here, because you’re going to – you’ll have heard these things that’s quite important, but you’re going to be hearing some more evidence called by the defence at a later stage in this trial and it’ll be many weeks before that, so please keep an open mind.” He may not make a specific referral to this, but I’m quite sure he will be giving those sorts of warnings on a regular basis to the jury throughout the weeks or months that this case will occupy Court time, so that the sort of matters which my friend complains of, and it would appear Mr Hampton complaining of similar problems in a different sort of way, in that case, are easily addressed, it’s not as stark as my learned friend has suggested.

Apart from the case of *Taylor*, I mention there on that same page the case of *Mathey*. It was a mother accused of killing her four children. During – part of the evidence was a 111 call she made, saying that one of her children had stopped breathing and was unconscious when she fell from a toy horse and the 111, well, the recipient of the 111 call thought she could hear noises of the child in the background and the accused woman said the noise came from the television, and the Crown there wanted to introduce evidence from a doctor to say listening to those noises of the child in the background, they’re consistent with a baby gasping and, as I’ve indicated there, just paraphrasing the report, the doctor’s expertise was said to be derived from observing a video tape of a father attempting to suffocate his 10 month old daughter, and the Court held that the doctor was not sufficiently qualified to give evidence on the matter. It also held that there was no need to call the ambulance officer. The Court concluded ultimately whether the sounds emanate from Shania or the family television is a jury matter.

In terms of just looking at probativeness, in the Crown’s submission, you have here evidence that, first of all, will be given with – I’ll leave aside the mechanics at the moment, I know it’s a separate issue that has been raised by your second question, but just presuming for the moment that the scenario envisaged by the Court of Appeal occurs, that you have evidence from experts that will address this issue. Now, that Professor French can’t discount

the possibility that it may be just out breaths with no meaning or content behind them, and so they will be aware of that, and of course, as I say, we've got the issue that what Professor French said at page 8 of that first bundle of documents put in by the defence about not being able to read backwards from the words themselves to the psychological processes that give rise to them. So that that issue, reading back to the psychological processes and making some assessment of what was going on in David Bain's mind at that time, in that house in the light of all the other evidence is very much within the matrix of the jury's activities rather than the expert, who is just a linguistical sound analyst who is not someone who is, as he says, qualified to read backwards into psychological processes, that's not for him.

This, in the Crown submission, is quite clearly a jury question. The points I have already made in the different context, you've got the same point of voicing on out breaths where you give the second half of the telephone number, there's evidence of that occurring and you've got the evidence about that. The jury are also entitled to ask themselves the question when looking at probative value is, do, well, these words – what are the odds of these words being that for which the Crown contends and I come back to a point that Your Honour raised with Ms Cull about context. You said you were looking at the telephone number, of course you've got context within the telephone call itself to help you tell you what those are. There isn't the same sort of context about the disputed passage and I accept that but context, in the Crown's submission, is not confined to the telephone call itself but it's the circumstances in which it comes to be made that morning and there is therefore – there is on that context clear evidence of five people having been shot in that house that morning so that the – that can provide in the Crown submission context as well as the internal context of the telephone call itself. The internal context of the telephone call itself has relevance to the fact that words can be uttered on out breaths without vocal fold vibration when it comes to a telephone number so within a very short space of one minute you get Mr Bain using that same, if I can call it speech device or speech mannerism, and within point something of a second after he just used it in a – something before. So that the – if the Court accepts that that's where the

probableness lies in looking then at the issue of prejudicial effect the key question of course is unfairly prejudicial. Prejudice that is over and above that which is properly prejudicial against an accused and in this case the sort of reasons that I have just been mentioning there are many safeguards to guard

5 against the danger of suggestibility because I suppose it may be there are other things but as I understood my learned friend it's that danger of suggestibility that is the danger of unfair prejudice and wondering how can that be controlled and in the Crown submission – I mean, in the defence submission, there's no way that it can be because it comes back to sort of

10 once they're primed, they're primed and that's it, whatever advantage we had is lost.

In the Crown submission the – again we are assuming for the sake of argument at the moment that the proposal put forward by the Court of Appeal

15 as to how this matter should be dealt with, are going to be dealt with in that way and the Court is well placed to give the sort of warnings, not to the jury at summing up time but as I have indicated before, along the course of the trial itself especially when the evidence has just been called and asking them to keep an open mind. They'll have the value of cross-examination of

20 Professor French looked at another way. His evidence will be 10 weeks down the track before the evidence that the jury hear much more close to their retiring which will be from experts suggesting a contrary viewpoint to that of Professor French or suggesting in part a contrary viewpoint.

25 In paragraph 41 of my submissions I quote again from the Law Commission on its Evidence Code and commentary. At 59 where it says that under section 8(1)(a) the test for excluding unfairly prejudicial evidence is not met if the evidence is simply adverse to the interests of say a defendant in a criminal proceeding. Since any evidence from the prosecution is going to be

30 prejudicial to the defendant the evidence must be unfairly prejudicial. There must be an undue tendency to influence a decision on an improper basis commonly an emotional one for instance, graphic photographs of a murder victim when the nature of the injuries is not in dispute. Evidence is also unfairly prejudicial if it's likely to mislead the jury if it appears far more

persuasive than it really is, as is occasionally the case with some types of expert and statistical evidence. In this case, my learned friend emphasises that this is in danger of misleading and the Crown's submission, when one looks at the report of Professor French it is an extremely cautiously worded approach, worded report and is approached extremely cautious. It is not someone who is gung-ho in his attitude of "Well, these are the words you can hear them and there's a jolly good chance they're there", he's cautious, careful and expert, as you might expect, professionalism that you might expect an expert to be. So that the danger of misleading is only if you are misleading them in to thinking that out breaths are speech when they're not. Here, Professor French is very careful not to do that at all, nor is Dr Harrison. The issue will be very fairly there presented by the expert. You've also had the opportunity of reading his evidence given at the voir dire and you've seen the manner in which he gives evidence which again, didn't suggest that he's going to rush head long in to misleading a jury in any way. As I've said already, he will be cross-examined on the alternative viewpoints of Messrs Foulkes and Innes and perhaps Dr Guillemin, although Dr Guillemin's affidavit doesn't really address the issues that are the matrix of this case, or this appeal in the Crown submission but go to an issue of whether there's be tampering or not which isn't really before this Court at all. Going back to the question of addressing the dangers of suggestibility. You are going to have, if it is 10 weeks down the track to use my friend's phrase, you are going to have again similar, careful, expert evidence suggesting caution in every way to the jury and you're going to get from the Judge that suggested cautious approach. I think we can fairly well bank on that with a Judge of this experience. So that, all those areas of potentially unfair prejudice are able to be addressed, are addressed in the evidence and are going to be, obviously addressed by the Judge himself.

One of the factors that my friend points out is that well, you know, you've got here the most graphic illustration of sort of suggestibility because Professor French was primed and I agree, we don't actually know that Mr Harrison was primed, Dr Harrison but I – let me just assume that for the sake of argument that he was because they work very closely together and

they seem to give the document – give the thing to Ms Cauley to look at which might suggest that they want her to look at it because he was primed but I just don't know but I can assume for the sake of argument that they were primed in the sense that they knew about it. Primed or not, their report does not

5 suggest people who are just rushing head long in to a conclusion because they've been told by the prosecuting authorities, in one way or another, that they want to know whether these words are there or not. If any thing, Professor French is being overly cautious in a way that would be very hard to say look, well here's a man who has obviously been primed so therefore he

10 hears what he wants to hear and there's no discrimination, no area of expertise brought to bear on that at all, it's quite the opposite.

Likewise, with the Court of Appeal, with respect to my learned friend, obviously they were primed because everyone knew what the phrase was that

15 they were looking at and they mentioned in their own judgment but the issue – to think that the Court of Appeal weren't trying to listen to that objectively to see well, let's see for ourselves because they told us they were going to be doing it, or might well do it but there's no suggestion that they therefore jumped to a conclusion. All they've said in their judgment is, it is clear that

20 those words can be heard or that's – are available, I forget how they phrase it now in their judgment. In that, they're not wrong because Dr Foulkes says so, Dr Harrison says so, Professor French says so. That is an available interpretation of the disputed passage, so that all that the Court of Appeal have done, whether you call it primed or not, they have listened for

25 themselves to see whether, notwithstanding all the submissions made by counsel, that leaves them with any lingering doubt that they should withdraw this from the jury. Having heard it, they have said that that is certainly an available interpretation of the sounds at that disputed portion of the tape but to suggest that we can't place any reliance on the Court of Appeal judgment

30 because they've been primed, nor Professor French because he's been primed, in the Crown's submission, is incorrect. We know from this case that the words were first heard by someone who was not primed, well it was heard by two people in fact, hence the way this whole matter has been enquired into, that's Messrs Pearce and Ward.

Now, there you will have seen from the judgment, I think, in particular of Justice Panckhurst, just to briefly outline the scenario, that the tape was taken by Detective Ward to ensure that it was, that it could all be played on
5 equipment properly and were checking out at the place called Strawberry Sound, a sound place in Dunedin, with a Mr Pearce, and neither were expecting to hear words, they hadn't been heard up until that time, not in any time between '94 and 2007, and they both heard them, independently of each other. Now, that gave rise to this enquiry, but it does suggest that you don't
10 have to be primed to hear them, and that's – I put it no more than that, whereas my friend says, well once the jury have been primed, they've got no choice.

In the Crown's submission, we've got all the sort of caveats that you're going
15 to get from the experts and the warnings from the Judge, the dangers of suggestibility will be well guarded against, and the fact that the jury would hear it, if this Court approves of the Court of Appeal's suggested mechanics, would mean that they have the opportunity to hear it before anyone has told them what is said to be on that tape so that they will be able to recall for
20 themselves what they thought at that time, when they're actually being asked to just look at the dangers of suggestibility.

We know from, in the Crown's submission, judicial experience let alone the research of Warren Young and others about jury approaches to their job, that
25 they do it extremely seriously and take account of judicial warnings. One of perhaps the more graphic illustrations in a very different context is something like the Clint Rickard case, notwithstanding all the adverse media publicity about that matter, especially between the two – the first and the second trial, the leaflets that were circulated in the streets and on the internet and the
30 preponderance of material that suggested that those writing it thought Mr Rickard and his cronies were guilty, he was acquitted in both trials. It's an illustration of something the Court's well familiar with, but juries are well capable of doing the job properly and professionally if they're properly guided by the Judge and they pay attention to his directions, and there's no

suggestion of anything in this case that the jury aren't likely to. All it amounts to, in the Crown submission, an assertion that because someone will mention at some stage or in the course of the trial what those words are, that's the end of it, the cat's out of the bag, no putting the cat back in, as Ms Cull put it last
 5 Monday. In the Crown's submission, it's nothing as high as that at all.

ELIAS CJ:

Mr Raftery, I just wonder whether – where are you in your submissions now?

10 **MR RAFTERY:**

I'm looking at the unfair prejudicial effect which starts at paragraph 40, and goes through to 48.

ELIAS CJ:

15 I'd just wonder if I could take you back to para 29, because your footnote reference rather pulled me up and I think I should indicate to you that I don't read *The Queen and Handy* as supporting the proposition that it's cited for there, because it's about, it's simply about similar fact evidence and the actual passage is, "Canadian case law recognises that as similar facts become more
 20 focused and specific, to circumstances similar to the charge" and so on, but I am interested in that proposition you're suggesting there, I don't think that case supports it because that would be a proposition that the more damaging the piece of evidence, the more important that it be admitted.

25 **MR RAFTERY:**

What I was intending to convey there was that if you look at this phrase, "I shot the prick", it's – if you've accepted that it is an interpretation available, once the jury have had all their safeguards and whatever explained to them and on the evidence in the Crown's submission, it is available, not just from
 30 the Crown experts but also from Dr Foulkes, I know Dr Innes doesn't say it is but Dr Foulkes does, then if that's the case, then the jury will be entitled to say that amounts to an admission of guilt in the immediate aftermath of these murders. In quoting that little passage from *Handy*, all I was intending was that if the jury have accepted the Crown submission that these are spoken

words not out breaths and that these are what the words are, then its probative force has really gained in momentum. But I'm not suggesting it's – in the terms of the threshold the Judge is looking at, he's looking at is that an interpretation that is available in the evidence? Yes it is. Then if that is

5 available then it would have considerable probative effect in this case. That's really what I was intending to try and convey there.

ELIAS CJ:

I don't think the case supports the proposition but I understand the

10 submission.

MR RAFTERY:

Yes, well, I can leave aside whether I understood *Handy* correctly. I mean obviously it's a one liner chosen out of a much more lengthy case and I accept

15 that sort of criticism. It's very easy, I think we all fall into that habit as lawyers of suddenly finding a paragraph here or a line there that –

ELIAS CJ:

Well I don't think you did really, I think it's taken out of – because the passage

20 is relating to similar fact evidence. It seems a different point.

MR RAFTERY:

But coming back to what I was saying about similar fact evidence in terms of when you start with whether it should even be admitted, you're looking at a

25 low threshold that can – and the Judge can view the threshold as rising as he looks at the probative value as rising in his own assessment. In terms of what he has to do as a gatekeeper, is actually look at a throw threshold, so that although you may get probative value increasing, he doesn't have to look for that in the Crown's submission in this particular type of case.

30

ELIAS CJ:

I'm sorry and I interrupted you when you were talking about unfair prejudices?

MR RAFTERY:

So that the – I talked about the question of the experts. Now one of the issues raised by the questions that – on which leave was given about the mechanics and there are a number of different ways that this matter could be approached as far as mechanics are concerned if Your Honours agree with

5 the Crown on the answer to the first question. You can either do with experts or without. In the Crown's submission that the – it's probably fairer to the accused that there should be expert evidence than there should not because if it's just a question of playing the tape unedited and letting the jury make up their own mind what's there, the defence might be deprived of the opportunity

10 of putting up someone like Dr Foulkes to say well actually that's not right, that's quite dangerous, or in fact for Professor French and Dr Harrison to just issue words of warning and to be careful in your approach so that, while at one view, a perfectly tenable view in the light of the authorities, say well it's up to the jury what's said there. Here's a tape, it's a piece of real evidence. They

15 make up their mind what's said on that tape, not just in the disputed passage but any other passage in the tape, and it's up to them entirely.

They don't have to accept even if they have a transcript, which is not proposed in this case for obvious reasons, whether they accept the words are

20 said there or not. That would be a perfectly proper view on the authorities when they talk about intercepted warrant, you know, the interception warrant cases and drugs cases. Up to the jury what they make of those words. But the – in this case because you do have evidence from experts who say it is equally possible that they may be exhaled breath with no vocal fold vibration

25 carrying any meaning, on an expert forensic speech analysis rather than looking at what the intent of the speaker was, that the jury should be deprived of that so the Crown have been of the view that it would be, especially because the Crown are contending for this interpretation, much fairer to the accused that he should have the benefit of expert evidence to – and therefore

30 the jury should have the benefit of expert evidence in approaching this particular contested passage.

What I suppose is unusual about this case is that you've got experts coming along to say that these might be exhaled breaths without vocal fold vibration

but that apart is really no different to a case where someone else comes along and says those are not the words spoken, I think the words spoken are this an exercise that Dr Guillemain for example does from time to time in cases in Auckland or that isn't the speaker or things of that sort. Now all you've got

5 here is one extra thing to consider along with is it I can't breathe, is it I shot the prick, is it just puffing and panting and so because you do have expert evidence to say actually from a forensic speech analysts point of view we can't say definitively one way or the other. That might be of assistance to the jury. I could see an approach that says, no the jury should have no experts,

10 they should make up their own mind rather as they said in the *Matthew* case, you know they don't need the paediatrician to make up their mind as to whether that is the child gasping or it's the sound from the family television set. It's a pure jury issue. They've got the tape, that's the best evidence and they can listen to it. In the Crown's view they saw this as an appropriate way

15 to deal with the issue bearing in mind it's a very contentious issue as far as the defence are concerned. And the other point about it, that if they were unaided by experts and Mr Bain was to give evidence, he doesn't have to make that election for many months, the Crown will be bound to put that to him in cross-examination. It would be contrary to our obligation if we were

20 not. So that then would be a very late stage in the proceedings for someone to say, help, I now want an expert to say this could be exhaled breath. So in the Crown submission the procedure proposed is an appropriate procedure.

I don't want to say anything more about the mechanics unless Your Honours

25 want to test me on that. I was going to move to section 28 of the Evidence Act.

McGRATH J:

Just before you do Mr Raftery, the competing point I think to pick up

30 something you've just said recently but I was really harping back I think to the rate of force.

MR RAFTERY:

Yes.

McGRATH J:

When the expert witnesses say it's equally possible these are sounds or words, do I understand you to say that that opinion derives solely from the
5 forensic speech analysis and not at all from contextual factors that might indicate intentions?

MR RAFTERY:

The only contextual factor that comes into play there is the fact that the same
10 speech device or mannerism is used on the telephone number.

McGRATH J:

So that's what you call internal context?

15 **MR RAFTERY:**

Yes.

McGRATH J:

But they don't take into account external context, the coincidences?
20

MR RAFTERY:

No, no and Professor French specifically said, I think it was –

McGRATH J:

25 It would help me actually if you pointed to his report and/or cross-examination to help me clarify that.

MR RAFTERY:

Well, a good starting point perhaps is the passage that you discussed with my
30 learned friend this morning or the Court discussed with my learned friend starting at page 31 of their first bundle. So the – just starting at the top of the page perhaps when he's confirmed on the page before that he'd been told by the Crown about the words before he did his analysis. Dr Foulkes and Dr Innes, who will be giving evidence, are both of the view that it would be

dangerous to do that because the words may not in fact be words at all. This is about playing the tape to the jury at all were his words then, that's what they're talking about rather than transcripts or anything like that. "Would you agree with their view? No. If a jury member was primed before going onto the jury by some improper means that would obviously be dangerous wouldn't it? Yes, that would be dangerous." And that harks back to something that's been a theme quite often from the defence that this is out there in the public domain somewhere because they've heard it in places, there's a danger a juror might know it even before he comes into court.

10

"The jury will not have the benefit of any expert advice before they hear the tape because the transcript will not include the words. Do you understand that?" "Yes." So we are left in the position that the jury room where the tape is being played, someone could see if you could hear the words but they aren't in fact words, they could hear words?" "Yes." "They could hear words at that point and at other points in the recording?" "Yes." "But they wouldn't know, would they, whether they were in fact words or whether they were just audible breathing, they wouldn't know that?" "No." Dr Foulkes is of the view –

15

20 **ELIAS CJ:**

Well isn't that really indicating that you couldn't be confident, which is really what he says his opinion is, that you couldn't be confident whether they were words or not, and that a jury couldn't be confident whether they were words or not?

25

MR RAFTERY:

Well the way I read the question was, they wouldn't know whether they were words or audible breathing, no they wouldn't know, and that was in the context of, because of the opinion expressed by Professor French, what he was really saying there is they wouldn't know that because they wouldn't have had the benefit of any expert evidence.

30

So that the – he goes on to say, he says, "Dr Foulkes is of the view that it's impossible to resolve whether it's audible breathing or they're actual words, do

you agree with that?”, “We have that much in common.” So the experts agree that, and what they are, can’t agree what they are, “And you are highly trained to evaluate, aren’t you?”, and that’s the passage my friend read this morning.

5 **ELIAS CJ:**

Is that preceding passage, which I haven’t, because we were looking at the later one, must be highly significant in the question that the Court has to determine as to probative and prejudicial balancing?

10 **MR RAFTERY:**

In my submission, no Your Honour, what that really goes to is saying that’s why there is value in having expert evidence to raise a possibility that the juries might not be made aware of before, if it weren’t there, they would not know of this alternative possibility. In other words, if the Crown says it’s these words, and they wouldn’t have the benefit of knowing, well actually, there is a dispute among forensic linguists, or speech analysts, as to whether they are words or they are out breaths without words in them.

BLANCHARD J:

20 It’s not so much a dispute because none of them seem to be prepared to say that they are words.

MR RAFTERY:

Well, to the exclusion of the other.

25

ELIAS CJ:

And what’s more, they say that the jury wouldn’t be able to tell whether they were words or not.

30 **MR RAFTERY:**

But if you look at the context of all of what he’s saying, it’s without the benefit of some expert –

ELIAS CJ:

Without someone telling them what they say?

MR RAFTERY:

5 Well no, without the benefit of someone telling them that there is an alternative that they wouldn't yet have heard that they aren't words at all. In other words, as a professional speech analyst or speech, I don't know whether it's a speech analyst, let's call it that, we can say that there is a possibility that these are not words, and they're just out breaths.

10 **GAULT J:**

Mr Raftery, do we have a situation then that without the benefit of expert evidence, the jury would not be able to determine whether or not they were words, and then there would be expert evidence which says we can't tell whether or not they are words, where does that take it?

15

MR RAFTERY:

In the Crown submission, in fact, the jury listening to it, if they were unaided by experts, and this is going away from what Professor French is saying, would hear something at that stage, and there are, and forget other formulas
20 of words someone might want to come up with later, there are three possible contenders at the moment.

BLANCHARD J:

And you say that, despite the fact that Ms Cauley didn't hear anything?

25

MR RAFTERY:

Well, she did, she heard "I can't touch", she got touch is in brackets, suggesting less confidence about that.

30 **BLANCHARD J:**

She never ever got the words that the Crown is contending for?

MR RAFTERY:

No, and nor did Dr Foulkes. So that the issue is, I know we're actually talking about what role the experts play at the moment, it goes back to the sort of questions we've been talking about before. Is there some evidence that these words could be there? And you've got from, well first of all, is there evidence
 5 that words could be there? You've got evidence from everyone, including the absent Ms Cauley, that, yes, apart from Dr Innes who says she's not sure she hears any words there at all, or construction units, as she says she's looking for, rather than words per se, so you've got from all experts the possibility of words being there. You've got from three of those four, well, we haven't
 10 actually got the evidence as such from Ms Cauley in the sense that I think, if I remember rightly, she doesn't rule out that possibility but that's once she's been primed, once she's been told what they are but the – so leaving out what I call the three professional experts rather than Ms Cauley, who is, as I understand it, a post-graduate student of Professor French's and just looking
 15 at the three who have given evidence, they all say that, those three I'm talking about, Foulkes, Harrison and French, that the interpretation "I shot the prick", is available on the evidence.

McGRATH J:

20 So the interpretation is?

MR RAFTERY:

Is available on the evidence.

25 **ELIAS CJ:**

Well, they can't exclude the possibility really.

MR RAFTERY:

If they can't exclude a possibility it must be available, mustn't it?

30

ELIAS CJ:

Well I don't know, it so is a matter of evidence.

MR RAFTERY:

Again, the Crown's point is that it's not for us to again say what the jury would say because it is they who tackle a piece of real evidence and they make the decision as to the facts about it. It's not for this Court to say they should be prevented from doing so. The value the Crown sees in having expert
 5 evidence introduced is to give them the opportunity of considering other alternatives.

ELIAS CJ:

The experts are there in fairness to the accused.

10

MR RAFTERY:

Yes because otherwise the Crown could contend for that without, other than just an assertion, if –

15 **ELIAS CJ:**

The evidence is unsafe.

MR RAFTERY:

In the Crown's submission, no, it's not unsafe.

20

ELIAS CJ:

The evidence would be, surely, unsafe on it's on for conviction?

MR RAFTERY:

25 Go back one stage before that –

ELIAS CJ:

Depends what the evidence I think, we're just back in to that.

30 **MR RAFTERY:**

It goes back one further than just that. The question we need to be asking ourselves is, if this was a 344A before trial and this was the only evidence that there was, would the Judge say, well the test I'm going to apply is, if this is the only other evidence would the conviction be unsafe and that's not a test that's

applied at that stage and the Crown's submission, what the Judge is required to do is say, I've got to remember my function is different to the jury's function –

5 **ELIAS CJ:**

Sorry, what is your answer in terms of as if it was the only evidence?

MR RAFTERY:

I was just going back saying well, it's not quite that question as to the way you
10 formulate it in the Crown's submission, you need to go back to what is the Judge's role, to say and the Judge would not ask himself the question that Your Honour posed to me, in the Crown submission. The Judge would say, is there in what is said there, some evidence upon which a properly instructed jury could convict. If the jury accept, these are the words "I shot the prick" –

15

ELIAS CJ:

Well, that's the question.

MR RAFTERY:

20 Yes and if they are and if the jury say that they are, they could convict on that alone.

ELIAS CJ:

Yes.

25

MR RAFTERY:

Yes. So that therefore –

ELIAS CJ:

30 There is a risk because it is sufficient evidence to found a conviction, that the jury could convict on the basis of this evidence alone.

MR RAFTERY:

I don't know if you'd call it a risk but that is something they could do –

ELIAS CJ:

It is available to the jury –

5 **MR RAFTERY:**

It is available, yes –

ELIAS CJ:

– convict on the basis of this evidence alone.

10

MR RAFTERY:

Whether they would do so, they may want more support and comfort and they've got that in this case from the material – I mean, we haven't yet had the ruling from the Court below about the 347 but assuming for the moment, for the benefit of argument, without that ruling saying there is going to be a discharge on 347, there is evidence there available to consider alongside it. So, in fact, the sort of case where sometimes the Court say although it might be the gateway or threshold test in an ordinary sort of case, we're really worried because just standing alone it is so potentially dangerous and it's so fraught with the caveats that the expert have centred around, we're not going to let that go to the jury. This is not such a case because you've got other evidence supportive of the fact of Mr Bain's guilt. It can't be seen in isolation like that, in the Crown's submission. It's not one of those stark cases where you say, is this the only evidence, therefore we're going to –

25

ELIAS CJ:

The jury could, as you've acknowledged –

MR RAFTERY:

30 If they've ignored every other piece of evidence –

ELIAS CJ:

– reject all other evidence, that's the thing about confessional evidence.

MR RAFTERY:

Yep, so that then if – it comes to section 28 because that really probably leads in to that quite naturally because it's a statement of an accused –

5 **ELIAS CJ:**

I'm not sure that it isn't, it's still in section 8 territory because section 28 doesn't seem enormously conveniently addressed to this sort of matter but –

MR RAFTERY:

10 Well I was going to suggest that section 28 doesn't really apply but –

McGRATH J:

Mr Raftery, I wonder if I could just come back to what I was wanting you to take me to further than you already have is to look at this issue as to what I think the Court of Appeal regarded as the limited nature of the expert's evidence and I was putting it to you in terms of whether there was forensic speech analysis was the technique but it didn't go so far as to look at evidence and intention at least non-internal evidence and intention. Were there other passages in the transcript that help on that? It's a matter I think of just going a bit further. There was a passage where Mr Reid asked a question and I think Justice Wilson touched on earlier that led into the witness French giving an answer that goes to the point of view as to the appropriateness of the matter going to the jury.

25 **MR RAFTERY:**

I do –

McGRATH J:

Understandably prefaced by saying well it's for the Judge to decide.

30

MR RAFTERY:

Yes, I was going to lead onto that after – just noting that passage at the bottom of page 31. He makes the point, and it's in his report as well at page 8

where he says about line 30-31, I don't think any speech oratus can leap backwards from the form of things –

McGRATH J:

5 Sorry, which page are we on now?

MR RAFTERY:

This is page 31, line 30 and 31 where he says, "I don't think any speech oratus can leap backwards from the form of things that they could – that they
10 hear to what the intention is behind this." And then he said that also in his report and the passage that Your Honour – I mean, just pausing there. Why I think that's important in the Crown's submission is that what they're saying is in fact context may help. The jury will know the context but we don't, we just remain the pure expert saying this is what this is like a piece of blood staining,
15 this is a piece of blood that's a drop of blood that's fallen in this way. What that means is neither here nor there to us we just tell you as experts. So he's saying the same there, that's the same to us as experts but what the intention behind it is only something you'll know from looking at the rest of the evidence in the case and that's the jury province not theirs.

20

But the passage I think Your Honour has in mind was the one I was going to come to at page 33 and maybe I should just read the question before giving you the answer which is line 8, she says, that's referring to Dr Innes and this is a quote from Dr Innes's report, "you also asked me to comment on whether
25 there's a danger in having the disputed portion played to the jury. In my opinion there is. That danger lies in leaving the interpretation of that portion open to the jury because of the technical knowledge required to assess it. One way of avoiding this difficulty would be to not play that portion of the recording to the jury. In my view that would remove any identifiable words for
30 the recording," which is the position for which my friend contends, "can you comment on that?" And his answer is, "I see it, I suppose there are two views. Ultimately it's for His Honour but properly advised by experts and my own feeling on it is that if a jury was simply to be warned, that they would at certain points of this recording hear speech produced on out breaths which they do.

In fact they hear the end of a telephone number produced on out breaths. On other points of the recording you simply hear audible breathing and they should be careful in interpreting anything that is in the transcript one way or the other. I would see no basis for removing it.”

5

I don't know if that was the paragraph that Your Honour had in mind.

ELIAS CJ:

His remark earlier that the jury shouldn't be told, presumably is a universal
10 view. In other words, the Crown should be suggesting that either?

MR RAFTERY:

Well, one of the difficulties about it is – we have been talking about putting a transcript in there, having the words in the transcript and that was cleared up
15 at the beginning of Mr Reid's cross-examination and that was something that had been explained to Professor French before he gave evidence so that he knew what we were talking about which was the transcript would not – in the light of his admonition against doing so, the transcript would not have the spoken words in them so that – it's against that backdrop that
20 Professor French is –

ELIAS CJ:

It's at the bottom isn't it, no justification for putting the interpretation.

25 **MR RAFTERY:**

I realise the phrase says that but I'm just saying, it's that passage earlier on page 31 we were talking about it, you know, wouldn't be in the transcript and he's already been told that by the Crown because the transcript they're going to get will not include the words. So it's against the background that they're
30 not going to have written there in front of them what those words are and it's important therefore, in the Crown view, that they should hear that tape without any suggestion to what those words are first and that's how that came about but then the talk about with the help of experts and so on, it's bound to get into this area and so I didn't read his evidence, bearing in mind we were

against the backdrop of having a written transcript at that stage, although when we were before Justice Panckhurst, although in submissions at a later time that I thought about and I thought, the first thing was to have no transcript at all and Justice Panckhurst thought that was more appropriate, it's only a
5 one minute conversation that we're talking about anyway. So it's against that backdrop, that one was talking about putting words before the jury while at one – the phrase seems to think no one should ever mention them at all, it would be virtually impossible ever to do so and certainly if Mr Bain gave evidence, it would be improper not to do so. So that the – I would ask
10 Your Honours to read that evidence in that light.

ELIAS CJ:

This expert may not have appreciated some of the trial implications but he does seem to be saying that the jury should not be told what the suggested
15 words are and it's on that basis he says well, I don't see a problem with letting them hear the tape and being warned to be very careful about anything they take from it. What you're really sort of putting to us I think is, the consequence that it may well be played, the Crown may well want to make submissions on it and will put it to Mr Bain if he gives evidence, so that
20 therefore the conditions that this expert is talking about may well not be fulfilled.

MR RAFTERY:

I suppose I didn't read or hear his evidence at that time was suggesting quite
25 what Your Honour's suggesting, only because we were against the backdrop of them having or not having a written transcript with the words in and so when he talked about being properly advised by experts, it was in the Crown's view, in the way that we were then doing in that exercise before Justice Panckhurst and in fairness to Professor French, I can't speak for him
30 certainly but it may have been that he had that same idea too because we were talking about – there had been suggestion of a transcript and that he was very clear that no words of the sort should go in.

ELIAS CJ:

But as you properly acknowledge, if they are to be told what the suggested words are, then as a matter of fairness to the accused, it will be necessary for the experts to be called to give evidence so that the experts can say, look we're experts and we can't even tell whether it's speech.

5

MR RAFTERY:

Yes.

ELIAS CJ:

10 Yes.

MR RAFTERY:

As so often, anywhere experts give evidence, that's not the be all and end all because there is the matter of which Professor French says, that we can't
15 comment on because that's not our province but it's the context, was there any intention behind what this man was doing or saying that morning, that's for someone who knows all the facts of the case. We're just saying, purely on looking at our computer screens and our banks of technology, that it's impossible to say definitively one way or the other and we can't rule out either
20 possibility.

TIPPING J:

The passages you've taken us to represent, they're only Mr French, they're really only cross-examination I think. They represent the sum of the evidence
25 on that aspect do they, as to the limits of what the experts can say?

MR RAFTERY:

Yes. Professors Foulkes and Innes, as you'll have gathered from the cross-examination, saying no, don't play them at all. That's just brought one
30 passage to my attention, if you could just give me one moment. Mr Foulkes, I cross-examined him, this is page, starts at page 45, although it's described as re-examination, it's cross-examination and on page 46 the – just as an example of just what I was talking about earlier to the Chief Justice, my question at line 8, "And they expressed the view that it would be dangerous to

put, as it were, a transcript in front of the jury with the words in them because of the power of suggestion, would you agree with that?" "Yes." I just say that just to sort of show the understanding that we had when we were discussing that with him, that it was, we were talking about the transcript rather than

5 anyone talking about those words at all that were there. Next question is, "The exercise that you and the experts exert was to try and find some objective, phonetic or acoustic material or analysis that will confirm one way or another whether those words were there or not, is that fair and from your objective, acoustic, phonetic analysis **inaudible 15:46:14** say they were there

10 one way or the other for certain?" "That's correct." "We understand Ms Innes has said it would be that passage is removed, all that would remain would be passages of identifiable words?" "Yes, although there could be other sections, as you discussed with Professor French, where it may also be questionable whether we have speech or out breaths that are accidentally

15 shaped." "You've answered the next question I was going to ask you. It's clear from the exercise that you went through and Ms Cauley went through for example, that you inserted the question passages, some words brackets, indicating a lower level of confidence?" "That's right." "Although they are different words, they are words as opposed to non-words, aren't they?" "They

20 are because as I said to Ms Reed, although I didn't draw explicit points about the section of the call to my initial board, I did make a general observation that they were sectioned throughout the recording where it was difficult to determine whether or not the material reflected speech or an out breath and that section is certainly one of the sections. I've had difficulties about that

25 general statement." This is a passage, it doesn't really answer directly Your Honour's question, it was, he talks on the next page about the telephone out breaths if I can call it that way, the telephone number should I say, his answer at line 10 when being asked about that other passage, whether out breaths – "I would say, that in context, the other sections when taken on

30 there own are difficult to decide whether they are actually resolved by the context, we have already had a discussion with Professor French about that."

ELIAS CJ:

There wasn't anything about speech mannerisms, about speaking on out breaths was there because you've said sometimes in your submissions to us, that this is a man who we know does speak on out breaths and there's an example but none of the experts actually addressed that, did they?

5

MR RAFTERY:

If Your Honour understood me to be saying this is a mannerism of Mr Bain's, I'm not saying that. I'm saying, within this telephone call –

10

ELIAS CJ:

Yes.

MR RAFTERY:

– we know that he does that, so that at this particular minute because it is
15 literally a minute long in time, we know that that is a mannerism reflected by circumstance.

ELIAS CJ:

I'm just querying whether mannerism –

20

MR RAFTERY:

Is the right word –

ELIAS CJ:

25 – might be putting it too highly? He has done it.

MR RAFTERY:

It may be. It was my own choice of word not theirs, I accept. It was trying to think of a word to explain, he speaks in this way –

30

ELIAS CJ:

Well, that's what I'm wondering –

MR RAFTERY:

– on this occasion.

ELIAS CJ:

Yes.

5

MR RAFTERY:

But it's within a very short space of time –

ELIAS CJ:

10 Yes, I understand.

MR RAFTERY:

– of the other, so that within – that's what I call the internal context. Like I say well, he does – I mean, the experts say that well, he does do it a bit later so, 15 you know, without the aid of other context for that second thing, as Dr Foulkes is saying we wouldn't be able to say but you've got – because he's made to repeat the number and then the telephonist repeats the number. So then you can say I'm confident about that but remove those two and they weren't, so they were in the same type of activity but uses neutral phrases as the other 20 section itself. Just one final thing, just to go back to His Honour Justice McGrath's question, I did ask the question arising out of something that Justice Panckhurst had said, I said, as far as the practice in the United – this is page 49 at the very end Your Honour, of the evidence of Dr Foulkes, "As far as the practice in the United Kingdom because it's only when tape 25 recordings are being playing, it is the practice that the interpretation of those passages is left to the jury. I believe that this is the case, I wouldn't know for sure." It doesn't actually address the specific question of this type of, is it speech or is it out breath but just in terms of –

30 **McGRATH J:**

Is that at the top of the page?

MR RAFTERY:

No, the very bottom, sorry, it's at the very end of page 49. Sorry Your Honour, where it says questions arising, this is from the Judge's question.

McGRATH J:

- 5 Is there anything just above that on that page that you want to point us too?
I've just been reading on.

MR RAFTERY:

- Yes, if I can take you back to page 48. The Judge asks a question and
10 Dr Foulkes had drawn an analogy with fingerprint evidence and
Justice Panckhurst said, this is line 27, "One matter I want to raise with you. I
wondered about the appropriateness of your analogy at the end of your
15th of August report, where you compared leaving the question of the
disputed utterance to the jury as leaving the question about fingerprint
15 evidence to a jury. My concern is that analysis of fingerprints have always
been accepted as a matter of expert opinion, whereas listening to a recording
and discerning what is on it have not. To my mind, it questioned or called into
question whether that was an appropriate analogy." He said, "I would argue it
is an appropriate analogy particularly in a case exactly like this, where the
20 material is so difficult that it would be inappropriate to ask an untrained
listener to interpret the words, whereas a scientist approaches the material
objectively with top quality equipment and the capacity to listen and to
re-listen. We are all of the view that it is impossible to resolve exactly what is
going on at this particular point and there have been many cases of this type
25 in the UK and other countries where the opinions of the experts have been
sought out and have been taken as important parts of deciding whether upon
that material just as dealing with fingerprints and other scientific issues." Just
as a reference to that, I asked the Judge, to that last question or two, "You say
the opinion of the experts had been sought out. In what way have they been
30 made available to the jury as part of the evidence that they should bring to
bear on the problem, or are you suggesting something more than that?" "I'm
aware of many cases where alternative interpretations of difficult material
have been put to the jury so that they may be asked to decide between the
two. I'm not aware of any other cases of this type where the material is so

difficult, it would not surprise me that there are cases of the like.” Then that’s – gave rise to my question there.

McGRATH J:

5 Thank you.

MR RAFTERY:

I know that Your Honours have just said that section 28 isn’t really engaged but just –

10

ELIAS CJ:

Well, no. I’m not sure that you should take that. I just simply raised with you whether it – it’s not very, it doesn’t fit very well because it’s clearly directed at –

15

MR RAFTERY:

At something entirely different. I mean, it’s against –

ELIAS CJ:

20 – voluntariness, that dimension.

MR RAFTERY:

It is but sub paragraph 2, the one that His Honour Justice Wilson drew to Ms Cull’s attention, the mandatory nature of it. The Judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability. That comes back to the point that Your Honour has just made, that it is more directed at that sort of voluntary –

25

ELIAS CJ:

Which doesn’t mean to say it doesn’t, it couldn’t, extend to –

30

MR RAFTERY:

I accept that the wording is not limited for example, when you look at the whole section of 27 to 29 and, or 30, you think back on the area where it was drawn which was mainly confessions made to police officers or people in authority but the wording is quite clear, that it's wider than that and obviously

5 the paedophile who confesses at a family meeting, you may want to look at that in that same context and look at section 28 as to whether it was reliable but the mandatory nature of sub section 2 is that the phrase, "The circumstances in which the statement were made were not likely to have adversely affected its reliability." This is a man on a 111 call. He has initiated

10 the call, he's not under any pressure or any improper activity on the part of the 111 receiver and so it's not something that, in the Crown's submission, readily engages sub section 2 in this context. What it's more looking at, in the Crown's submission is, where the statement has been made in circumstances where there's, not the oppression referred to in section 29 but some – the

15 circumstances may be such that render it unfair and while it's not exclusively confined again to police officers, I can talk about the family group meeting when one's talking about to, you know, a paedophile being accused by the family doing dreadful things and the pressure put on him and the circumstances surrounding that family group meeting may be such that the

20 Court is left with an uncomfortable feeling that it's the circumstances of the making of it were such as to affect the reliability of what he then did, was supposedly confessing to under the pressure from the family, improper pressure from the family. It's aimed at that sort of thing rather than here, where you've got someone who has himself initiated the telephone call, is

25 telling them what he wants to do and mutters something and whether it's words or mutterings is the issue in this case.

GAULT J:

Is that affected by sub section 3 which is, "Sub section 2 does not have effect

30 to exclude statements offered only as evidence of whether the statement was made"?

MR RAFTERY:

That's another bit I was going to come too and I'll deal with that now. That's an entirely different sort of issue. That's the traditional one that we know about, in other words, the mere fact that these statements were made, or these sounds were made. So, coming back to a point that Your Honour made

5 to my learned friend earlier that the, you know, if it's just agitated out breaths, that of itself is relevant material about the state of Mr Bain on that occasion.

ELIAS CJ:

But it's not been often "only" for that –

10

MR RAFTERY:

No, no, no, I accept that. I'm just saying, that would engage sub section 3 so that there are more ways in which this material, sort of engages the interests of the law. I accept that the primary reason why the Crown is relying on it is

15 not for that but for the words that the Crown says are there.

WILSON J:

It's the content of the statement not the fact of the statement, that you really want this info, isn't it?

20

MR RAFTERY:

Well, that's the primary reason why the Crown want it in.

WILSON J:

25 Put it in common law hearsay terms.

MR RAFTERY:

Well, that's often – the section, sub section 3, it isn't, you know, the mere fact of it being said, it doesn't engage the hearsay common law, where the

30 Crown's relying on it for it's truth it does, yes I accept that. When you look at the sort of factors in sub section 4, coming backing to sub section 2, again while they're not exhaustive, they are an indication of the sort of thing that sub section 2 is aimed at. I think, with respect, Her Honour the Chief Justice is correct when, I forget exactly how you phrase it but it doesn't happily sit with

what we are talking about in this case. Section 28 seems to be really addressing a very different scenario.

ELIAS CJ:

- 5 Although sub section 1 which establishes the conditions for consideration of sub section 2, is directed at the issue of reliability –

MR RAFTERY:

Yes, I accept that.

10

ELIAS CJ:

- which might mean that sub section 2, the circumstances in which the statement was made are not likely to adversely effect it, is a wider concept than the voluntariness area. I was looking back at the definition of statement
15 to see whether it affected but I don't think it does.

BLANCHARD J:

- I wonder whether, if we're looking at analogies in determining how the exercise under section 8 should be carried out, there isn't a pretty good
20 analogy in section 46 dealing with voice identification evidence. On one view of this, you could say that this is voice identification evidence. You are trying to determine whether it's a voice.

MR RAFTERY:

- 25 I understand what Your Honour is saying but in the Crown's submission, it's not appropriate. I say it for two reasons –

ELIAS CJ:

- The Court of Appeal said section 46 was an analogy, didn't it?
30

BLANCHARD J:

No, we did –

ELIAS CJ:

Oh, we did, oh sorry, you did.

MR RAFTERY:

I can't remember what – no, I thought you did but I wasn't sure that they had.

5

ELIAS CJ:

No, thank you, that's fine.

MR RAFTERY:

10 Going back to Justice Blanchard's question. In the Crown's submission, it's not our position because we know the identity of the speakers –

BLANCHARD J:

Ah but is there a speaker?

15

ELIAS CJ:

Yes.

BLANCHARD J:

20 Is there a speaker?

MR RAFTERY:

Yes, I know that's the question Your Honour but we know that Mr Bain is talking to the 111 – to the St John ambulance man. So, we know that "the noises", to put them as neutrally as possible, uttered at this passage are his. There is no dispute, the "the noises" are his. The question is, what do the noises amount to and that in the Crown submission is not what section 46 is aimed at. Section 46 is aimed at what the deceased's widow did in *Robinson* where she says, I think the man who spoke to me on the telephone was the man I just heard talking in court.

25

30

BLANCHARD J:

Granted there's a good deal of force in what you've just said, but doesn't it still provide, because of the closeness of the kind of issue that we're considering,

to the closeness of the kind of issue that comes up under section 46, doesn't it provide an analogy and suggest the appropriate approach when one is doing the exercise under section 8(1)?

5 **MR RAFTERY:**

In my respectful submission sections 45 and 46 which deal with the identification, one visual one oral, are a separate little area of their own with separate rules that apply to them. In respect, I know we're not talking about visual but you've got all the section 126 the *Turnbull* type directions that go
10 with that, and in section 46 they have, as it were, raised the bar in terms of what the Crown must show before it's going to rely on voice identification. But in the Crown's submission what that is directed at is the *Robinson* type of situation and not the one we have here where we know the identify of the noise maker and once we do that we don't need to look in any way at section
15 46 in order to find out how we approach.

Section 46 implies a particular standard of proof which we don't have elsewhere and it doesn't it section 8, section 7, don't imply those at all, don't incorporate those and don't state those in any way. So the danger, in the
20 Crown's submission, of looking to section 46 is that you then start applying section 46 tests which nothing in the Evidence Act in the Crown's submission suggests apply anywhere other than in relation to section 46 or any other portion that raises that balance of probabilities.

25 **ELIAS CJ:**

That might be entirely right but when you said what section 46 is aimed at, section 46 is aimed at preventing the risk of unsafe convictions because experience has demonstrated that these questions of identity may lead to unsafe convictions. That's the question here really too, isn't it?

30

MR RAFTERY:

Well with respect no because identity has always been an area where the Court has been very particular about hedging all sorts of safeguards around identification evidence.

ELIAS CJ:

So too has the Court been concerned about confessional evidence.

5 **MR RAFTERY:**

Yes and they've been concerned, the circumstances in which the admission or confession is made should be fair. There should be nothing unfair about the circumstances and there should be no oppression so no bad behaviour by the police and so on and so forth. Now in the Crown's submission you haven't
10 got anything in the circumstances of the making of this utterance that would engage section 28 and there's nothing to suggest oppression that would engage section 29.

ELIAS CJ:

15 Foulkes says that, in the passage you've just taken us too, that he's not aware of any other cases exactly of this type and this was a particularly difficult case?

MR RAFTERY:

20 Certainly, but he does say that he wouldn't be surprised if there were. So it's not as though – while that doesn't answer the question –

ELIAS CJ:

And it would be inappropriate to ask an untrained listener to interpret the
25 words, which is precisely what the Crown is suggesting the jury should be asked to do?

MR RAFTERY:

That's because it's not an untrained listener in the sense that someone who
30 has no idea of any other evidence. This is – one of the things the jury will be asked to consider is what was this man's state of mind that morning in light of a variety of bits of evidence that they're going to have about that, and therefore using that, and any other material, that helps set it in context and gives some evidence upon which you can say, over and above what the

experts say, taking all their caveats into mind, his state that morning suggests that when he uttered those words he was – when he uttered those sounds, he was speaking.

5 **ELIAS CJ:**

That might be entirely an appropriate submission if the piece of evidence wasn't evidence upon which the jury would be entitled to convict by itself. It buys into the question of the way the Court's have treated confessional evidence. Yes, it's very difficult.

10

MR RAFTERY:

Yes but if you just had a confession and people have been convicted on confessions alone, providing they're warned, I mean people have been convicted on, I can't remember his name now, he was convicted, remember

15 Your Honour may or may not –

ELIAS CJ:

Bentley?

20 **MR RAFTERY:**

No, no it wasn't Bentley no.

ELIAS CJ:

I'm just thinking of some of the miscarriages.

25

MR RAFTERY:

Yes, but thinking of the man whose name I now forget who made a full confession to rape and there was no victim ever found and –

30 **ELIAS CJ:**

Yes, yes, yes.

MR RAFTERY:

Providing the jury is warned and given all the appropriate judicial warnings, they're fully entitled to do that. And there's lots of authority that suggest that, as a proposition, is correct.

5 **ELIAS CJ:**

If the basis, if the threshold as Ms Cull would put it for reliability of the confession is sufficiently made out?

MR RAFTERY:

10 Yes. And I don't need to repeat what the Crown said about the reliability in respect of that.

WILSON J:

Mr Raftery can I just check. Is it your position that the specific provisions in
15 section 28 and section 46 cannot be invoked to inform albeit by analogy the application of the general exclusion in section 8?

MR RAFTERY:

There might be cases where it could. I would say certainly this isn't one.
20

WILSON J:

You're saying not here?

MR RAFTERY:

25 If you look at section 28(1) I accept what the Chief Justice says, that looked at in isolation 21(a) says, the defendant against whom a statement is offered raises on the basis of an evidential find the issue of reliability. He's done that by saying well – recall Dr Foulkes. But then we go onto the rest of the section it doesn't really engage properly or gel with what we're talking about here
30 because when you're asked you're saying you must exclude it if the circumstances in which the statement are made – when you look at the circumstances, they don't really engage subsection (2) at all and when you look at subsection (4) the sort of things, without limiting subsection (2), if you look at these sorts of things, they're looking at a very different type of issue to

the one we've got here where a person is, you know, in his own home, making his own telephone calls to someone who he wants to speak. That's a far cry from the sort of situation that section 28 and 29 really envisage. So that's why I say it's, in the circumstances of this case, it is unhelpful if the Court were to

5 look there.

For section 46 I say it for the same reasoning, it's very specifically directed to true voice identifications and to try and say this is a sort of a half, with respect Your Honour, half-hearted sort of voice as the case is, is not the way to look at it because we know that it's his voice and this, section 46 is aimed at the

10 person who is saying I can identify that accused from that telephone call I had and that's what they're asking you go guard against and they're setting that rather high threshold of the Crown must satisfy the Judge on the balance of probabilities which is not a test incorporated in section 8 and section 7.

15

Now I want to allow my friend time to reply, if there's anything further that Your Honours want to –

ELIAS CJ:

20 No, thank you Mr Raftery.

COURT ADJOURNS: 4.09 PM

COURT RESUMES: 4.25 PM

25 **MS CULL QC:**

May if please Your Honours. You had asked and were taken to a number of passages and in particular Justice McGrath had asked for references to page 31 and in my submission there are several other passages that should also be read in context with that passage. Essentially the point here is that it is

30 impossible to say that the sounds are words and that is what the experts are saying.

So just starting with page 31 and going to lines 17 to 24, which is the passage Your Honours noted at the time that Mr Raftery took you to them, I'm emphasising that the lines 19 onwards reinforce the problem that the jury will have here. "They wouldn't know would they whether they were in fact words or whether they were just audible breathing?" "They wouldn't know that, no."

5 "And Dr Foulkes is of the view that it is impossible to resolve whether it audible breathing or whether they are actual words. Do you agree with that?" "We have that much in common, yes."

10 And that is again reinforced at page 33, lines 29 to 32. Again this is French, "But you expressed the view and you've agreed with Dr Foulkes that it is not possible for you or him to resolve whether they are words or whether they are not. You've agreed with that?" "That's right. It is not possible for an expert or a layman to resolve the matter either way."

15

And again at page 45, lines 21 to 30, that view is also –

McGRATH J:

Don't go too fast.

20

MS CULL QC:

I'm sorry.

McGRATH J:

25 Forty-five?

MS CULL QC:

Forty-five, lines 21 to 30. "Because the section in question as we've already explained may be speech, may not be speech, but there is no objective scientific way to resolve the issue of whether or not that is speech and if it was speech what the specific words are." And that's the answer to the question,

30 "Why do you agree with that." And then the person is taken to the transcript but there again is the reference to, this is an impossibility to say one way or the other.

Page 46, over the page, lines 9 to 15 and this is cross-examination by Mr Raftery to Dr Foulkes, "And they expressed the view that it would be dangerous to put as it were a transcript in front of the jury with the words in

5 them because of the power of suggestion that they might be there and I understand you would agree with that?" "Absolutely, yes." "The exercise that you and they as experts are concerned with is to try and find some objective, phonetic or acoustic material or analysis that actually would confirm one way or another whether those words are there are not, is that fair enough?" "Yes."

10 "And from your objective and acoustic or phonetic analysis you're not able to say one way or the other for certain?" "That's correct."

Now those passages with respect inform the report which has summarised essentially those sentiments at page 8 of the volume in Professor French's

15 report in the passage where he deals with entirely possibilities so if we take you to the top of page 8. This is where, after the analysis, Professor French says, "Whilst we cannot discount the possibility the material amounts to speech, particularly as he did utter 2-5-2-7 in this way. It also remains entirely possible that it is not speech." He says, "Rather it could be no more than an

20 audible out breath that has in the distress of the moment been modified by a random and unfortunately sequenced series of movements of the tongue and lips so as to create a series of sounds that could, albeit with a little effort, be heard as the disputed words."

25 He then reaches the conclusion just in that paragraph but starting with the words, "In respect of the questioned material" which is the passage down from there, "There is unfortunately no way of reading backwards" which is the passage, or which Justice McGrath asked Mr Raftery to deal with, "From the sounds themselves to the psychological processes that gave rise to their

30 production and therefore no way of resolving the issue of whether Mr Bain did in fact whisper the words suggested." In my submission, the questions that have arisen and the discussion during this hearing about whether the experts can deal with intention, in my respectful submission, counsel could not call such evidence. It would be requiring a psychologist or a psychiatrist to say,

when we hear these words we can say what the intention of the accused was and that crosses the boundary of all of the experts areas. They cannot be given that opportunity and nor do the courts allow it. So that is the way, in my respectful submission, that that passage should be read. It is inappropriate
 5 and impossible for anyone to second guess another person's intention.

I just move from there to the reference Mr Raftery made to Ms Cauley and Dr Foulkes and this was in response to a question from the bench. My submission here is that Ms Cauley and Foulkes never got to say that those
 10 disputed words of what they could hear. The nearest Dr Foulkes gets to it is saying, "I can understand how you can get to those words" but he doesn't actually say, "I hear them." He still questions whether they are words and again –

15 **ELIAS CJ:**

Where does he say that?

MS CULL QC:

I have set it out in the submissions –

20

ELIAS CJ:

In the submissions, all right, that's fine.

MS CULL QC:

25 It is captured in the front part of the submissions but it is a different thing to my friend saying well, of course Ms Cauley and Foulkes were unprimed but when primed could hear the words. The transcripts that were prepared by each of them, make it clear that there is some question as to whether they are the words themselves. In the working notes and indeed, the supplementary
 30 report of Dr Foulkes, at page 61, he then goes through an analyses the tape again, knowing what those words are supposed to be. The nearest he gets is saying, "Agree that the question section could be heard as the disputed words. I also agree it's possible the section is not speech at all, however I remain of the view" and it's further down the page, "that his alternative is also

a possible interpretation of the section.” So, even primed, these two do not state categorically that yes, I now hear the words. They’ve gone through the proper process of hearing these tapes unprimed and then have been told what those words are but as the passage to which I have referred you and the

5 Court has been referred throughout the day, the experts are saying it’s easy for experts for us to be standing in that role, it is not the position for a layperson to simply be given these possibilities and then analyse them in an appropriate way. In my submission, the evidence is unsafe and it’s unsafe because it invites a conviction.

10

If I can then just go to the question that my friend, or issue that my friend addressed in relation to priming and the risk and how it can be managed. In my submission, the evidence is clear that once you hear the words, for those that are told, they can be heard and they are there. It’s not a risk but it’s a

15 certainty. So, when the experts are told that it’s there, then the unprimed experts go back and say, I can see that that is a possibility but we are experts, we have reached another conclusion. The Court of Appeal, in my submission, have reached that conclusion as an obvious conclusion because of what they’ve been told. In my submission, it’s not a risk, it’s a certainty that the jury

20 will hear those words and will, like the Court of Appeal, say it’s obvious and in my respectful submission that goes right to the heart of the prejudicial effect unfairly on the accused in this matter.

25

Turning to the question of jury direction Mr Raftery has referred Your Honours to *R v Robinson*, the first case in the Crown bundle, and that was the example that was dealt with by the Court on the basis that the judge had the right to say that he had only two questions to answer, namely whether the evidence was relevant and whether if it was it satisfied the basic test of admissibility. And the appropriate test was to ask whether the evidence was such no

30 reasonable jury properly warned as to its defects could place any weight upon it and Mr Raftery took you to that passage at page 226. However, in that passage the question that’s raised is, “If the jury is properly directed the voice recognition evidence can be taken in conjunction with other evidence in the

case and the jury can then reach its conclusion one, with other evidence and two, any risks can be dealt with by judicial direction.

5 In my submission there are two differences in this case to that of *Robinson* and indeed any of the other cases before the Court. A judicial direction is essentially going to have to say to the jury, you should unhear what you've heard. That in my submission is one of the obvious problems here. That like the Court of Appeal if it's obviously what's heard and it's obviously on the tape it is very difficult to have a judicial direction say what you heard is not really
10 what you heard. That's the first point.

The second point is, this is not a case where this evidence can be viewed in conjunction with other evidence in the case. Like the *R v Robinson* facts, this is not something where as a result of all the other evidence the jury can then
15 say collectively, how do we view this in the mould of all the evidence that's available because the statement, if it is for what the Crown contends the admission or confession of the statement, then it stands alone. It is in isolation. It has never been part of the Crown case. It is difficult to see how it is part of the Crown case now given the evidence that surrounds it. But it has
20 to be seen in isolation because it doesn't have any foundation anywhere else. There is no other evidence suggesting that this person for instance may have been in the disputed meeting as you have in the drug case to which the Crown referred. I'm sorry I've forgotten the name of it. The disputed meeting where the six words were heard in the conversation on the tape. This is quite
25 different. This is for the first time since 2007 a stand alone statement which can't be heard in the context of anything else in this case and that, with respect, underlines the prejudice and the importance with which the confession has to be seen and weighed in terms of the prejudicial value and the risk – probative value and the prejudicial risk.

30

Secondly, in relation to the cases the Crown has referred to *R v Randle* and in particularly in the way that the judgment deals with evidence that is relevant. At page 474 of that judgment under tab 3 the Court says this, "A Judge ruling on a point of admissibility involving an issue of relevance has to decide

whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue.” It is always addressed at probability and indeed my friend’s submissions refer to the Australian Evidence Code as the probability in the same way that I addressed the New South Wales Code this morning. When one puts in context the evidence in pages 31 and following that I have just taken you to, the highest point we get to is discounting possibilities. It doesn’t bring it into informing or increasing the probability of the existence of a factor at issue and in my respectful submission those decisions highlight the very basic threshold we have in this case is that we are below the normal way in which the courts would deal with it. We have the question of whether these sounds are sounds or whether these sounds are words and the jury is in no better position than the experts to discern that.

The third point in relation to the case is the reference by the Crown to *R v Anderson* and also Your Honour Chief Justice the question that you raised about *R v Ewing*. In both cases at least there was in one a text message and in the other a handwriting sample. There was something that the experts could actually, or the identification evidence could address. In this case we have the discounted possibility words or sounds. We are not even at that threshold.

I just want to deal briefly now with the question raised by Mr Raftery about David Bain’s mannerism. The reference to that and the telephone numbers I’ll just remind Your Honours, and I won’t canvas that again, at page 9 of our submissions, the experts do put the telephone out breath in a different context to the disputed passage and those passages are outlined from page 9 of our submissions and I would rely on those also.

Turning to the section 28 and 46 sections. It’s my submission that in the same way that I addressed the Court on section 29. Each of those sections can inform a Judge in carrying out the weighing of the evidence under section 8 to the appropriate thresholds and also to the issues that each entails. Indeed on the voice identification issue I understand that the Crown says that is not possible or it is possible but not in this case. There was a question

about the definition section of voice identification evidence. If it is an assertion by a person to the effect that a voice, whether heard first hand or through mechanical or electronic transmission or recording is the voice of the defendant or any other person who is connected with an act. Now it does
 5 tend to rely on the difference in identification but nevertheless in the same way as Justice Panckhurst used section 28(2) by analogy for dealing with authentication in my submission is entirely open to a Judge in dealing with the prejudice issue to also have regard to 28, 47, 29 and the ultimate effect of the conclusive nature of the statement to be admitted.

10

For 14 years the Crown has asserted that the mass of evidence proves David Bain committed the murders but the tape has never been an aspect of that. The Crown loses nothing by the excision from this tape and in my submission it can be put no better than Justice Gault to Mr Raftery that
 15 without the benefit of expert evidence here, it has been accepted by Mr Raftery that the jury can't tell whether they're words or they're sounds, now the jury if the Court of Appeal ruling stands, will hear evidence from the experts who can't tell themselves whether the sounds are words, or words and what they are.

20

Those are all the points in closing. I would just lastly remind the Court that in terms of any appropriate remedy that the later suggestion by the Crown that there be an agreement that one, no transcript would go in and two, the Detective Ward who took the tape to Strawberry Sound in Dunedin is now
 25 going to be led in relation to those words. So in the same way that we're dealing with this issue that brief has come in, in the last three days now with the words reinserted that those words should not be led –

ELIAS CJ:

30 Sorry Ms Cull. I want to ask Mr Raftery. Mr Raftery shouldn't we have that, if that's part of the evidence?

MR RAFTERY:

Certainly Your Honours and I can supply that.

ELIAS CJ:

Because it's part of the whole picture for us, isn't it?

5 **MR RAFTERY:**

Yes.

ELIAS CJ:

Of what is proposed.

10

MR RAFTERY:

If I can just address you on that. The issue of – the importance of Detective Ward and Mr Pierce for that matter, who was the other man at a place called Strawberry Sound, is that it meets the suggestion that only if
15 you're primed do you hear them.

ELIAS CJ:

I see, yes.

20 **MR RAFTERY:**

Here were two people, totally unprimed, never expected to hear them because as you know no one appears to have heard them in '95 at the trial there, nor when being prepared for the Court of Appeal for the 406 proceedings.

25

ELIAS CJ:

So it's another response to –

MR RAFTERY:

30 To the very priming issue, yes.

ELIAS CJ:

Yes.

MR RAFTERY:

And I can see that the Court will get copies of those.

ELIAS CJ:

5 Well we perhaps don't need it if that's all that –

MR RAFTERY:

I can paraphrase if it does help. The two men give evidence to say we listened to the tapes, or we listened to the procedure or what it was, and then I
10 can paraphrase, they sort of looked at each other and said “did you hear that” and both said “yes we did”.

ELIAS CJ:

Well that's probably enough for our purposes. I just needed confirmation.
15

MR RAFTERY:

Yes, it's what triggered this whole exercise which wouldn't have been triggered probably until trial.

20 **ELIAS CJ:**

Yes, thank you. Yes Ms Cull, sorry.

MS CULL QC:

Well that brief has become available as a result of the Court of Appeal ruling I
25 apprehend but in my submission that evidence also should not be led.

MR RAFTERY:

I certainly wouldn't intend leading it unless this Court said the 111 call –

30 **ELIAS CJ:**

Yes I understand that.

MS CULL QC:

Thank you, that's what I wished to clarify.

ELIAS CJ:

Thank you counsel. We'll reserve our decision but we know the timeframe you're working too and we'll try and accommodate it.

5 COURT ADJOURNS: 4.47 PM